THE COURT OF APPEAL

Record No: 247/2019

Edwards J.
McCarthy J.
Kennedy J.

Between/

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

RESPONDENT

V

DAVID O'BRIEN

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 2nd day of February 2021 by Mr Justice Edwards

Introduction

1. On the 5th of November 2018, the appellant had been sent forward from the District Court on a signed plea in respect of indecent assaults on four complainants between 1972 and 1981. However, before the Circuit Court, the appellant only affirmed the plea in respect of one charge relating to one complainant, disputing the evidence in respect of the other three complainants. A trial date was set for the 24th of October 2019, and a seven-count indictment was preferred.

2. On the 17th October, 2019, the appellant pleaded guilty to counts 2, 3 and 7, but maintained that the remaining allegations were false. On the 22nd October, 2019, he entered pleas to counts 1, 4, 5 and 6 and the sentence hearing proceeded on the original date for the trial on the 24th October, 2019.

3. On the 7th of November, 2019, a combination of concurrent and consecutive sentences were imposed on the appellant resulting in a total cumulative sentence of 8 years' imprisonment with the final 18 months suspended, with provision also for 12 months post-release supervision.

4. The appellant now appeals against the severity of his sentences.

The Appellant's Offending Behaviour

5. On the 24th of October, 2019, the court heard from Detective Garda Neil Plunkett that the appellant was born on the 10th of April, 1952, and was a scout leader for various groups in North Dublin in the 1970s and early 1980s. The offending behaviour was inflicted on four victims who were members of the various scout groups. Detective Garda Plunkett proceeded to outline to the court the details of the assaults in relation to the four victims.

R.K. – Count 1

6. R.K. became a cub at the age of 7 years, and was subjected to the offending behaviour of the appellant over the course of 1972 and 1973.

7. R.K. went on one camping trip as a member of the scout group to Larch Hill, accompanied by the appellant. R.K.'s family paid a substantial amount of money for his uniform and camping equipment, which was difficult given their means. R.K. was unable to remember the name of the scout leader, but recalled that he was a postman, and that he always smelt of cigarettes, two factors which were consistent with the appellant.

8. Whilst on the camping trip, the appellant had told ghost stories to the children during a night walk, which frightened R.K. On the walk back towards the camp, the appellant singled R.K. out from the group. The appellant then masturbated the complainant and inserted his fingers into his anus. He described the appellant as a mad man, grunting and breathing heavily. R.K. described the assault as vigorous and felt like it lasted an eternity. He stated that he knew it was wrong, but remained silent out of fear.

9. After the assault, the appellant held him tightly, referring to his actions as "*their little secret*", and told him not to tell anybody. R.K. cried himself to sleep following the assault. He could not wait to return home and subsequently felt unable to return to the cubs after the trip. This caused arguments with his father due to the expenditure on equipment, but R.K. did not feel able to tell his father about the assault.

10. It was not until 2001 that R.K. felt able to tell his mother, and made a statement to the gardaí in 2016.

D.McD. – Counts 2, 3 & 4

11. D.McD. joined the same scout group as R.K. at the age of 7 or 8 years, and was a member from 1976 to 1978, when the appellant was still the scout leader. D.McD. also recalled being excited about a camping trip, but could not remember the location. However, before the group went on a hike, the appellant pulled him aside and held him back so the remainder could continue walking. He asked D.McD. if he needed to urinate. He replied that he did not, however the appellant instructed him to take his penis out regardless. Once D.McD. complied, the appellant took hold of his penis and began to grope it. This constitutes count 2 on the indictment. The appellant was described as being friendly and acting as if the assault was a normal activity. D.McD. remembered feeling confused and did not understand what was happening.

12. Before re-joining the group, the appellant took D.McD.'s penis out and groped it again. This is the subject matter of Count 3 on the indictment. Before returning to the group, the appellant warned the complainant not to tell anyone, and that it was their secret.

