THE COURT OF APPEAL

Record No: 48/2022

Edwards J.
Kennedy J.
Burns J.

Between/

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

RESPONDENT

V

P.P.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 9th of June 2023.

Introduction

1. Before this Court is an appeal brought by P.P (i.e. "the appellant") against the severity of the sentence imposed on him by the Central Criminal Court on the 11th of February 2022. This sentence, amounting to an effective and global custodial sentence of 5 years and 6 months, comprised:

    - Consecutive custodial sentences of 3 years and 6 months imposed on count no. 1, which was a count of rape contrary to s. 48 of the Offences Against the Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981 (i.e. "the Act of 1981"), and; 3 years on count no. 5, which count was a count of indecent assault on a female contrary to Common Law and as provided for by s. 10 of the Act of 1981;

    - Concurrent custodial sentences of 3 years on count no. 7, a count of s. 10 indecent assault; 2 years on count nos. 3 and 4, which were counts of indecent assault contrary to s. 6 of the Criminal Law (Amendment) Act 1935 (i.e. "the Act of 1935"), and count no. 11, a count of s. 10 indecent assault, and; 15 months on count no. 10, which was a count of s. 10 indecent assault.

2. The remaining counts on the indictment were taken into consideration by the court below when imposing sentence. These remaining counts comprised two counts (count nos. 2 and 9) of s. 6 indecent assault, and two counts (count nos. 6 and 8) of s. 10 indecent assault.

3. The final 12 months of the global custodial sentence of 6 years and 6 months was suspended on certain conditions, namely:

> *"1. that he submit himself for assessment in respect of any programme directed towards addressing his offending as may be considered suitable by the Probation Service.*
>
> *2. that he does not approach or have any contact with any of the complaints (sic) in the case or their families either himself or through a third parties (sic) by telephone , letter, social media or otherwise*
>
> *3. that he not be in the company of any child under the age of eighteen years unless in the company of another adult*
>
> *4. that he comply with the directions of the Probation Service.*
>
> *5. that he attend all appointments with his Probation Officer.*
>
> *6. that he keep the Probation Service informed of any change in his place of address and he will keep the peace and be of good behaviour towards all the people of Ireland during his periods of imprisonment and for the said period of 3 years from the date of his release.*
>
> *And further that he will come up if called upon to do so at any time during the said period of 3 years to serve the portion of the sentence of the Court this day imposed but suspended on his entering into this recognizance. [...]"*

4. The arguments the appellant advances in support of his application can essentially be distilled into two distinct grounds: First, that the sentencing judge erred in structuring the sentence to incorporate a consecutive element in the circumstances of the case and/or to the extent that he did so, and; second, that the sentences imposed did not adequately reflect the mitigation which the appellant was entitled to have taken into account (most particularly, the appellant's mental ability/capacity, his age at the time of offending, his genuine remorse, and the fact that he came to no adverse attention following the commission of the offences).

Factual Background

5. At the sentencing hearing of the 7th of February 2022, a Detective Garda Colin Fitzpatrick (otherwise "D/Garda Fitzpatrick") gave evidence in relation to the factual background to the appellant's offending, which was perpetrated against five complainants, who were children at the time the various offences were committed, and which occurred in and around the vicinity of the appellant's family home which was situated in a housing estate in the County of Dublin. The complainants are sisters. For the purposes of this section of the present judgment, setting out the evidence before the court below, these complainants shall be referred to respectively as complainant A, B, C, and so forth.

Complainant A

6. The counts which relate to complainant A were count nos. 5, 6, and 7, three counts of s. 10 indecent assault, and they occurred in or around the year 1985 when she was approximately 8 years old. Complainant A was good friends with, and neighbour to, a half-sister of the appellant (referred to for the purposes of the present judgment as "H.S.") and lived with him in the family home. One day, in and around the time that complainant A had made her first confession and her first communion, the complainant was in the back garden of the appellant's family home playing hide and seek with H.S. when she was invited by the appellant to come into one of the make-shift shacks or sheds he had built for the purpose of housing rabbits. In the small confines of this dark shed, the appellant anally raped her. She recalled how she felt sore around her bottom following the event, and that she did not know what to do when it happened, so much so that she "*froze*" and did not scream as the incident unfolded. This event forms the basis of count no. 5. The appellant was aged between 16 and 17 years at the time of offending.

7. The next event occurred in the context of a sleepover with H.S. at the appellant's home. While asleep in H.S.'s bedroom, which H.S. shared with another sister of the appellant, the appellant came into the bedroom and, having called complainant A, brought her out onto the landing whereupon he told her to get down on all fours, and then proceeded to anally rape her. Immediately following this incident he told complainant A, "*Better not to tell anybody*", which she complied with for many years. This event forms the basis of count no. 6. The appellant was aged between 17 and 19 years at the time of offending.

8. Count no. 7 involved an incident of oral rape committed by the appellant which took place in the confines of the front sitting room of the appellant's home. While this occurred, the complainant was seated and the appellant was standing, all the while looking out the front window in case his mother and her male friend would come back. Complainant A recalled in her statement to gardaí that she was "*very scared and afraid*", that she did not understand what was happening, but that she knew it was wrong and that she was afraid to tell anyone. The appellant was aged between 17 and 19 years at the time of offending.

