THE COURT OF APPEAL

[Record No. 74/20]

Neutral Citation Number: [2021] IECA 212

Birmingham P.

Edwards J.

Donnelly J.

PEOPLE (DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

NOEL McKEON

APPELLANT

Judgment of the Court delivered by Ms. Justice Donnelly on 23rd July, 2021

A. Introduction

1. This is an appeal against the imposition by the Central Criminal Court (Hunt J.) of a combined sentence of sixteen years imprisonment but with two years suspended on various terms including co-operation with the Probation and Welfare Service. The sentences were imposed in respect of a number of counts arising out of two separate incidents of considerable violence perpetrated on two separate victims.

2. A trial date had been fixed for 16th March 2020 and on the 29th July 2019, the Appellant entered pleas of guilty to six counts on the indictment. This was "a relatively early plea

of guilty". The Appellant pleaded guilty to counts 2, 3, 4, 5, 6 and 7 on the indictment covering the following victims and offence dates:-

Victim 1 **(**18th June 2016):-

Ct. 2 Sexual Assault;

Ct. 3 False Imprisonment;

Ct. 4 Assault Causing Harm; and

Ct. 5 Robbery.

Victim 2 **(**4th February 2018):-

Ct. 6 Rape; and

Ct. 7 Rape under Section 4.

B. The Offences

B(i) Victim 1, 18th June 2016

3. The victim had been working in the sex trade in Ireland in the months prior to 18th June 2016. A telephone and text exchange resulted in the Appellant arriving at the victim's address. On payment of a sum of money there was consensual sex between them.

4. The victim then became concerned for her safety due to the tone of the Appellant's remarks. He suggested she was a Romanian (in fact she was not) and was a parasite. He closely followed her to the toilet and then to the kitchen. He then demanded more sex and pulled her pyjama top over her head and bit the nipple of her right breast causing pain. He pushed her onto the bed and she screamed in protest. He was verbally abusive, and he tried to climb on to her in a manner indicating he wanted to have sexual activity

with her. He was removing his lower clothes. He slapped her on the face causing her to fall from the bed to the floor. She managed to avoid the Appellant who fell and she shouted to a neighbour when she opened her apartment door.

5. The Appellant picked her up and slammed her against the front door. He grabbed her around the throat and closed out the neighbour. She came to her knees and he slammed her head against the doorknob and the door causing a laceration. He dragged her by the hair shouting "Romanian Romanian". He pushed her to the floor whereupon he kicked her repeatedly in the face. He gripped her by the throat and restrained her. She bled. He demanded her wallet and took money from it. He then started punching her in the face, chest and ribs. She was held against the kitchen sink as he pulled her hair. He kicked her legs apart and used gross language of a sexual nature to indicate what he would do to her. At this time, he had an erection. He ripped a necklace from her neck and earrings from her ears and pocketed them. He forcefully penetrated her vagina with his fingers despite her continuous screaming. He ignored her protestations and struck her. He was scratching inside and outside her vagina area to the anus.

6. The victim, although naked, managed to get onto the kitchen counter and began to climb out the apartment window. He picked up a kitchen knife and tried to stab her at the top of her ankle. The apartment was on the ground floor but escape entailed her having to alight onto a roof area below. She then hid whereupon the Appellant calmly left the premises. She was driven by a passing taxi to Clontarf Garda Station. She was taken to the Mater hospital for treatment of her injuries which required five sutures. She was also taken to the Sexual Assault Treatment Unit.

B(ii) Investigation in Relation to Offences of 18th June 2016

7. As a result of photo fit and telecommunication records, the Appellant was linked to the offences. The Appellant was nominated as a suspect and he presented himself to Clontarf Garda Station where he was arrested detained and interviewed with no probative outcome. He declined to join a formal identification parade.

8. On the 17th October 2016 an informal identification procedure took place. He was identified by the victim. He was re-arrested on the 31st May 2018. It has not been explained why there was such an interval before his re-arrest. We consider that an unsettling aspect of the investigation. The re-arrest took place after the second offence was committed. He was interviewed but nothing of probative valued was obtained.

B(iii) Victim Impact Report on Victim 1

9. Evidence was given that the victim's injuries included a deep vertical laceration between her eyebrows. There was an abrasion on the right side of her neck and on her right shoulder. There was bruising and redness to her right elbow. There was also bruising to her left arm. There was dust and grit on the vulva, the skin around the anus and the soles of her feet. This was consistent with her history of a violent assault.