13. As D.McD. was going to sleep that night, the appellant called him and told him to bring his sleeping bag over to his tent, which was around 10 or 15 metres away from the other boys. The complainant felt he was being punished for some wrongdoing, and began explaining that he had not done anything wrong, but the appellant insisted that they were to sleep in the same tent. Once in the tent, the appellant reached into the sleeping bag of D.McD. and groped his testicles with his hand. The complainant was afraid as the two were alone and he could not shout for help. He stated that he knew it was wrong but did not know what to do. The appellant then asked him if he had wiped properly after going to the toilet and attempted to insert his fingers into his anus. The complainant squeezed his buttocks tightly to prevent this, which did result in the appellant ceasing his attempt. This is the incident reflected in Count 4 on the indictment. D.McD. had to spend the rest of the night in the tent with the appellant but did not fall asleep at any point.

14. D.McD. did not tell anyone of the assault until the early 2000s, when he told his partner. In 2011 he then told a subsequent partner, who made a statement to the gardaí. D.McD. himself then contacted the gardaí in 2015 and made a statement in February 2016.

T.H. – Counts 5, 6 & 7

15. T.H. joined the cub scouts when he was around 10 years old. He then left for a period and returned at the age of 12, which was when the abuse began. T.H. was able to remember his brigade details and the name of the appellant as the head scout leader. He remembered the first instance of abuse occurring on a camping trip in Roundwood in County Wicklow. Whilst sleeping, the complainant urinated in his sleeping bag. He woke the appellant, as he had told the boys that he was the person to come to should they have any problems. The appellant informed him that it was okay, and that they could share his sleeping bag. After falling asleep, T.H. awoke to find the appellant masturbating his penis. T.H. pretended to remain asleep as he was afraid, but believed the assault continued for hours. He described the appellant pushing his finger around his anus with such force that it brought tears to his eyes, but was unable to insert his finger. He believed this lasted for about half an hour. At some point during the night, the appellant grabbed the hand of the complainant and put it on his own penis, which was not fully erect. In the morning, the appellant acted as though nothing had happened. The whole event comprises Count 5 on the indictment.

16. On the following night, the appellant told T.H. and another boy, N, that they were to sleep beside him. T.H. was in his own sleeping bag, but was awoken by the appellant dragging his sleeping bag across the floor to adjoin his own. While facing away from the appellant, T.H. felt the appellant unzip his sleeping bag, reach inside his underwear and fondle his penis. He recalled his as lasting for about an hour. He then attempted to penetrate the complainant's anus with his finger but was unsuccessful, and gave up after a minute. This constitutes Count 6 on the indictment.

17. A third incident occurred on a camping trip in Powerscourt in County Wicklow. The appellant again insisted that the appellant and the other boy, N, sleep beside him. T.H. asked him why they could not sleep with the rest of the boys, and the appellant in return asked him what would happen if he were to wet the bed again, how he would explain it to the other boys, leaving him with little choice. Once in their sleeping bags, the appellant again unzipped the complainant's sleeping bag and reached under his underwear to fondle his penis. This happened for a long time over the course of the night. T.H. pretended to be asleep for the duration. This is the basis for Count 7 on the indictment.

18. Following this, the appellant slept with his sleeping bag turned the other way so the zipper was on the opposite side, and held the bag tight around his neck so it could not be unzipped. For the rest of the camping trip, it was evident that T.H. was being favoured, and the other boys made fun of the complainant for being molested by the appellant.

19. T.H. made a statement to the gardaí in 1996, which led to an investigation in 1997.

J.L. – Signed Plea

20. J.L. joined a cub scouts group at the age of 8 or 9 years. He remembered the appellant joining the group as a temporary scout leader in 1980, when the complainant was 14 years old. The appellant took an immediate interest in J.L. over the other children.

21. The group went on a two-night camping trip in the summer of 1981 to Longwood in County Meath, led solely by the appellant. At night, the boys slept in one tent whilst the appellant had his own. During the course of the first night, the boys were making some noise, and the appellant shouted for them to be quiet. They did quieten down, but the noise gradually rose again, until the appellant shouted out for the complainant to get into his tent. J.L. initially refused, but the appellant insisted. He brought his sleeping bag into the appellant's tent and went to sleep, but was awoken by the appellant squeezing his penis with his hand. His sleeping bag had been opened and his pyjama bottoms were around his knees. He recalled that the appellant was also naked from the waist down and was rubbing up against his back. He could feel something rubbing hard against his anus, but could not be sure whether it was the appellant's finger or penis. He did not remember being penetrated by anything, but subsequently felt a soreness in his anus as if something had been inserted. This incident constitutes Count 8 on the indictment. J.L. described being in shock and not saying anything, but that the appellant exited the tent a few minutes later. J.L. then exited the tent himself and returned to the other tent. The next morning, the appellant called him aside and said "I*'m sorry for what happened, but you better not tell anyone*". He did not return to the scouts after that trip, and was unable to tell his parents why. He did not tell anyone until around the time he got married in the early 1990s when he told his wife. He then made a formal statement to the gardaí in July 2016.