9. Following these incidents, complainant A managed to avoid any of the appellant's invitations to be alone with him. She considered that these events affected her, inasmuch as she became nervous and shy around men. While she could not tell her mother, she eventually told a good friend of hers, a girl of similar age, when she was about 13 years of age.

Complainant B

10. Complainant B is the victim of the offending captured by count no. 8, a count of s. 10 indecent assault. She is a younger sister to complainant A, and was aged about 9 or 10 years at the time of the offending which occurred sometime between mid-summer 1987 and late spring 1988. On one occasion, she was upstairs in H.S.'s bedroom playing when the appellant asked H.S. to bring complainant B up to the attic, where he was, for the purpose of showing her his trains. Having climbed up into the attic alone, and while looking at the trains, the appellant put his hand up her top and touched her breast area. She recalled feeling "*shocked*" and "*frozen*" at this, and she had stated that at the time

she was not wearing a brassiere on account of her still being a young child. Following this event, complainant B felt "embarrassed" and avoided the appellant's house. The appellant was aged between 19 and 20 years at the time of offending.

Complainant C

11. Count nos. 9 and 10, being one count of indecent assault contrary to s. 6 of the Act of 1935 and one count of indecent assault contrary to s. 10 of the Act of 1981, were perpetrated against complainant C. Like the foregoing complainants, complainant C was familiar with the appellant on account of her being a neighbour and a friend of the appellant's sister. She recalled that the appellant would make a "*beeline*" for her if she was playing around his house, and she described how he would hold her down on the ground and would rub his penis against her legs or stomach. She averred that it happened on more than one occasion but less than five times, and that such conduct would usually occur in the sitting room or the kitchen and would last a couple of minutes. Complainant C stated that she did not tell anyone about these events, and that she tried to avoid the appellant's company. Having regard to the particulars of count nos. 9 and 10 and the date of birth of the complainant which was disclosed by D/Garda Fitzpatrick at the sentencing hearing, it is possible to calculate that complainant C was aged approximately between 8 and 13 years at the time of the appellant's offending. The appellant was aged between 11 and 16 years at the time of offending.

Complainant D

12. The offences against complainant D relate to count nos. 1 and 4 on the indictment, a count of s. 2 rape and a count of s. 6 indecent assault. Like the foregoing complainants, she was a friend of the appellant's siblings and would frequently visit the appellant's house to play. She described a number of incidents which form the basis of the two counts.

13. Sometime before her eleventh birthday, in and around the year 1980, she was in the appellant's house making costumes for Halloween when the appellant walked past her, "*jammed*" her up against the wall and rubbed against her. It was further stated that he had touched her chest area.

14. On another occasion, the appellant pushed complainant D into a free-standing wardrobe where he made advances that she mostly fended off. However, the appellant managed to digitally penetrate her vagina. Complainant D, "*taken aback*", was told by the appellant not say anything to anyone as they "*wouldn't believe [her]*".

15. Another occasion is described as occurring on a summer's day. While helping the appellant's siblings clear out a coal shed at the house, the appellant joined them and proceeded to get up close to complainant D, place a hand up under her t-shirt and then down in her pants and digitally penetrated her.

16. On another occasion, when she was about 12 years of age or so, she was in the garden of the appellant's house with her mother and his mother. After some socialising, complainant D decided to leave the premises and while she was making her way through the back garden the appellant pulled her into one of the shacks, once he had observed that the two mothers had disappeared from view. There, in this shack, he proceeded to throw complainant D on the ground, kneeled on top of her, and, following some indecent touching to her breast area, vaginally raped her. Complainant D described feeling sore, and that she was crying during an ordeal which seemed to her to last for a long time. Following this incident, he said to her that if she told anyone, they wouldn't believe her.

17. The appellant was aged approximately 14 years at the time of the rape offence's commission, having regard to the particulars of count no. 1 as set out on the indictment. Having regard to the particulars of count no. 4, he was aged approximately 12 years at the time of that offence's (s. 6 indecent assault) commission.

Complainant E

18. The final complainant, complainant E, was approximately 10 years of age when the event forming the basis of count no. 11, a count of s. 10 indecent assault, occurred. Like the other complainants, she was a friend of the appellant's sisters. On one occasion, when she was in the appellant's back garden with one of her sisters and two of the appellant's sisters, the appellant initiated a game of hide-and-seek. During this game, she was told that she should stay with the appellant, and while the pair were hiding inside one of the make-shift shacks the appellant proceeded to put a hand up her skirt, into her underwear, and digitally penetrated her vagina. The complainant described feeling "*scared*", that she did not say anything, and she stated that the ordeal naturally hurt her. The appellant ceased this misconduct upon hearing that someone was coming. Following this incident, complainant E made a "*conscious decision*" never to be alone with the appellant again. The appellant was aged approximately between 15 and 16 years at the time of this offence's commission.

Garda Investigation

19. The offending complained of first came to the attention of An Garda Síochána in May 2017 following an initial statement by complainant A. Following this disclosure, the other four complainants went to the gardaí to give statements. At some point subsequent to this, gardaí conducted a series of three interviews with the appellant in the presence of his solicitor and these interviews were video recorded. The appellant attended at these interviews on a voluntary basis. As the transcript of the sentencing hearing of the 7th of February 2022 makes clear, the appellant denied all of the allegations of misconduct that were put to him at interview.