10. The victim was present in court. Counsel for the prosecution summarised her victim impact report. €121 was taken from her wallet. She had jewellery taken. She set out her loss of trust in people. She described her treatment in accordance with the evidence given. She is conscious of a permanent mark on her face.

B(iv) Victim 2, 4th February 2018

11. The victim of these offences was a Romanian national. She worked as an escort in the sex trade industry.

12. Having made contact by text, the Appellant visited the victim at her apartment block. He was initially friendly, but alcohol was detected on his breath. He paid her €70.00 for 30 minutes and she believed he then asked her if she was clean as an introduction to a request for unprotected sex. Sexual activity occurred but the Appellant then took off his condom. The victim asked him to leave. His answer was to tell her in a graphic fashion that he wanted sex, put on another condom, punch her in the eye and push her from behind.

13. The Appellant then pulled the victim's hair from her head by the roots. She fell on a coffee table. He put his hand over her mouth and again removed his condom. In her bedroom he raped her anally and vaginally. He demanded a repeat, pushed her on to the bed and asked for oral sex. He told her he was sorry; the victim believed he said this because she convinced him she would not seek the Gardaí.

14. The prosecuting Garda agreed that the victim was satisfied the Appellant had taken cocaine and alcohol before his arrival. It was accepted that the Appellant agreed not to ejaculate inside the victim and instead did so on the bed covering.

B(v) Investigation in Relation to Offences of 4th February 2018

15. The victim contacted the Gardaí the following day who noted she had bruising to her face and swelling to the bridge of her nose. Photographs were taken and incorporated into the book of evidence. She made a formal statement and was taken to the Sexual Assault Treatment Unit.

16. CCTV footage was collected and led to the accused as did DNA samples.

17. On 17th April 2018 the Appellant was arrested and detained at Store Street Garda Station where he was interviewed on six occasions with no probative results. He declined a formal identification parade but gave an account of drinking with his brother and his ex-partner. He stated he contacted the victim and that he had used his own telephone and insisted the victim agreed to unprotected sexual intercourse. He explained her injuries as resulting from a push by him but denied deliberate assaults. He queried if clumps of her hair came away because "maybe from when I hit her". He denied taking money. She described being hit by him and marked when he had attempted anal sex. He thought her "nuts" when told of her allegations of going to another room.

18. The Appellant described damaging and throwing away his phone.

B(vi) Victim Impact Report on Victim 2

19. There were extensive areas of bruising and abrasions to her right eye lid and below her eye. There was an area of black bruising below her left eye. She had an abrasion on the frontal area of her face above the right eye. The nasal bridge was swollen. On her right arm and fingers there was further bruising.

20. Victim 1 read her victim impact report to the court. She eloquently described how she is still in fear because of what happened. She was unable to forget the offences. She can't let anyone put their hand on her neck for fear of what will happen. She described her humiliation. She had flashbacks of the assault.

B(vii) Previous Convictions

21. These total 22 mostly relating to Road Traffic matters with no Circuit Court convictions or District Court appeals.

22. Six more recent convictions relate to offences committed in or around the dates of these offences. These were offences of criminal damage and breach of Safety Orders when his own relationship broke down.

C. Evidence as to the Appellant's Circumstances

23. The Appellant put in evidence the following documents:-

(a) Psychological Report – Michael McCracken, Forensic Psychologist.

(b) Letter from Appellant.

(c) Neighbours letter – Ms. Lyons.

(d) Letter from Pieta House.

24. The sentencing judge sought a Probation Report having heard the plea in mitigation. Ms. Cummins of the Probation and Welfare Service provided the report.

D. Plea in Mitigation

25. The prosecution did not dispute the instructions given to and relayed by the appellant's Counsel as follows:-

(i) He was 31 years of age and had a relationship which has now ended. There are four young children.

(ii) The Appellant was brought up in Dublin with five brothers and two sisters and had a good family.

(iii) In fourth class he attended a school specialising in dyslexia. He also had a short-term memory loss. Notwithstanding these difficulties he returned to mainstream education and completed his Junior Certificate. He excelled at sport.

(iv) At fourteen years of age he chose to use cannabis and later cocaine and other drugs. He had however controlled this abuse to the extent that he worked well selling fruit and vegetables and also with his brother in the area of shuttering.

(v) He developed skills in woodwork, carpentry, welding and manufacturing. However, the continuing abuse of drugs took its toll and led to loss of work.

(vi) He had no history of violence (These submissions were made before the Probation Report was obtained in which there were references to issues of

violence within his relationship; he disclosed hitting his partner and he was subsequently convicted of criminal damage and breach of a safety order).