The investigation

22. Detective Garda Plunkett told the court that the appellant was contacted on foot of the complaint made by T.H. The appellant agreed to make a voluntary statement on the 25th of February 1997. In the body of the statement, the appellant stated that he could not recall the allegations, but did not deny them, and admitted to molesting a number of boys in the scouts over the course of about ten years. He describes being caught when the parents of one of his victims complained to the scout commissioner, leading to his expulsion from his scouting unit. However, with the help of a friend, he was able to join another troop and continued to assault boys there. He stated that all the boys were prepubescent and would not yet have been at the age of self-masturbation. He claimed that he had presented himself to Harcourt Terrace Garda Station in the early 1990s to confess, but that the gardaí had simply laughed at him.

23. The appellant claimed to have sought medical help for his sexual problem, and claimed not to have molested any boys since around 1987 or 1988. He did not remember which boys he had molested specifically due to the high number of victims. He claimed not to have engaged in any penetrative assaults, but admitted that he had fondled and had gotten some of his victims to touch him.

24. A file was submitted in 1997, and no prosecution was directed at that stage. The case was reopened in 2016 following the complaints from the other three complainants. The appellant was contacted and again agreed to make a voluntary statement on the 4th of August, 2016, whilst serving a sentence in Midlands Prison for factually similar offences. He admitted to various details, such as leading the various scout groups on camping trips which aligned with the accounts given by his victims, his occupation as a postman, and his smoking habit.

25. The appellant specifically admitted to molesting D.McD., stating that he touched his private parts, but claimed to have only assaulted him in a tent. The appellant later accepted the account given by D.McD. When asked whether he tried to insert his finger into the victim's anus, the appellant conceded that he could have, but did not remember. He accepted that he grabbed the victim's penis and stated: "*I can't be sure if I raped him, if I did try, I didn't succeed, I did indecently assault him*".

26. The appellant gave an account of abusing J.L. which was entirely consistent with the account given by the victim. The appellant believed he assaulted D.McD. and J.L. on the same trip, but this was not the case. When the full statement given by J.L. was read to him, the appellant disputed details such as the location, claiming that it happened on the same occasion as with D.McD., and denied raping him or going near his backside.

27. The appellant claimed not to remember R.K., and disputed penetrating his anus with his finger, as he claimed he "*only did that to one boy*", who is not a party to this case. Details were put to the appellant from the statement given by R.K., and he accepted that he did tell ghost stories. However, he denied indecently assaulting and raping R.K. on a camping trip in the 1970s.

28. When the statement given by T.H. was read to him, the appellant stated that although he could not remember, it could be true. However, he claimed to have never molested any child three nights in a row. When asked if he had digitally penetrated T.H., the appellant stated, "*I didn't rape him*", and repeated that he had only ever raped the one boy mentioned above.

29. When asked for an estimate of how many children he abused or indecently assaulted during his time as a scout leader, the appellant replied: "*Between 30 and 40, I haven't abused a child since nor will I again, it was all fondling*". When asked to clarify what he understood to be the definition of rape, the appellant said: "*If I stick my finger, penis or an object up their backside, I only ever raped one boy, I used to rub my fingers around their backside, but I only put my fingers inside once*". When the appellant was asked to explain the accounts given by the complainants of soreness around their anuses, the appellant said that he did not know, and questioned why he would admit to penetrating one victim and not the others.

Impact on the Victims

30. The court received victim impact reports from three of the complainants, one of whom, R.K., read his statement to the court. These will be detailed below.

R.K.