20. The book of evidence was served on the 20th of September 2018 and the matter was fixed for trial on a date in November 2021. The appellant offered some notification in advance of this date that he was going to enter guilty pleas in respect of counts nos. 1, 3, 4, 5, 7, 10, and 11, which he did, and in so doing it was said that he spared one witness from having to give evidence from abroad via video link.

Personal Circumstances of the Appellant

21. The appellant was aged approximately 12 to 20 years during the period capturing the events forming the subject matter of the various counts on the indictment. He was aged approximately 53 years at the date of sentencing.

22. Described as "*a bit of a loner*" by D/Garda Fitzpatrick in evidence, the appellant was residing at home with his mother and stepfather when the offences took place. He worked locally as a pump attendant at a petrol station for about 23 years, leading what was characterised by his counsel as a "*rather unremarkable*" life. It was said that the appellant had left school without ever having sat a public exam, and that his level of literacy was low and he did not achieve many of the ordinary attainments that people who have an education take for granted.

23. His financial circumstances were described as having changed in the years preceding the sentencing hearing, in that he was a part of a syndicate that had a lottery win, however there was no evidence that his lifestyle had changed as a result of this.

24. The appellant had no previous convictions, and he had never come to adverse Garda attention in relation to any matter apart from in relation to the offences in the present case. Moreover, he had not come to adverse attention since the offending the subject matter of the indictment ceased.

Victim Impact Statements

25. A number of victim impact statements were tendered to the sentencing court but were not read aloud in court on account of a desire expressed by the authors for those statements not to be aired publicly. However the substance of the impact on each victim was stated in summary terms by the sentencing judge in his sentencing remarks.

Probation Report

26. In a Probation Report dated the 2nd of February 2022, the details of a discussion with the appellant concerning his offending was described. Therein, and in reference to the appellant's perspective on what occurred during the period of his offending behaviour, it is stated that "*he did not think he did what some of the victims said*" he did. He did not recall elements of what was reported by the complainants, and further disagreed with certain aspects of their memory as regards the layout of his childhood home and garden. However he refused to otherwise discuss his offending behaviour, and repeatedly asserted that he would take the information to his grave. The appellant's non-cooperation with the Probation Service in this particular regard frustrated the ability of the Probation Officer to assess the appellant's sexual development and motivation. The Probation officer stated:

> *"Any further discussion was cut off by [the appellant] with him repeatedly saying he would take the information to his grave. When asked why he could or would not discuss what happened, he stated he did not want to. He stated also that he could not give an opinion on what impact these offences may have had on the victims. The possibility that he may be asked to discuss his offences again in the future, for example if receives a custodial sentence, was discussed with him, but he said he would not do this. He said he did not know why the victims would bring the*

information up after such a long time and pointed to the fact that he too was only a child when some of the offences took place. He also remarked that the victims had not spoken to each other about the allegations before now.

He mentioned that he thinks what happened with the victims affected him by impacting his capacity to form intimate relationships with anyone in his adult life. Despite a number of attempts, he would not be drawn into a more in-depth discussion on what happened, or on his own understanding of his sexualised behaviour. He stated he has never pursued an intimate relationship with anyone [...].

The age at which [the appellant] began the commission of these offences is a factor for consideration. [...] As he was unable to discuss his behaviour it was therefore not possible to explore his own sexual development and how he came to understand his own sexual motivation or how he was having his sexual needs met at such a young age."

27. The Probation Report also dealt with matters pertaining to the appellant's family life, education, and employment. It described a positive relationship with his mother and surviving siblings but stated that his father left the family home when the appellant was young. His mother re-married and the appellant has a good relationship with her second husband. As regards education, the Report stated that the appellant did not provide a positive account of his experience of schooling. The appellant advised that his literacy was impacted severely after he was knocked down when he was 8 years of age, and that it had never recovered. He left school aged 15 years having never sat a public exam. He worked initially as a fruit and vegetable picker, and then in a factory, before finally starting employment as a petrol pump attendant, which role he had held for some 23 years.

28. The Probation Report alluded to some health difficulties being experienced by the appellant. It did not elaborate on this, beyond stating that he was under the care of a consultant and was on prescribed medication. It is understood from material elsewhere in the papers that he may be suffering from an aneurysm that requires regular monitoring. No history of substance or alcohol misuse was reported, nor were any difficulties with mental health.

29. Application of the Risk Matrix 2000 (RM 2000) risk assessment tool indicated that the appellant shared similar characteristics as those found to be re-convicted at a low rate, relative to other convicted sexual offenders. Application of the Stable 2007 risk assessment tool indicated that the appellant presented a medium level of risk of sexual re-offending and a moderate level of offence-related needs.