(vii) His plea of guilty at a relatively early stage was relied upon.

(viii) The remorse of the Appellant was relied upon by counsel. The Appellants own letter confirmed his abuse of cocaine at the times of offending. There had been an attempted suicide for which treatment was sought at Pieta House. His life was a stop-go chaotic existence.

(ix) Senior Counsel referred to many of the matters set out in more detail in Dr. McCracken's Report. In particular he pointed to the acceptance by the Appellant of his full responsibility for what he did which acceptance was evidenced by his pleas of guilty which he never sought to resile from. The negative impact of drug abuse on his relationship has had terrible consequences for the Appellant and an intended and prospective marriage did not proceed.

(x) The imprisonment of the Appellant in February 2019 ended his contact with his children and partner. He has come to terms with his offending behaviour in all its depravity.

(xi) By the 4th November 2019 the Appellant was an "enhanced" regime prisoner having settled. He accepted his need for Anger Management intervention and for engagement in the Building Better Lives programme and these are pointed to as hugely significant positive factors and indicators. The need to prepare and change his ways so as to re-engage with his children is a target he has set for himself, assessed and appreciates. One background to his offending was severe depression as set out at page fourteen of the psychological report.

(xii) The confirmation of the Appellant's willingness to engage with intervention was submitted to be a hugely significant and positive indicator for his future life.

(xiii) Counsel also relied on the assessment in the Probation Report that the Appellant was assessed as at "moderate" risk of further offending.

(xiv) Counsel also referred to the fact that there was little planning in these offences and that the Appellant had left a trail of evidence.

E. DPP's Views at the Sentencing Hearing

26. Counsel for the prosecutor set out the Director's views in respect of guidance and sentence. He referred to the decision in the case of *D.P.P. v. F.E.* [2019] IESC 85 and proposed that offending behaviour to be in the upper category with ten to fifteen years imprisonment.

27. In reply counsel for the Appellant relied on a number of cases for support for a maximum headline sentence of between ten and fifteen years before mitigation. Some had upper limits of ten years and twelve years and six months (*D.P.P. v. Hearns* [2020] IECA 181; *D.P.P. v. M.K.* [2016] IECA 260; and *D.P.P. v. B.V.* [2018] IECA 253. In the case of *B.V.*, the victim was a child who was sexually assaulted prior to being raped. There had been a trial and no expression of remorse or rehabilitation. On appeal the starting sentence of fourteen years was reduced to one of ten years. The case of *D.P.P. v. M.A.F.* [2016] IECA 14, was also relied on at page four; lines seven to fourteen. There had been two victims and a sentence of fifteen years which was ameliorated on appeal by the suspension of the final three years.

28. At the date of the finalisation of sentence at the request of the sentencing judge, counsel for the DPP said the guidance was for the overall offending behaviour.

F. Sentencing Remarks

29. The sentencing judge articulated his reasons for the sentence imposed in his very clear sentencing remarks. We find it appropriate to annex his sentencing remarks to this judgment. The following synopsis should not take from the totality of the reasoning contained in the entirely of his sentencing remarks as annexed hereto:-

(a) Both sets of offences were committed against sex workers and involved violence, robbery and in one case misdirected xenophobic sentiment.

(b) Both victims were degraded in an extremely humiliating fashion.

(c) Harmful impact on the victims as set out in their Impact Reports.

30. The sentencing judge stated he was imposing concurrent sentences in light of the facts that there were two victims on different dates and the offending had the same underlying and worrying features. He quoted from the cases of *DPP v. S.C.* [2019] IECA 368 – Court of Appeal 19th December 2019 and *Fridey v. the Queen* [2014] VSCA 271. He observed the totality principle in these to avoid a crushing sentence and not simply to avoid the imposition of a lengthy headline sentence.

31. He quoted from the Supreme Court decision in *F.E.*, where, at para 35, the issue of rehabilitation effect (on an accused) must be considered. He noted the quotation from *R v. Holder* [1983] 3 NFWLR 245 to the effect that consecutive sentences might require

downward adjustment whether by telescopy or otherwise in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality in the sentences.

32. The sentencing judge identified headlined minimum sentences of ten years imprisonment and went on to consider the offending on the 4th February 2018. In this regard he fixed the headline sentence at fifteen years. He set out how he was adjusting a total of 25 years imprisonment downwards to 20 years and addressed mitigation. He noted that the Appellant was young and would have a reasonable period of life post release. He noted "as of the moment, this man is a very dangerous man indeed and I would have concerns about how this is to be addressed".