31. R.K. told the court of how the actions of the appellant caused him to become very withdrawn and experienced trust issues. He describes the lasting effects of the assaults as devastating, and he experienced severe nightmares as a result. Whilst he had previously been a happy and outgoing boy, the complainant began to self-harm and took up smoking. R.K. could no longer participate in team events due to his trust issues. The assaults had a harmful effect on his sexual development, causing him much confusion. He developed anger issues and became a bully, which has caused him shame.

32. He remembered the difficulty his family had in affording his scout equipment, and the arguments resulting from his refusal to return to the scouts, and his inability to explain why. He felt unable to tell his father until shortly before his death in 2010. R.K. states that he abused drugs and alcohol for twenty years, and became isolated as a result of the abuse.

D.McD.

33. D.McD. described low self-esteem and a lack of self-care following the assaults committed by the appellant, which progressed to self-harm in his early teens, whereby he would cut his wrists and extinguish cigarettes on his arms. He experienced trust issues, and attempted to block out the memories of the abuse, as he did not expect to be believed given social norms at that time. D.McD. later fathered a child, but was subjected to these memories returning, causing him to fear being close to his child in case he "*might be the same*" as the appellant. He abused drugs and alcohol in an attempt to cope with what had

happened, which had a negative impact on his relationships and lead to further depression.

34. D.McD. recalled loving the scouts prior to the actions of the appellant, and was thereafter unable to return. He became fearful of male contact, and questioned why it had happened to him. He describes living with the secret of the appellant's abuse as torturous.

J.L.

35. J.L. describes the negative effect the assault had on his confidence and self-esteem. He had previously loved the scouts, but he subsequently withdrew from activities such as team sports. He was plagued by nightmares and suicidal thoughts, and had attempted to commit suicide. He worried about being stigmatised as a potential abuser as he had heard of abuse victims becoming abusers themselves. He queried why he had been singled out by the appellant, and felt ashamed and unable to tell his family. He further developed trust issues, with adult males in particular, and now has no male friends, or any meaningful friendships.

36. This victim became very stressed and developed acid reflux which required three medical operations, one of which was complicated by infection and warranted further surgery. This resulted in the loss of his large bowel, and required five further operations. He now uses a colostomy bag and requires ongoing medical treatment.

Personal Circumstances of the Appellant

37. The appellant was 67 years old at the time of sentencing. He has three siblings with whom he has no contact. The appellant claims to have been abused himself when he was in secondary school. Over the course of his life, the appellant has been employed in several different areas, most consistently as a bartender and a postman. He has no issues with drugs, but had a history of alcohol abuse, and has an asthma difficulty. Prior to his imprisonment in 2015, he had been living in a hostel for nine years.

38. The court was furnished with a report made by a psychiatrist, in which he refers to his own allegations of sexual abuse, and accepts that he is a paedophile. It also contains reference to depression and a suicide attempt, as well as psychiatric treatment and admissions. The appellant claims to have initially disclosed his offending to a registrar some 25 to 27 years ago, and that he attempted to get arrested on three occasions. He accepts the position of trust he abused in relation to his victims. He maintains that he ceased his pattern of abuse in 1983, and has no associates who are paedophiles. The report concludes with an opinion that the appellant is in a position to exercise reasonable insight and judgment.

39. He had previously come before Dublin Circuit Criminal Court on the 15th of October, 2015, charged on Bill 667/15 with factually similar indecent assault charges dating from 1975 to 1978, for which he received 3 sentences of 2 years, to be served consecutively, and with the final 18 months suspended. That sentence ended on the 19th of February, 2019, and by then the investigation into the matters in the present case had begun. The

appellant did not seek bail. The appellant claims that his offending was confined to his role as a scout leader, and it is the case that he has not come to the attention of the authorities for any offending since 1981.

40. At the sentencing hearing, the appellant's counsel conveyed an apology on his behalf for his behaviour, and the appellant's acceptance that he had committed grave wrongs and had caused untold damage to his victims.

Remarks of the Sentencing Judge

41. The sentencing judge began by recounting in detail the facts of the case and the impact the offending had on the victims, before turning to what she identified as the aggravating factors. She referred to the age of the appellant, and the position of trust he held, and identified the abuse and breach of a position of trust as a seriously aggravating factor. The sentencing judge regarded the fact that three of the victims were warned not to tell anybody about the behaviour as an aggravating factor. It was noted that two of the complainants were subjected to repeated abuse. The sentencing judge recognised the significant detrimental and ongoing impact the behaviour had on the victims, that they had not only been deprived of the innocence of childhood, but had suffered negative effects lasting throughout their adult lives.