Psychological Report

30. A report prepared by a Dr Sara Culligan, senior counselling psychologist with Forensic Psychological Services, was tendered to the sentencing court. This report described the efforts of Dr Culligan to cause the appellant to address his conduct and offending, and

indicates that the appellant was "*respectful but reticent*". While there was an acknowledgement on his part that he had engaged in the wrongdoing, and that he had entered guilty pleas, the appellant was described as being unwilling to give an account of the incidents and "*stated that he did not wish to discuss them*". Dr Culligan, having assessed the cognitive functioning capacities of the appellant in various fields, characterised his cognitive ability as "*borderline*" on the WAIS-IV scale of IQ testing of cognitive ability and reasoning. In this regard, the cognitive ability of the appellant was said to be exceeded by 86% of adults his agee. He was further characterised as "*borderline*" in relation to a measure of his verbal concept formation, verbal reasoning and knowledge acquired from the environment, and in this respect, he stands surpassed by 95% of his peers. The appellant fell into the "*average*" range in respect of perceptual insight or reasoning, which was the highest score he attained across the various assessment fields, and it was said that this result indicated how he had managed to hold down a job of ordinary skill base inasmuch as he had sufficient perceptual spatial reasoning and visual-motor integration skills to operate a cash register and petrol pump. But in respect of working memory index and processing speed indicators, the appellant once again fell in a "*low average range*" and in this field was surpassed by 92% of his peers.

31. Having regard to the foregoing, counsel noted that the appellant was "*very ill-equipped to bring himself to express what it is that he is able to process with regard to what occurred to him at his hands in his youth, and has a resistance to it.*" It was submitted that the appellant could be seen as vulnerable, and counsel asked the sentencing court to take account of his abilities, or lack thereof, and what had been observed, as perhaps enhancing the effect of incarceration on him as compared to more capable peers.

Sentencing Judge's Remarks

32. The sentencing judge's analysis started by first acknowledging the content of the material before him in evidence and submissions at the sentencing hearing. He then stated that in determining sentence,

> *"[t]he Court has to consider the nature of the offending, the age of the offender at the time and the other circumstances which I've outlined already. The Court in that context has to consider the moral blameworthiness of the offender based on his psychological profile and his age and other factors."*

33. He further acknowledged the issue arising in respect of sentencing an appellant who at the time of the offending was a minor (aged 12 years at the earliest offence) but at the time of sentencing was an adult. To make allowance for the age at which the appellant committed the offences, the sentencing judge took into account the judgment of this Court in *The People (DPP) v. T.D.* [2021] IECA 289 and stated that it was not appropriate to impose as a headline sentence that which would apply to a person who had committed the same offences as an adult. The difficulty that arose in sentencing, the sentencing judge remarked, was "*to assess appropriate headline sentences bearing in mind his age and limitations at the time*".

34. Identifying the aggravating factors, the sentencing judge had regard to the following: that the appellant had clearly engaged in repeated sexual abuse of each of the complainants in a way that showed he well knew that what he did was wrong; that he did so in secret and sought to bind the complainants to secrecy by telling them that nobody would believe them; that he took steps to sexually assault the complainants when adults were not around, or otherwise invited or brought them into a shed or the attic where he knew that they would be alone; that the behaviour persisted up to an age beyond 18 years and into early adulthood.

35. The sentencing judge then set about stating what the headline sentence in respect of each offence would be if the rules applicable to adult offenders were to be applied. In respect of the most serious offence on the indictment, the s. 2 rape, the sentencing judge was satisfied that in the light of the aggravating factors and also having regard to the Supreme Court's (Charleton J.) guideline judgment in *The People (DPP) v. F.E.* [2019] IESC 85, the appellant's offending would have fallen in the mid-range of the scale of offending (7 to 10 years), and that the headline sentence to be nominated would have been one of 8 years' imprisonment, but for the fact that the appellant was aged up to 14 years at the time. As for the indecent assault offences involving an oral or anal penetrative element, which carry a maximum penalty of 10 years' imprisonment, the sentencing judge was of the view that such offences would in a case involving an adult offender attract a penalty in the upper range of the scale, and that a headline of 7 years would have been nominated. The appellant was aged 16 to 19 years at the time these offences were committed. The indecent assault offences involving digital penetration of the relevant complainants' vaginas, would attract a headline of 6 years. The repeated indecent assault offences involving other forms of sexual touching would attract a headline sentence of 3 years.

36. Turning to how the court below approached nominating a headline in the present case, the sentencing judge was satisfied that, bearing in mind the appropriate age and other relevant factors, the following headline sentences were appropriate:

- 5 years' imprisonment for the s. 2 rape offence.
- 4 years' imprisonment for the indecent assaults involving an anal or oral penetrative element.
- 3 years' imprisonment for the indecent assaults involving digital penetration of the vagina.
- 2 years' imprisonment for the indecent assaults involving touching or groping of other parts of the complainants' bodies.

37. The sentencing judge then identified the mitigation at play in the present case: the appellant's pleas of guilty which, while deserving of some credit, were limited inasmuch as they were late pleas; his age and state in life, and the passage of time; that he had lived an otherwise blameless life since the age of 20 and had worked for most of it; that

he has no previous convictions and had not come to the adverse attention of gardaí prior to the complaints; his physical health; his mental and psychological health, in particular "*the difficulties which custody will have for him given his limitations which I have taken into account*", and; his remorse, which was regarded as being particularly manifest in his offer of recompense (notwithstanding the lack of insight into his wrongdoing which he demonstrated). Allowing for mitigation, the sentencing judge imposed:

- 3 years and 6 months' imprisonment in respect of the rape offence;
- 3 years in respect of the indecent assaults involving an anal or oral penetrative element;
- 2 years in respect of the indecent assaults involving a digital penetrative element, and;
- 15 months' imprisonment in respect of the remaining indecent assaults.