33. The Appellant was sentenced to concurrent sentences of imprisonment as follows in respect of 18th June 2016 offences:-

- Count 2 – Sexual Assault– 7 years imprisonment;
- Count 3 – False imprisonment– 7 years imprisonment;
- Count 4 – Assault causing harm– 4 years imprisonment; and
- Count 5 – Robbery– 7 years imprisonment.

In respect of offences on 4th February 2018 he imposed the following:-

-Count 6 – Rape – 9 years imprisonment; and

-Count 7 – Section 4 – 9 years imprisonment.

The sentences on Count 6 and 7 to be concurrent but each consecutive to the sentences imposed on Counts 2, 3, 4, and 5 above.

34. The sentences imposed totalled sixteen years with final two years suspended on terms. The Appellant must be of good behaviour for six years post release, attend a sex offender treatment programme pre and post release, engage with the prison psychology service pre-release, and engage pre and post-release with the addiction services. He is to attend an Anger Management Course aimed at violence towards women. His probation bond continues for three years post-release. The sentences are back-dated to 12th February 2019.

G. Grounds of Appeal

35. The Appellant's notice of appeal contained eight substantive grounds of appeal. He addressed five of these in his written submissions as follows:-

(a) The applicability of imposing consecutive sentences;

(b) The principle of totality;

(c) Considerations of sentencing principles; deterrence and rehabilitation;

(d) Mitigation and the appropriate discount to be applied; and

(e) Preventative detention.

36. At the oral hearing counsel for the Appellant conceded, as had been conceded at the sentencing hearing in the court below, that there was a discretion to impose consecutive sentences in these circumstances and that he was not taking any issue with the exercise of that discretion. He confirmed that the central issues were whether there had been

compliance with the totality principle and the duty not to impose a crushing sentence. He relied in particular on the mitigating factors in the present case, especially as regards the plea of guilty, his remorse, his willingness to engage with the appropriate services while in custody and his family circumstances. In effect counsel submitted that the suspended part of the sentence should have been granted.

H. Issues

H(i) The Imposition of Consecutive Sentences

37. Despite this issue not being pursued at the oral hearing, we find it appropriate to state that in the circumstances of the present case that there could have been no error of law here. It is a well-recognised principle (see *People (DPP) v. G.McC* [2003] 3 IR 609**)** that a consecutive sentence may be appropriate in cases involving different victims. Charleton J. held in *People (DPP) v. F.E.* [2019] IESC 85 that:-

> "[w]hile 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."

38. This was a most appropriate case in which to impose consecutive sentences, especially when one takes into account the fact that the Appellant was actually questioned by the Gardaí about his involvement in the first set of offences but nonetheless went on to commit the second set of offences. There is no error in principle. Indeed, in the

circumstances of this case, absent good and stated reason to the contrary, there may well have been an error in principle if no consecutive sentence had been imposed.

H(ii) The Totality Principle

39. This was the main argument made by the Appellant at the hearing. He submitted that this principle was breached by virtue of the crushing sentence imposed, in particular by the failure to reduce it because of the substantial mitigating factors. In written submissions this was introduced as follows:-

> "[T]hat while the trial judge properly referred to the decision in the *F.E.* decision and to the extract of the judgement in *R. v. Holder* he went on, nevertheless to impose what can only be considered as a "crushing" sentence total. Indeed the judge […] appears to downplay such a happening solely on the basis of the age of the Appellant."

40. The DPP submits that the trial judge was mindful of the totality principle. Having considered the appropriate headline sentence as a total one of 25 years he reduced that by five years which was a reduction of 20%. It was on the reduced total that he applied the mitigation.

41. The DPP submits that precedent has established that when applying consecutive sentences, the court must reflect and make a final assessment as to whether the cumulative sentence "fairly reflects the offending conduct viewed in its totality" (O'Malley, T. (2013) *Sexual Offences*, Roundhall; Dublin, at paras. 23 – 119) and satisfies the twin components of proportionality (*People (DPP) v. Delaney* [2020]

IECA 15). The final sentence should be less than the sum of the component parts to avoid the imposition of a disproportionate sentence.

42. The DPP also relies upon the following in *People (DPP) v. Casey* [2018] 2 IR 337 where Birmingham P. stated:-

> "[It] is most frequently seen to operate where a court approaches sentencing on the basis of first determining in the normal way the appropriate post-mitigation sentence for each individual offence, and whether and to what extent those sentences should be consecutive or concurrent, *inter se*, without reference to any consideration of what cumulative figure and if necessary adjust it downwards, with appropriate pro rata adjustments to the individual component sentences, so as to avoid the imposition of a 'crushing' sentence on the offender."