42. The sentencing judge was mindful of the need to consider all of the circumstances of the case in sentencing, and quoted the words of Barron J. in *The People (DPP) v. McCormack* [2000] 4IR 356 which state that:

> *"Each case must depend upon its own special circumstances. The appropriate sentence depends not only upon its facts, but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused".*

43. The sentencing judge then detailed the personal circumstances of the appellant, reflecting those already outlined and referring to the contents of the psychiatrist's report. She noted that in terms of mitigation, the most helpful form of mitigation is a plea of guilt, and that the earlier it is entered the greater will be the level of mitigation afforded. It was said that a signed plea was of particular value, as it is the most expeditious way to plead and to indicate to the victims that a trial will not be proceeding. It was recognised that the appellant had entered a signed plea in respect of the offences against J.L., had not done so in the cases involving the remaining three victims as the appellant disputed aspects of their allegations. The sentencing judge nevertheless acknowledged that there was a benefit afforded by a plea at any stage, and she accepted that the appellant was entitled to some credit in respect of the pleas he eventually entered in respect of the remaining three victims.

44. The sentencing judge noted that the appellant had expressed remorse. She commented that the appellant had attended court in a wheelchair, and took into consideration his age and the added difficulties it will bring in the serving of a prison sentence. The sentencing

judge was cognisant of the lack of offending over the previous thirty years, and the appellant's cooperation with the investigation by making voluntary admissions both in respect of much of the abuse which formed the subject matter of the charges, and in relation to offences committed against other victims and not the subject of charges. The sentencing judge clarified that the court must sentence the appellant exclusively for the matters in respect of which he was charged, regardless of his other admissions.

45. The sentencing court noted that the appellant had made admissions when interviewed by Gardai in 1997; that notwithstanding the submission of a file no prosecution was directed by the DPP at that time; that it was only following a later re-submission of the file to the DPP that a prosecution was directed; and that the appellant was now pleading in circumstances where he claimed to be unable to now recall some of the details relied upon.

46. The sentencing court had been referred to the decision of the Court of Appeal in *The People (DPP) v Rashid* [2019] IECA 130, in which the accused placed his tongue in a six-year-old child's mouth, and rubbed his fingers around the outside of her vagina. In that case, the Court of Appeal located the conduct in the lower half of the mid-range of the scale of gravity. The sentencing judge here stated that she regarded the offending of the appellant as being of a more serious nature.

47. The sentencing judge referred to the six-year sentence with 18 months suspended imposed on the appellant in relation to offending between 1975 and 1978 and noted the considerable delay in this further matter coming before the court. She also noted that the appellant had presented himself at a Garda station in the 1990's and was not taken seriously. He had made admissions when approached by a garda in 2010. The sentencing judge agreed with defence counsel that the present matters should properly have been addressed years ago, but stated that the fact that they had not been so addressed did not detract from the moral culpability of the appellant, and that the court was obliged to consider consecutive sentences in the circumstances of the case. Consideration was given to the Supreme Court's decision in *The People (DPP) v R.McC.* [2008] 2 IR 92, in which Kearns J had accepted a defence submission that there is a "*due process requirement in sentencing*" to which any sentencing court should have regard and that this requires that:

> *"… any sentencing court should conduct a systematic analysis of the facts of the case, assess the gravity of the offence, the point on the spectrum at which the particular offence or offences may lie, the circumstances and character of the offender and the mitigating factors to be taken into account :- all with a view to arriving at a sentence which is both fair and proportionate."*

48. The sentencing judge stated that although the appellant had served a sentence in respect of similar offences which had occurred at around the same time as the present offences, the court was concerned with four other victims who were subjected to offending of a considerable gravity. The sentencing judge expressed the view that consecutive sentencing was appropriate to mark the seriousness of the offending.