38. The sentencing judge then considered whether the foregoing sentences should run consecutively or concurrently. He noted: the number of complainants and various levels of damage inflicted; that the appellant as he grew older was growing and developing but not necessarily maturing, and; that the offending ended at the age of 20 years. He remarked that "*the repeated and extensive nature of this offending must be reflected in the sentence imposed*" but that "*[i]t would be highly disproportionate to impose consecutive sentences in respect of all of the offences committed against each victim particularly since he was a juvenile at the time*", and further remarked that the principle of totality would have weighed significantly on the mind of a sentencing judge had the matter been before the court below for determination 35 years ago when he was still a juvenile. The judge concluded that he was satisfied that on the evidence the appellant knew that what he was doing was wrong, and that he acted in a predatory way towards the complainants. As such, he exhibited a high degree of moral culpability notwithstanding his limitations and young age. The sentencing judge therefore considered a consecutive element to the sentence an appropriate marker of the extensive and repeated nature of the offending towards five complainants. The sentences imposed in respect of the more serious offences, namely the s. 2 rape and indecent assaults involving anal or oral penetrative elements, were ordered to be consecutive sentences. As such, the global post-mitigation sentence imposed was 6 years and 6 months' imprisonment.

39. Finally, the sentencing judge suspended the final 12 months to encourage engagement with the Probation Service in respect of rehabilitation, which suspension was ordered on certain conditions which were outlined at the start of this judgment.

Notice of Appeal

40. In Notice of Appeal dated the 7th of March 2022, the appellant appeals to this Court and has advanced the following grounds:

"1. The learned sentencing judge erred in setting a sentence which was excessive and the learned judge erred in the way in which the consecutive element of said sentence was formulated.

2. The learned sentencing judge erred in that the sentence failed to adequately reflect the mental abilities and / or capacity of the Appellant at the time which the offence occurred and at the time of sentence.

3. The learned sentencing judge erred in that the sentence failed to adequately reflect the age of the Appellant at the time when he committed the offences.

4. The learned sentencing judge erred in that the sentence failed to adequately reflect the genuine remorse shown by the Appellant, as evidenced by the very significant compensation which he provided to the victims.

5. The learned sentencing judge erred in that the sentence failed to adequately reflect the fact that the Appellant has come to no adverse attention whatsoever post commission of these historical offences."

Parties' Submissions to the Court of Appeal

Submissions of the appellant

41. In respect of ground no. 1, the appellant accepts that the decision of whether to impose consecutive sentences falls under the discretion of the sentencing judge. In written submissions, he sets out the various factors identified by the sentencing judge in determining whether to impose consecutive sentences. He further refers this Court to the decision of the Court of Criminal Appeal in *The People (DPP) v. G.McC.* [2003] 3 I.R. 609 wherein that Court (Geoghegan J.) stated, at pp. 617 – 618 of the Reports,

> *"[...] it is, of course, true and always has been true that where there have been a number of offences relating to different victims and especially if they are unconnected, there is discretion in the sentencing judge as to whether he or she makes the respective sentences concurrent or consecutive. In such a case, it is not the discretion that presents the problem but rather the exercise of it. It has long been the sentencing practice in this jurisdiction that a discretion in favour of consecutive sentences is exercised sparingly.*
>
> *[...]*
>
> *Here there were different victims, different incidents to some extent, different types of offences and different degrees of depravity. In theory therefore, the sentencing judge clearly had a discretion to impose consecutive sentences. But given that the maximum sentence for rape was a life sentence and that there were substantial maximum sentences of fourteen years under the 1998 Act for the production of the pornographic pictures,* ***it would not seem to accord with long established practice to impose consecutive sentences in those circumstances in the absence of some special reason.****"*

[Emphasis added by the appellant]

42. Counsel submits on behalf of the appellant that the sentencing judge stepped into error in his formulation of the consecutive sentence inasmuch as he had regard to matters that should not have been considered. In particular, he points to the sentencing judge's consideration of the possible approach that a judge, had the accused appeared for sentencing on a date 35 years ago, may have adopted in relation to deciding whether to impose consecutive sentences. The appellant submits that such a consideration on the sentencing judge's part violated his general obligation to approach sentencing on the basis of the offender who appears before him. In this regard, counsel notes that at this present-day juncture the appellant has mitigation which was not present 35 years ago, in particular that he had not come to adverse Garda attention in the time since his offending in the 1980s and that he had developed health conditions more recently. Counsel concede that the presence of multiple complainants is a valid ground upon which a judicial decision to impose consecutive sentences may be based, however it is submitted that in the circumstances of the present case the imposition of same is disproportionate. It is emphasised that the principle of proportionality plays a role in sentencing, and in the circumstances of the present case there was no special reason warranting the imposition of a consecutive sentence.