43. In the case of *People (DPP) v. Delaney* [2020] IECA 15, the Appellant appealed against the imposition of three consecutive sentences on the ground of, *inter alia*, offending the principle of totality. The Court of Appeal rejected the appeal and held that the suspension of the final twelve months of an eight-year sentence (12.5%) was appropriate, satisfied the principle of totality and was within the Judge's margin of appreciation.

I. Decision

44. As this Court has said in *People (DPP) v. S.C.* [2019] IECA 348:-

> "The essence of the totality principle is that when imposing consecutive sentences, a court should review the aggregate sentence to be imposed in order to ensure that it fairly reflects the totality of the offending. The principle is a widely accepted principle in sentencing. The primary rationale for the principle arises from the concept of proportionality."

45. In the present case, the sentencing judge addressed the issue of totality prior to taking into account the post-mitigation sentences. As Kennedy J. said in *S.C*: "Totality is most frequently considered at the end of the sentencing process". That statement accords in accordance with the dicta of Birmingham P. in *Casey* above. The point at which the sentencing judge addressed the totality issue was not a ground of appeal or raised in argument. We simply make the point that rationale of the totality principle is best served by looking at the overall sentence which is produced by the consideration of the assessment of the gravity of the offending and the mitigation applicable to each of the offences which are affected by the consecutive nature of the sentencing and then to address the overall sentence in order to assess whether the sentence is truly crushing i.e. it offences the principle that sentencing must be proportionate to the gravity of the offending behaviour and the circumstances of the individual offender. We also note that this Court gave a detailed judgment dealing with the totality principle in *People (DPP) v. Crowley* [2021] IECA 178 in which having discussed the concept of a crushing sentence concluded in that case that the sentence was disproportionate and

crushing in the sense of being more than the circumstances of that appellant's case merited.

46. There can be no doubt here but that the sentencing judge was highly tuned to the totality principle and the effect that imposing consecutive sentences might have. He invited submissions on consecutive sentences having indicated his view that this appeared an appropriate case for one. He gave a significant reduction in the pre-mitigation sentence to take into account the totality principle. This was reduced from a total sentence of 25 years to one of 20 years. Undoubtedly a headline sentence of 20 years for the particularly violent sexual offending that took place here, on two separate occasions on two separate victims, particularly where the second set of offence took place *after* the Appellant had been questioned by the Gardaí over the first set of offences, is behaviour that merited such a headline sentence. On behalf of the Appellant it was submitted, albeit with respect to mitigation, that the Appellant had tried to kill himself after the first set of offending and thus had some idea of how unacceptable his behaviour way. We do not find that a situation that would reduce the gravity of the offending behaviour; if anything, it might aggravate it as he knew how wrong his behaviour was but persisted nonetheless.

47. We are quite satisfied that in respect of the gravity of the offending behaviour, the totality principle was not violated by the manner in which the sentencing judge reduced the headline sentence from 25 years to 20 years.

48. The Appellant's principle submission, as noted above, was that the mitigation aspects of the Appellant's case were not sufficiently reflected in the reduction in the sentence

to one of sixteen years with two years suspended. In this context the Appellant also referred to principles of rehabilitation and not simply deterrence which must feature in the sentencing process.

49. The Appellant submits that the early pleas of guilty were not sufficiently reflected in the mitigation applied by the judge. He also submits that the sentencing judge failed to take adequate account of the mitigation present including the display of remorse and the Appellant's addiction and mental health issues. The DPP submits that, on the contrary, careful consideration was afforded to the mitigation presented. The DPP relied upon the following remark of the sentencing judge:-

> "[…] I am satisfied [Counsel] has, in her very focused submission, identified significant mitigation in terms of the probation report and the psychological report and Mr. McKeon's personal disposition. He has obviously had troubles with drug addiction and has had struggles involving self-harm and suchlike. These are all mitigating factors that I take account of. I also take account that he has, although not been particularly cooperative with either investigation at the times that they took place, he has done the main thing that he could have done to secure credit for mitigation and that is pleaded guilty at an early stage to these offences and therefore a significant consideration must be given to that."