49. The sentencing judge proceeded to impose the following sentences in respect of the counts on the indictment:

a) Count 1 – the sentencing judge located the offending as being in the upper end of the scale relating to indecent assault and identified a headline of 4 years. She then reduced the sentence to 2 years in the interests of ensuring proportionality and to take account of totality, given the sentence already served by the appellant.

b) Counts 2 & 3 – the sentencing judge determined upon headline sentences of 3½ years' imprisonment, which were then reduced to 18 months.

c) Count 4 – the sentencing judge identified a headline of 4 years' imprisonment, and reduced this to 2 years, and made it to consecutive to Count 1.

d) Count 5 – after nominating a headline sentence of 4 years' imprisonment, the sentencing judge reduced it to 2 years. consecutive to Count 4.

e) Count 6 – a headline of 4 years' imprisonment was nominated and reduced to 2 years.

f) Count 7 – a headline of 3½ years' imprisonment was identified and then reduced to 18 months.

g) Signed Plea – after nominating a headline of 4 years' imprisonment, the sentencing judge imposed a sentence of 2 years, consecutive to Count 5.

50. Counts 2, 3, 6 and 7 were to run concurrent to the sentence imposed in respect of Count 1

51. The total period of imprisonment, when account was taken of both concurrent and consecutive sentences, was therefore 8 years' imprisonment. The sentencing judge then suspended the final 18 months. Having considered s. 28 of the Sex Offenders Act of 2001, the sentencing judge ordered that the appellant be placed under supervision of the Probation Service for 12 months post-release on condition that he enter into a bond of €100 to keep the peace and be of good behaviour. The sentence was backdated to reflect time spent in custody following the cessation of his previous sentence.

Grounds of Appeal

52. The appellant appeals on the grounds that the sentencing judge failed to consider:

a) the rehabilitation of the appellant;

b) the absence of any record of offending since the early 1980s;

c) his previous custodial sentence for similar type offences;

d) that the imposition of consecutive sentences was unduly harsh.

Submissions of the appellant

53. With the imposition of the sentence in the present case following on from the previous sentence served by the appellant, he will be imprisoned for a total of 14 years with 3 years suspended. It is submitted on behalf of the appellant that the sentence imposed by the sentencing judge was excessive and offended the principles of proportionality in circumstances where the following were present:

a) Final pleas of guilty (albeit late);

b) Admissions by the appellant that he is a paedophile;

c) Efforts made by the appellant to seek psychiatric help in this regard;

d) Repeated unsuccessful attempts at confession;

e) A recognition by the appellant of his abuse of trust;

f) His apologies through his Senior Counsel;

g) His age at date of sentence;

h) His difficult life in hostels prior to imprisonment;

i) His freedom from substance \ intoxicant addictions;

j) His isolation from his family;

k) His reported history of being abused himself;

l) The apparent laxity of controls in the administration of scouting activities involving overnight trips, of which laxity, it was conceded, the appellant had repeatedly taken advantage;

m) The fact that the sentences were consecutive to each other and to those imposed on Bill 667/15.

Case law relied upon by the appellant in this appeal

54. The appellant has referred to *The People (A.G.) v Michael Driscoll and The People (A.G.) v Thomas O' Driscoll* C.C. A. Nos 45 and 46 of 1971, 3 March 1972 (Frewen Vol. 1, 351 at page 359), which emphasises the importance in sentencing of an inducement to lead an honest life. It was submitted that the sentencing judge's decision to only suspend 18-months of the cumulative 8 year sentence is inadequate in that respect given that the appellant has not offended in decades.

55. We were also referred to *The People (DPP) v McCormack* [2000] I.R. 356 to emphasise the weight that should be given to the circumstances of an offender in sentencing. It was submitted the sentencing judge failed to give sufficient weight to the appellant's personal circumstances.

56. The Court has also been referred to *The People (DPP) v Jennings* C.C. A. 143/98. 15th February 1999, as illustrating the importance of giving a "*last chance*" to a defendant with a troubled background to become a useful member of the community.

57. In *DPP v Yusuf* [2008] 4 IR 204 it was held that only the last two sentences imposed in respect of offences committed while on bail should be cumulatively consecutive. Although the appellant was not on bail at any point during his offending, Yusuf was referenced in the context of a submission on the appellant's behalf that the totality of the sentences imposed on the appellant in respect of all offences committed during a set period of time, decades ago, renders his sentence unduly harsh. We would merely comment that it is difficult to see how *Yusuf* provides any support for this argument.