43. In respect of ground no. 2, counsel submits that the cognitive ability of the appellant is a matter of direct relevance to his moral culpability in relation to his offending. It is noted that the psychological report provided to the sentencing court pointed to certain deficiencies in his cognitive ability and that these rendered him "*particularly vulnerable*". Specific aspects of this report have been highlighted to us in written submissions, inter alia, that the appellant had limited insight into his emotional state and psychological functioning and that he frequently spoke of emotive subject matter in an emotionally blunted matter, and that the appellant's lack of verbal comprehension means that

> *"he will have difficulties understanding what others are communicating to him. He may struggle to find the words to express himself. [The appellant] may have difficulties following rules, instructions or directions. This can lead to increased frustration levels as well as feeling misunderstood".*

The Court is further reminded that the appellant was involved in an accident at the age of 8 years which has adversely affected his literacy skills ever since.

44. Counsel submits that the sentencing judge, while cognisant of these cognitive ability-related issues, did not afford sufficient credit for them in mitigation. It is said that particularly vulnerable offenders have been recognised as requiring "*more leeway*" from the Courts in sentencing. In this regard, we are referred to a number of authorities, including: T.D., cited previously; *The People (DPP) v. C.* [2013] IECCA 91, and; The *People (DPP) v. Sweeney* [2008] IECCA 42. Counsel submits that although the circumstances of the appellant are not directly reflected in this line of jurisprudence, the principles which can be derived from those cases are "*apt*" and apply with equal force to the present case, namely that the circumstance of being particularly vulnerable, owing to

some developmental or psychological issue, should be regarded as bearing substantially on the culpability of a defendant and thus as meriting greater credit in mitigation. It is said that the appellant is "*undoubtedly*" vulnerable, such vulnerability having been demonstrated not only in the assessment of his cognitive ability but also in the reclusive lifestyle which he had led and his poor emotional functioning. Coupled with the "*extreme*" youth of the appellant at the time of offending, it is said that these amount to "*substantial and irrevocably interwoven factors which must be afforded a significant degree of weight in assessing the moral culpability of, and the ultimate sentence to be imposed upon, the Appellant.*"

45. In respect of ground no. 3, counsel notes that the appellant was approximately aged 12 years at the time of the earliest offence, and that his offending ceased when he was aged approximately 20 years. While the sentencing court had regard to the age of the appellant at the time of offending when assessing his culpability and identifying the various headline sentences, counsel takes issue with certain aspects of the sentencing judge's ruling, in particular: (i) his characterisation of the appellant's conduct as "*predatory*"; (ii) his remarks to the effect that the appellant "*knew what he was doing was wrong*"; (iii) his finding that the appellant had a "*high degree of moral culpability*", and; (iv) his decision to impose consecutive sentences.

46. Counsel observes that the approach towards sentencing adult persons who offended when they were children has been considered in a number of previous cases, in particular in *T.D.*, cited previously, in which this Court (Edwards J.) held that sentencing parameters applicable to adult offenders are not applicable where the offender was a child when the offence was committed. Similarly, *The People (DPP) v. H.M.* [2014] IECA 19 and *The People (DPP) v. McCormack* [2000] 4 I.R. 356 are also cited by the appellant as authorities in this respect, particularly inasmuch as the issue of maturity having a bearing on culpability was regarded in both cases as a mitigating factor to be weighed in the balance.

47. It is said that the case of *The People (DPP) v. Cotter* [2014] IECA 40 bears the greatest relevance to the present case. The appellant was aged between 15 and 17 years at the time of offending and had been sentenced to 2 years' imprisonment in respect of historical sexual assaults he had perpetrated against three younger cousins. In circumstances where he was a teenager at the time of the offending, and had not committed any subsequent offence in the intervening 20-year period before he was tried in respect of his offending, and had himself been a victim of sexual abuse as a young child, and in circumstances where the appellant had only a month remaining on his sentence, this Court suspended that month and held that the sentencing court had erred in concluding that it could not impose a sentence of less than 2 years. In the present case, it is submitted that not only did the sentencing judge fail to have adequate regard to the extreme youth of the appellant when the offending commenced, he further failed to assess the culpability of the appellant at that age in the light of the severe cognitive defects and intellectual impairment that the appellant has. In this vein, it is argued that an assessment of an appropriate sentence in the present case must have regard to the

child offender "*in the circumstances of their own particular knowledge, maturity and intellect*". It is submitted that the culpability of the appellant should have been assessed as being even lower than that of the standard 12- to 14-year-old child in the light of his cognitive ability and intellectual impairment.

48. In respect of ground no. 4, it is noted by counsel that the sentencing judge expressly acknowledged remorse as a mitigating factor in the present case. However, it is submitted that it was unclear from the sentencing judge's ruling whether this factor was afforded appropriate weight. Counsel highlights that while the appellant had entered a guilty plea on the first day of trial, it had been indicated in advance to the prosecution that a certain course would be taken and that it would not be necessary to require witnesses to give evidence. It is further highlighted that it was submitted to the court below that the delay in entering this plea was owing to his inability to concede to his family that he had committed the offences with which he was charged.