50. In answer to the submission on deterrence, the DPP relied upon the fact that the concept of general deterrence was particularly important in the context of the type of offending behaviour at issue here. With regard to the sentencing principle of rehabilitation, the DPP submitted that the sentencing judge clearly recognised the central importance of

the Appellant's rehabilitation. The probation report noted that the Appellant was willing to engage with their services but noted that he remained a "medium" risk of re-offending. Accordingly, the sentencing judge carefully structured a sentence to foster and encourage rehabilitation to ensure that upon his release, he did not represent a danger to society. He directed that the final two years of his sentence be suspended. The condition of that suspension required that he attend a sex offender treatment programme, pre and post release. He must also engage with the prison-bases psychology services. Furthermore, he is to engage with addiction and anger management services pre and post release. There can be no doubt that the way in which this suspended sentence was structured placed a particular emphasis on rehabilitation; all appropriate services were put in place to support the Appellant's rehabilitation efforts.

51. The DPP submits that the Appellant received significant discount to reflect the mitigation. The headline sentence was reduced by six years (two of which were suspended); a reduction of 30%. Accordingly, the DPP submits, the facts establish that no error in law has been established.

52. The sentencing judge's remarks were apposite; he considered all aspects of mitigation and rehabilitation in his sentencing. He applied significant mitigation to the Appellant.

53. The reduction to be accorded for a guilty plea is not a mathematical one. This was a relatively early plea and there is no doubt that a plea in these types of cases are particularly helpful. On the other hand, one has to look at the strength of the case against him and while this is not "a caught red-handed" situation, the extent of the

evidence against him, particularly in the context of the totality of the evidence that would be available to a jury hearing *both* cases, was strong.

54. The remorse of the Appellant has to be seen in the context of the committal by him of the second offence despite his suicidal behaviour after the first. Furthermore, in both the psychological report and the subsequent probation report, there is an indication of a reluctance to take full responsibility for the entirety of his behaviour on the night. Nonetheless it was clear that he took responsibility and recognised that he needed intervention. That was significantly to his credit but that was reflected by the sentencing judge in his careful structuring of the sentence.

55. With regard to the particular submission that there should have been a greater suspended element of the sentence, we are not persuaded that any error in principle has been identified in that regard.

56. We have carefully considered whether the sentence of sixteen years with two years suspended on such terms that the Appellant agrees to abide by and with which he has no complaint, was an error in principle because of its crushing nature on this relatively young man with four children. We are not satisfied that the principle of proportionality has been broken. These were extremely grave offences carried out with considerable violence with an interval of eighteen months between them. In the interim period the Appellant was questioned by the Gardaí but went on to commit the second set of offences. The offences had a sinister xenophobic context to them. The sentence imposed reflected the gravity of the totality of the offending behaviour and appropriate mitigation. Overall, the sentence imposed did not offend the totality principle.

57. We therefore dismiss this appeal.

ANNEX

Redacted Sentencing Remarks of Sentencing Judge

JUDGE: That's great. Thank you very much. Very well. The evidence in both of these cases very much speaks for itself, so my remarks are not going to be lengthy. These are very disturbing cases involving violent and repeated sexual offending. The aggravating features over and above the features inherent in the offending are clear. Both sets of offences were committed against sex workers involving violence, robbery and in the first instance xenophobic sentiments issued incorrectly as it turned out in relation to the nationality of **[Victim 1]**, but certainly is a surrounding circumstance to be taken account of. But, more importantly, in both cases both of the victims were degraded and treated in an extremely humiliating fashion. It is the case also that very great harm was caused as a result of the offending in each case as is obvious from the eloquent and lengthy impact statements heard on the previous occasions.

This is an obvious case for a consecutive sentencing regime. The offences were committed in sequence against separate victims and in my view it would be failing to reflect the matter not to impose separate punishments in relation to each victim and it would be failing to reflect the matter if they weren't consecutive because the underlying offending was consecutive and had the same underlying and worrying features.

The issue of consecutive sentencing in such cases has been recently considered by the Court of Appeal in the case of the *Director of Public Prosecutions v. S.C.*, a judgment of that court delivered by Kennedy J. on the 19th of December 2019 and that case extensively and helpfully discusses the various options and approaches that arise when a consecutive sentence is being contemplated. The Court of Appeal stated that the judge

must have regard to the desideratum of sentencing, whether a sentence is consecutive or concurrent, that is, to achieve a proportionate sentence. "It is in this respect [...]" -- and I quote from the judgment – "It is in this respect that it is important to ensure that the sentence ultimately imposed is not a crushing one. The Supreme Court of Victoria described a sentence as crushing in *Fridey v. The Queen* [2014] VSCA 271, as one where: -- '[…] it is such a length that it would provoke a feeling of helplessness in the applicant if and when he or she is released, or which would result in the destruction of any reasonable expectation of useful life after release.' ".