58. We were also referred to *The People (DPP) v McC* [2003] 3 1. R. 609, a case in which it was held that a court has a discretion to impose consecutive sentences in circumstances where there are multiple victims. It was submitted that the court should have decided not to impose consecutive sentencing in the present case. The basis of this submission, in so far as we have been able to understand it, is that although there were multiple victims the offending occurred during a continuum across a period which is capable of being viewed a single episode of serious offending behaviour, rather than as repeated episodes of recidivistic offending.

59. The appellant also referred us to *The People (DPP) v Maunsell* [2014] IECA 7 as providing "*strong support*" for a submission that given the appellant's "*rehabilitation over the decades since his last offending*" and his previous sentence, he should have received a wholly suspended sentence, subject to post-release supervision.

60. The appellant also relies on the Australian case of *Fridey v The Queen* [2014] VSCA 271, a decision of the Supreme Court of Victoria. In particular, we were referred to paragraph 35 of the judgment of that court, reflecting part of the submissions of the applicant in that case. The applicant, who was claiming *inter alia* that the totality principle had not been properly applied at first instance in his case, was relying in turn on certain passages from *Postiglione v The Queen* (1997) 189 CLR 295, a decision of the New South Wales Court of Criminal Appeal. Paragraph 35 contains the following quotation from the judgment in *Postiglione*:

> *"McHugh J recognised that the totality principle had been given an extended application by the New South Wales Court of Criminal Appeal. His Honour said:*
>
> *The application of the totality principle therefore requires an evaluation of the overall criminality involved in all the offences with which the prisoner is charged. Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.*
>
> *Recent decisions in the Court of Criminal Appeal have extended the ambit of the totality principle. Those decisions hold that, in order to comply with the totality*

principle, a sentencing judge must consider the total criminality involved not only in the offences for which the offender is being sentenced, but also in any offences for which the offender is currently serving a sentence.

The most recent statement to this effect was made by Hunt CJ at CL in R v Gordon:

> *When a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, an existing custodial sentence, the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable."*

Statute law relied upon by the appellant

61. It was submitted that s. 29 of the Criminal Justice Act, 1999, incentivises early pleas of guilty by recognising their value in appropriate circumstances, and that the sentence imposed here may undermine this incentive as it did not sufficiently reward the unsuccessful attempts at confession. It was submitted that this may deter other historical offenders from coming forward.

Submissions of the respondent

62. Regarding the absence of evidence of offending outside the scouts, the respondent reminds the court that there was no positive evidence of rehabilitation before the court, and that the sentencing judge took the appellant's circumstances into account, including the references to treatment sought in the psychiatric report. It was further submitted that the appellant should not be entitled to mitigation on the basis that he is an opportunistic offender who ceased offending only when he had no contact with boy scouts.

63. Turning to the issue of consecutive sentences, it was submitted that the sentencing judge fulfilled her obligation, and indicated as much by stating her view that consecutive sentencing was appropriate to mark the seriousness of the offending. The complainants were not related, and consecutive sentencing was therefore appropriate and could not amount to an error in principle where care was taken to abide by the totality principle. It is submitted that the sentences imposed in respect of each count was shorter than what would have otherwise been warranted, and the suspension of 18 months reduced the total even further.

64. In respect of the previous sentence served by the appellant, and the delay in bringing the present charges, whilst this was acknowledged by the judge, it is submitted that there was no error on the part of the judge when she noted that this did not detract from the moral culpability of the appellant, and did not rule out consecutive sentences.

65. It is submitted that there were significant aggravating factors present, and that the majority of the guilty pleas could not be regarded as early. However, the judge had nevertheless recognised the benefit of the pleas, and had afforded the appellant significant mitigation for his circumstances, and arrived at a sentence which reflected this.

