THE COURT OF APPEAL

Record No: 33/2023

Edwards J.
McCarthy J.
Kennedy J.

Between/

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

Respondent

V

O.G.P.

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on 12th of October 2023.

Introduction

1. The subject of this judgment is an appeal brought by O.G.P. (i.e. "the appellant") against the severity of the sentence imposed on him by the Central Criminal Court on the 8th of February 2023.

2. By way of brief introductory background, the appellant was arraigned on the 27th of July 2022 on a number of sexual offence-type charges which were preferred against him under Bill CC0007/22. Count nos. 2 to 5, inclusive, were counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (i.e. "the Act of 1990"), as amended by s. 37 of the Sex Offenders Act 2001. In respect of these counts, the appellant entered guilty pleas on the 10th of October 2022. Count no. 1 on the indictment, that being a count of rape contrary to s. 4 of the Act of 1990, more particularly a count of oral rape, was contested by the appellant, and following a 2-day trial by jury he was convicted of this charge on the 12th of October 2022. The offences with which the appellant was charged, and of which he was ultimately convicted, were perpetrated by him against his younger cousin (i.e. "the complainant"), then aged approximately 7 years at the time of offending.

3. On the 14th of November 2022, the appellant, who had committed the above offences when he was approximately 13 years of age, was still a minor when he appeared before the Central Criminal Court for sentencing. On the 8th of February 2023, that court ordered, pursuant to s. 142 of the Children Act 2001 (i.e. "the Act of 2001"), as amended, that the appellant be conveyed to a Children Detention School for the purposes of serving a period of detention of 1 year on count no. 1 and a concurrent period of detention of 9 months on each of count nos. 2, 3, 4, and 5. These sentences were to date from the 15th of February 2023. It was further ordered by

the sentencing court pursuant to ss. 28, 29, and 30 of the Sex Offenders Act 2001 that the appellant be subject to post-release supervision for a period of 2 years from the date of his release from detention. The sentencing court further issued a certificate pursuant to s. 14(2) of the Sex Offenders Act 2001 requiring that the appellant be subject to obligations under Part II of that Act to notify certain information. The appellant attained his majority shortly after the date of sentence.

4. As will be seen later in this judgment, while a number of grounds were advanced by the appellant in support of the herein appeal, it would appear that the core complaints relate to the treatment of the appellant at the time of sentencing (he was a minor who had committed the offences when aged 13 years), the imposition of an immediate and total custodial disposal as opposed to part or whole suspension, and an alleged delay in processing the appellant's case which counsel on his behalf now argue raises the prospect that he may serve a period of his sentence in the sex offenders wing of an adult prison.

Factual Background

5. At the sentencing hearing of the 14th of November 2022, a Garda Mairead Hannon (otherwise "Garda Hannon") gave evidence in relation to the factual background of the appellant's offending.

6. Garda Hannon averred that the appellant's offending (inclusive of all five counts) took place over a two-month period in late 2018, and that it occurred at the family home of the complainant situated in a village in Leinster. At this time the appellant was aged approximately 13 years, and the complainant was approximately 7 years old. The two children were first cousins and were well known to one another on account of the close relationship their respective mothers shared.

7. On the 14th of July 2019, the complainant made certain disclosures to her mother, as a consequence of which her mother shortly thereafter attended at a Garda station to make a complaint. The complainant was interviewed by specialist interviewers on the 25th of July 2019 and therein she detailed certain sexual misconduct on the part of the appellant. As Garda Hannon describes, the essence of the complaint was that on four occasions the appellant had digitally penetrated her daughter's vagina and that on a separate occasion he had orally raped her.

8. Garda Hannon expands upon this in more detail. With respect to the incidents of sexual assault, it was said that the appellant had "*pushed*" the complainant onto a bed and then pulled down her trousers and her knickers before then proceeding to digitally penetrate her vagina. Garda Hannon averred that this misconduct was repeated on three further occasions. Reference was also made in evidence to the placement by the appellant of a chair against the door to the room in which the offending occurred. The complainant told specialist interviewers that these incidents made her feel "*like she'd have the memory forever and she felt scared, sad and miserable*". The complainant said that she felt unable to tell anyone about what had occurred because she feared getting into trouble if she revealed what the appellant had done.