The Court of Appeal continued as follows, "It logically follows therefore that having decided upon sentences in respect of any given offence, and where a judge decides that such sentences should be imposed on a consecutive basis, it is essential that the judge step back and look at the overall sentence to be imposed to ensure that it accords with the totality principle.".

So there the totality principle and the purpose of the totality principle is very clearly stated. It is to avoid the imposition of a crushing sentence, not simply to avoid the imposition of a very lengthy headline sentence.

The matter was also canvassed by the Supreme Court in the *F.E.* decision as follows, where the Supreme Court at paragraph 35 stated that, "The totality principle means that the judge should objectively consider the overall impact of the offence on the victim or victims and also the rehabilitative effect of the overall result in light of the final total, and the justice of retribution and the need to mark the harm to the victim or victims. Thus, Street C.J.'s description of the principle in *R v. Holder* [1983] 3 NSWLR 245 and

in *R v. M.M.K.* (2006) 164 A Crim R 481 at 12 is apposite: "The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences."

And if we just dwell for a moment in terms of the totality of the criminality on the various aspects of both sets of offences. In relation to **[Victim 1]** the counts are counts 2, 3, 4 and 5 being sexual assault, false imprisonment, assault causing harm and robbery all taking place in the context of the same of events on the 18th of June 2016. As pointed out, she was a sex worker operating by way of an internet agency. Consensual sex occurred between the complainant and the accused followed by the remark about her not being from **[REDACTED]** but being from Romania and the denigratory references made to those of that nationality. This was a matter of obvious concern to **[Victim 1]**. She left and went to the bathroom, was followed by the accused who was demanding more sex. He pulled off her pyjamas top over her head and bit the nipple of her right breast causing her pain. She noted that his penis was erect and he tried to climb on top of her while she was on the bed, having been brought back there. She was slapped very hard. She was stunned. She rolled off the bed. She tried to escape. She was grabbed back by her thighs, was slammed against the front door, grabbed by the waist and again imprisoned in her

apartment to prevent her seeking aid from a neighbour that she had seen outside. Her head was slammed against the doorknob of the front door and she suffered a laceration to that area of her body. She was dragged by her hair across the floor of the kitchen whilst he was shouting again about Romanians. She was asked where her wallet was. She gave that to him. He removed the money; put it in his pocket. Started punching her in the face, chest and ribs and she was told to put her hands on the kitchen sink and he was pulling her hair. He was using his legs and free hand to kick her legs apart. She was in a position to notice that his penis was erect and shorts were down. He threatened to fuck her up the ass. He grabbed and ripped the necklace that she was wearing from around her neck and pulled earrings from her ears. She hid a kitchen knife that she saw due to her concern about these matters. He started to lick his right hand. He forcefully put two or three fingers into her vagina with great force and strength such that she said she could feel his nails. She went on to describe clawing and scratching inside of her and also scratching on the outside of the vaginal area to her anus. She apprehended from his movements that she was going to be penetrated. She again tried to make good her escape. She had to leave her house by jumping on to a roof from the first floor, being naked, receiving further injuries in the course of her escape. The injuries are set out at page nine of the transcript of the 4th of November and are all entirely consistent with the experience as described by her.

Quite clearly this is an appalling case, and I cannot see how a headline sentence of, before mitigation, of less than ten years would be justified in these circumstances. Likewise the second offence is equally appalling and is worse in many ways, being aggravated as it is, by the commission of the first set of offences also involving a sex worker, **[Victim 2]**, and again she voluntarily entered into consensual sexual activities but again clearly, just

as in the previous case, these got out of hand and well beyond anything consensual very quickly. It's quite clear that Mr. McKeon was, despite her wishes, angling for unprotected sexual intercourse, both vaginal and anal, and when this was not forthcoming he began to use violence. She put a condom on him. There was sexual activity. He took the condom off. She fought with him. Told him to leave. He still wanted unprotected sex. Said, "No. I still want to fuck you". She put another condom on. He pushed her from behind on to the bed, hurting her. Punched her in the right eye with a closed fist. She said she was very frightened. It hurt a lot. At this point he shouted asking for his money back and that he wanted to leave. He pulled her from behind. She fell on to the coffee table. He pulled her hair roots out and matters continued in that vein. He went and got lubrication in the bedroom, put it on her vaginal area, held her down on the bed, raped her vaginally and then anally. He ejaculated on to the bed and cleaned him off with some wipes. He then proceeded to examine her phone to see if his number was on the phone and this was followed by her being pushed on to the bed and a further attempt to have sexual intercourse. In the course of all of this she sustained visible bruising to her face and swelling to the bridge of her nose. Her subsequent admission to the Sexual Assault Treatment Unit is described at page 20 of the transcript of the 4th of November.