Discussion & Decision

66. The principal complaint advanced on behalf of the appellant is based upon the principle of totality. He contends that all of his offending occurred within a set time period, yet he is being punished on a piecemeal basis. He was punished in 2015 by the imposition of a sentence of 6 years' imprisonment with 18 months suspended for similar offences to those with which we are concerned in the present case committed against six other boys. In the present case he received cumulative sentences of 8 years, with eighteen months suspended, for offences involving four further victims. The aggregate of these two terms represents a 14-year sentence, with 3 years thereof suspended or a net 11 years. Counsel for the appellant makes the case that if the appellant been punished for the offences the subject matter of the present appeal at the same time as he was punished for his offences against the other six boys it is very unlikely he would have received a cumulative sentence of 14 years with 3 years suspended. It is said that the sentencing judge in the present case should, applying the *Posiglione* approach referred to in the quotation from *Fridey* v The Queen, have taken account of the totality of the criminality involved and the punishments allocated thereto in determining upon the sentence in this case. It is said that it was insufficient to confine her consideration of totality to the sentence structure she was proposing in respect of the seven counts relating to the four victims in the present case.

67. We have considered the argument made. The *Postiglione* approach has not been endorsed to date in this jurisdiction and we do not believe that this case is the appropriate vehicle in which to consider doing so. We are not prepared to express any view on this issue in circumstances where we consider it unnecessary to do so in order to determine the appeal before us. We think it is unnecessary for several reasons.

68. First, we do not agree with the submission that had all of the offences been sentenced together that the appellant would not, as a matter of probability, have received a net ultimate sentence as high as 11 years. We believe that a court sentencing for significant indecent assaults against ten separate victims, where the circumstances of their commission was aggravated by a serious breach of trust and exploitation of the offender's leadership position, could easily have justified a cumulative net sentence of 11 years imprisonment, in circumstances where the same mitigating circumstances existed as obtain in this case.

69. Secondly, it is clear from the transcript that the sentencing judge in this case was fully alive to the fact that the appellant had already received a sentence of 6 years imprisonment with 18 months suspended. She expressly confirms her awareness that he had served the custodial term of that sentence and that he was at liberty during the currency of the suspended portion thereof when he was arrested and charged with the present offences. She was therefore fully conscious of the totality of his criminality and the totality of his punishment, and we are satisfied that the sentences in the present case were informed by, and took account of, that.

70. Thirdly, the Oireachtas has provided an express statutory mechanism whereby an offender facing sentencing can "clear the slate", so to speak, in respect of yet uncharged

matters. We are referring to the mechanism contained in s. 8 of the Criminal Justice Act 1951 whereby a person, on being convicted of an offence, admits himself guilty of any other offence, and asks to have it taken into consideration in awarding punishment, the court may, if the DPP consents, take it into consideration accordingly. However, in this case the appellant, who was legally advised at the time, did not seek to clear the slate in 2015. Counsel for the appellant has sought to suggest that the appellant could not have done so in 2015 because he could not remember the names of the other boys he had abused. However, as counsel conceded when challenged on this by a member of the bench, the appellant had been able the following year when being interviewed by gardai to recall specifically three of the four victims with which we are concerned in the present case.

71. In the circumstances we find no error of principle with respect to the application of the totality principle in this case as a means of ensuring overall proportionality in the imposition of sentence. The overall sentence in this case was, we are satisfied, a proportionate one and was not a crushing one.

72. It has also been argued that insufficient credit was given for the range of mitigating factors to which counsel for the appellant has referred in his submissions, but particularly for the appellant's co-operation, for his self-reporting, for his remorse, his insight into his paedophilia and various cries for help in that regard (including presenting himself to gardai on several occasions and making admissions), his psychiatric history and other adversities in his life. We are not persuaded by this argument. The sentencing judge was careful to pass a sentence on each instance of offending, and in that regard adopted the recommended semi-structured methodology, nominating a headline sentence in each case (accepted by counsel for the appellant as having been appropriate) and then discounting for the mitigating factors based on her synthesis of what they merited. All of the factors identified by counsel for the appellant are referenced in the sentencing judge's remarks and counsel accepts that. His complaint is that insufficient weight was afforded to them cumulatively in the circumstances of the case. However, it is clear that an average discount of 50% was afforded on the headline sentence in each instance and, in some instances, it was greater still. We are satisfied that an appropriate level of discount was afforded to this appellant, and we find no error of principle on that account.

73. On the contrary, our overall impression of the sentencing judgment at first instance is that it was constructed conscientiously and with great care. We have not discerned any error of principle in the sentencing judge's approach.

74. The appeal is dismissed.