49. Counsel states that a substantial measure of compensation was offered by the appellant and that this was provided to the complainants subsequent to the guilty plea "a*s a sign of remorse and recognition by the Appellant of the harm caused to the victims.*" Counsel notes that the role of recompense as a mitigating factor was previously discussed by the Court of Criminal Appeal in *The People (DPP) v. McLaughlin* [2005] IECCA 91 wherein, it is said, that Court made clear that a compensation order made pursuant to s.6 of the Criminal Justice Act 1993 will not necessarily be imposed in lieu of a custodial sentence, but that payment of compensation is a factor to which a court can, and should, have regard in weighing the mitigating factors when sentencing. In the present case, counsel submitted at first instance that the appellant's expression of remorse was manifest in his offer of compensation. It is stressed that this is of particular importance in circumstances where the psychological report made clear that the appellant suffered from poor cognitive ability, particularly in relation to verbal comprehension and communication. In net, it is submitted that the sentencing court failed to sufficiently consider the context in which the appellant seemed to be, or was, unable to articulate insight into his offending, and that this failure resulted in insufficient credit being afforded in mitigation to what is described as "*a sincere and genuine effort by the Appellant to demonstrate remorse.*"

50. In respect of ground no. 5, counsel emphasises that the appellant had no previous convictions, both at the time of offending and at the time of sentencing, and in this regard it is submitted that a convicted person is entitled to credit for their subsequent good behaviour in cases where the offending is far removed temporally from the date of sentence, and where the offender has not come to adverse Garda attention during that intervening period. In support of this proposition, we were referred by counsel to a number of authorities, to which we have had regard: *Cotter*, cited above, and; *The People (DPP) v. Counihan* [2015] IECA 76.

51. In sum, it is said that the sentencing judge afforded insufficient credit for mitigation. As such, it is submitted that the deduction from the headline was too low and that accordingly, the sentence imposed was excessive and unduly harsh.

Submissions of the Director

52. In reply to the appellant's submissions, counsel on behalf of the Director advances the following arguments. In the first place, while it is accepted that the appellant offended from the approximate age of 12 years, it is emphasised that the appellant's misconduct carried on for a period of approximately 2 years following him attaining his majority. It is further said that the sentencing judge's characterisation of the appellant's behaviour as being "*predatory*" was made in the light of the appellant having engaged in a pattern of repeated sexual abuse and that it is this pattern, and the manner in which that abuse was perpetrated, which demonstrated that "*he knew well what he was doing was wrong*". The Director emphasises that the offending of the appellant was of a very serious nature, and was degrading and humiliating to the victims who were very young at the time. The fact that the appellant sought to bind his victims to secrecy is indicative of an awareness on his part of his wrongdoing. It is further said that his level of culpability is raised by the fact that each of the appellant's victims suffered sustained long-term consequential damage which in some cases, it is said, was very serious and persistent.

53. It is also said that the reluctance of the appellant to engage with the Probation and Welfare Service frustrated the determination of an appropriate sentence, and that this was further highlighted in the Psychological Report which stated that he did not engage "*at any meaningful level*".

54. In nominating a headline sentence, it is stressed that the sentencing judge was cognisant of the age of the appellant at the time of the offending, and that his youth was reflected in the headlines nominated and in the comparison made between what headline sentences might have been applicable had he offended as an adult versus what was ultimately nominated.

55. The Director's submissions then address the argument that insufficient credit was afforded for mitigation. It is submitted that the cognitive ability (or lack thereof) and intellectual impairment of the appellant was offset by the pattern of offending which exhibited:

> *"a series of calculated and deliberate acts to include rape and indecent acts of penetration, perpetrated on 5 innocent young girls unbeknownst to each other until recent years who lived in fear of the Appellant who was their neighbour and who warned them not to tell anyone".*

56. This calculated behaviour was further demonstrated by the appellant refraining from informing his family of his misconduct. It is submitted that this is also at odds with the lack of capacity the appellant relied upon in mitigation.

57. As for remorse, it is said that all due weight was afforded. And as for the plea of guilty, it is highlighted by the Director that it was afforded limited weight on account of its lateness, and the distress that this caused to the victims who had anticipated the approaching trial date. It is submitted that what credit was afforded for the guilty plea

was appropriately afforded because the plea amounted to "*a public acknowledgement of his guilt*".

58. As for the personal circumstances of the appellant, it is submitted that the sentencing judge had adequate regard to his age, his status in life, the passage of time and the leading of a blameless life in the intervening period. The absence of previous convictions was noted, and the various health difficulties were accounted for in mitigation, and where these difficulties relate to the appellant's mental health it is said that the sentencing judge recognised the problems that a custodial disposal would pose to the appellant.

59. On the point that the sentencing judge erred in imposing consecutive sentences, the Director submits (and refers, in this regard, to *The People (DPP) v. M.U.* [2021] IECA 357 and *The People (DPP) v. L.C.* [2023] IECA 30) that it was appropriate to impose consecutive sentences having regard to the circumstances of the present case, in particular that the offending spanned a protracted period of 8 years and was perpetrated against five complainants. It is said that the guiding principle is set out in para. 25 of *M.U.*, which states:

> "[...] *The Court has to decide whether to choose the route of consecutive sentences or to go down the route of concurrent sentences. If the consecutive route is to be taken, then it would be necessary to step back and address the totality of the sentences that were being imposed as a result of that exercise so as to arrive at a sentence that would be just and proportionate. If the concurrent route is taken, then it is necessary to identify a sentence that reflects the overall level of offending and the overall scale of the offending.* [...]"