So, it is quite clear that this is also appalling carry-on. It went actually further than the first set of offences in that it involved violent and non-consensual vaginal and anal rape. On a standalone basis I am satisfied that the headline sentence for that kind of behaviour could not be less than fifteen years prior to mitigation.

So, if one adopted a simple totting-up procedure the headline sentence, combined headline sentence in this case would be one of 25 years. In my view this would be

entirely proportionate to the consecutive and serious criminality disclosed by the evidence in these cases but I am inclined to think that, having regard to the application of the totality principle as described by both the Supreme Court and the Court of Appeal, that produces an excessive result but I am satisfied, whilst having to discount from that, that an overall headline sentence prior to mitigation of 20 years is justified in respect of this kind of violent and sequential offending. I cannot see how it would be otherwise if one is not to have regard to the serious harm caused to both the victims in sequence and to deter this kind of carry on is all I can describe it as. So, I intend to structure the sentence based on a premitigation total of 20 years.

Now, Ms Biggs, I am satisfied has, in her very focused submission, identified significant mitigation in terms of the probation report and the psychological report and Mr. McKeon's personal disposition. He has obviously had troubles with drug addiction and has had struggles involving self-harm and suchlike. These are all mitigating factors that I take account of. I also take account that he has, although not been particularly cooperative with either investigation at the times that they took place, he has done the main thing that he could have done to secure credit for mitigation and that is pleaded guilty at an early stage to these offences and therefore a significant consideration must be given to that. However, I am concerned that there's much work to be done. I accept that the probation report shows that he is willing to address the significant amount of rehabilitative work that is required to ensure that this man is not, who is a relatively young man, this man, he is now aged 32, that this man doesn’t represent on his release and he will be released at a relatively young age and at an age when he would still, if unreformed, present a significant danger to society. So, the question of a crushing sentence in the sense of a sentence that would be overwhelming or couldn't be done or

would leave nothing to him in terms of his life doesn't arise, even in terms of a 20-year sentence. That would still, if served in full, leave considerable aftermath if Mr. McKeon enjoys ordinary luck and health, and I have to have some consideration to the wellbeing of society because I am satisfied that, as of the moment, this man is a very dangerous man indeed and I would have concerns about how this is to be addressed.

So, I propose to have recourse to the mitigating circumstances by giving him both a straight discount in respect of his plea and a suspended portion of a sentence to ensure that rehabilitation is addressed both in custody and afterwards and to ensure a considerable period of good behaviour. So, what I propose to do is this: I propose to allow a six-year discount, delivered in the following way; four years straight discount in respect of the plea of guilty and a conditional suspended discount of two years. So that will leave sixteen years with two suspended and I will attribute that as between the offences in the following way. In respect of the first set of offences, it seems to me that the appropriate way to proceed is to impose a seven-year sentence on count No. 3; that's false imprisonment. A concurrent seven-year sentence on the sexual assault charge in count No. 2 and a concurrent seven-year sentence on the aggravated -- no, that is not one of the ones. It's 2, 3 and -- 2, 3, 4 and 5. A concurrent four-year sentence on count No. 4, assault causing harm, and a concurrent seven-year sentence on count No. 5. Therefore in respect of the second set of offences, count No. 7 -- that is count No. 6 and count No. 7, there will be consecutive nine-year sentences or they are imposed consecutively on the seven-year sentences on counts 2, 3 and 5 and they are internally concurrent, that is a nine-year sentence in respect of each of those, the last two years of both of those sentences will be suspended on the basis that the accused enters a bond today in terms of keeping the peace and being of good behaviour for six years following his release in the

sum of €100 and secondly a probation bond that, in terms of the probation report, he is to attend a sex offender treatment programme, pre and post release, as directed by the Probation Service. He is to engage with prison-based psychology service pre-release. He is to engage with addiction services pre and post release. He is to attend a specific anger management programme aimed at violence towards women. He is to cooperate fully with the Probation Service in relation to all directions in addressing his offending behaviour. The period of the probation bond continues whilst in custody and for a period of three years post release. In the light of the terms of that bond, I don't consider it necessary to make a statutory post release supervision order pursuant to the Sex Offenders Act. I do, however, direct that he is subject to part 2, the notification provisions of the act, on a permanent basis from the date upon which he pleaded guilty in this case and I will extend legal aid certificate in the event of an appeal.

[END OF REMARKS]