60. While the appellant submits that the imposition of a consecutive sentence in the present case breached the totality principle, the respondent directs this Court's attention to the judgment of O'Malley J. in *The People (DPP) v. M.J.* [2022] IESC 50, in particular para. 41 thereof, wherein the learned Supreme Court judge observed:

> *"As in many other contexts, the decision of a trial court or, for that matter, an appellate court, will not necessarily be vitiated by failure to specify and expressly analyse every matter that must be taken into account in reaching a decision. However, if a significant factor is not expressly dealt with then it should at least be implicit in the court's reasoning.* [...]"

61. In this regard, it is said that the imposition of consecutive sentences, and the ultimate sentence imposed, correctly reflected the total level of misconduct and was in all aspects appropriate.

Court's Analysis and Decision

62. We firstly reject the contention that the sentencing judge failed to have sufficient regard to the situation of the appellant at the date of his sentencing when he alluded to the possible approach that a judge, had the accused appeared for sentencing on a date 35 years ago, might have adopted in relation to deciding whether to impose consecutive

sentences. The sentencing remarks of the trial judge have to be considered in their totality and in our assessment the sentencing judge very scrupulously and conscientiously had regard to all of the circumstances of the offender before him. We do not accept that he disregarded in any way mitigating circumstances which were not present 35 years ago but which were now available to the appellant. The observation complained of has to be seen in its proper context. The sentence in question, which appears on page 9 of the transcript of 11 February 2022 commencing at line 11, reads

> *"I'm also taking into account the fact that as a teenager and young adult the overall length or totality of the sentence resulting from consecutive terms would have weighed significantly on a judge then determining the matter had these offences been dealt with 35 years ago."*

In so remarking, the sentencing judge was, in effect, saying that he was going to adopt the same approach in considering the issue of totality in respect of any sentences that he was minded to impose. Even though the appellant was now in his 50s, the judge would approach a consideration of totality on the basis that the cumulative total of any sentences he proposed imposing, should be regarded as weighing just as heavily now on the person before him as it would have had that person been sentenced for the same matters while still a teenager. There was nothing in the sentencing judge's remarks to suggest that he would disregard or not take into account everything that had happened since the offending behaviour had ceased. We are satisfied that the sentencing judge gave the appellant in this case full credit for the fact that he had no previous convictions before the offences, and has not offended since. Moreover, he was assiduous in taking into account the personal circumstances of the appellant and the various adversities he had experienced in his life.

63. We are satisfied that it was not disproportionate to impose consecutive sentences in the present case and we agree with the submission made by counsel for the respondent that consecutive sentencing was not only appropriate, but was called for in the circumstances of this case.

64. We explicitly reject the contention advanced in ground of appeal no. 2 that insufficient account was taken of the appellant's cognitive deficits. We do not accept the argument that his cognitive ability was a matter of direct relevance to his moral culpability in respect of his offending. There was clear evidence that the appellant knew that what he was doing was wrong. He deployed coercion. As counsel for the respondent pointed out in his oral submission to the Court, one of the offences was committed in circumstances where the appellant simultaneously kept watch through a window lest his mother and her partner would come back and disturb them. He repeatedly warned his victims not to say anything because they would not be believed. He was functioning at a sufficient cognitive level to act in an opportunistic way. All that having been said, the sentencing judge recognised that the appellant had intellectual limitations, and that custody would be difficult for him given those limitations. We are also satisfied that those limitations were taken into account when considering the issue of remorse. Reading the transcript of the

sentencing judge's remarks in their totality, we are not persuaded that the sentencing judge insufficiently took the appellant's remorse into account. The sentencing judge was right to say that some questions remained as to the completeness and sincerity of his remorse, having regard to the lack of insight into his wrongdoing indicated in the various reports. However, despite that, the sentencing judge expressly gave him credit in respect of the remorse that had been expressed and the sensitively made offer of compensation to the victims. We have considered the level of discounting by the sentencing judge and the careful and considered way in which he constructed the entire sentencing package and we are not persuaded that it insufficiently reflected the weight appropriately to be given to the mitigating circumstances in the appellant's case, including the appellant's intellectual functioning and literacy difficulties.

65. We are also satisfied that the sentencing judge was fully cognisant of, and appropriately took into account, the maturity, or rather lack thereof, on the part of the appellant at the time that he committed the offences. He recognised that youth and immaturity had a bearing on culpability and he adjusted the headline sentences that he had nominated downwards, to an appropriate extent, to reflect that factor. We are also satisfied that the sentencing judge was cognisant of a potential difference between a person's expected level of, or notional, maturity based on the metric of calendar age, and actual developmental maturity in an individual's case. We are satisfied that this accused was sentenced on the basis of a proper appreciation of the level of his actual maturity at the time of the offending.

66. In conclusion, we find no error of principle in the approach of the sentencing judge. Indeed, we regard the sentencing judge's remarks as well-explained and well-referenced. He was conscientious and how we approach the case and assiduous in attempting to be fair to the appellant. Nevertheless, this was a very serious case and the gravity of the offending was considerable. Due account was taken of the personal circumstances of the offender but this was not a case in which a custodial sentence could have been avoided. Nor was the case one in which consecutive sentencing could properly have been avoided. We are satisfied that the sentences actually imposed were appropriate and that the overall sentencing package was structured in a careful and considered manner that was entirely within the sentencing judge's discretion. We do not criticise it in any way.

67. The appeal is dismissed.