9. The oral rape, the only contested charge, was said to have occurred in the context of a "*food test*" game being played by the appellant and the complainant. She recalled, "*I was putting Lego into his mouth for the food test when he locked the door and then it was my turn, and I closed my eyes and he put his willy* [in her mouth]". It was said that the appellant had "*banged*" or locked her in the room when the offending occurred, and that he had told her afterwards,

"*Shush, this is the last time I'm going to stay shush* (sic)*. If you tell anyone I will tell a lie like that*."

10. It was said that the last time anything happened between the two parties involved an attempt by the appellant to drag the complainant into her brother's room. The complainant was in her mother's bedroom watching her tablet on the bed when the appellant called out for her, saying "[complainant's name redacted] *come on, I want to tell you something*". The complainant did not oblige and held onto the bed as the appellant attempted to drag her out. He eventually relinquished, said "*fine*", and walked away.

11. The appellant's mother learned of her son's misconduct when the complainant's mother rang to inform her of what her son had perpetrated. Following this initial disclosure, the appellant's older sister interviewed him in relation to this and took handwritten notes based on what the appellant had told her in discussions. This material was of use to investigating gardaí inasmuch as it provided "*to some extent*" the basis for the subsequent interview of the appellant which took place on a date during the summer of 2020. In advance of this interview, statements were taken from the appellant's sister and mother, the contents of which were put to him in interview.

12. Garda Hannon confirmed that the appellant made some admissions in the interview, however it is apparent that he also sought to present an alternative account. In essence, his recollection was of putting his hand on her chest and bottom areas. A further memory described by the appellant was of inviting the complainant to touch him on the exterior of his trousers, and he stressed that at the time he was not aroused. His account did not describe, at any stage, incidents of digital penetration of the complainant's vagina, nor were admissions forthcoming in respect of the incident of oral rape.

Victim Impact Statement

13. The complainant gave evidence at trial. However, it should be noted that the defence declined to cross-examine her, and, as was made clear by defence counsel in the course of the plea in mitigation, the defence declined to make a closing speech so as not to "*inflame further what was a very difficult situation within the family*". The complainant prepared a victim impact statement which was tendered in evidence to the sentencing court, excerpt of which is quoted below:

> "[...] *When it first happened I was scared and confused and it made me really, really sad that I was afraid it would happen again to me. I wasn't the same old* [name redacted] *to myself, so I acted like I would do already* (sic)*, and be a smiley, happy person, but inside I was a scared kitten. Sometimes I would have nightmares about it. A while later I began* [to] *not to really trust people, boys in general, which made* [it] *kind of hard to make friends. After I told my parents what happened I felt shocked, happy and sad. I was shocked because I thought they would not believe me. I was sad because it was a really traumatic event in my life, but it made* [me] *happy to talk to someone about it. But I am also sad as we have lost part of our family. I don't see my Auntie* [the appellant's mother] *anymore.*"

Personal Circumstances

14. The appellant was aged 13 years at the time of offending, and he was just shy of turning 18-years-old at the time of sentencing.

15. He had no previous convictions and had not come to the adverse attention of gardaí in the period since the complaint was made.

16. A Probation Report (dated the 26th of October 2022) was tendered to the sentencing court which detailed the appellant's personal circumstances. It described the appellant as residing with his mother and younger brother. He has older sisters in their twenties. It was said that he generally gets on well with his brother and that their relationship was characterised by a "*normal brotherly rivalry*". At the time of sentencing he maintained contact with only one of his sisters, the other having severed contact after his sexual offending came to light. It was said that he had good relationships with both parents. It was stated that the appellant's parents' relationship ended following a disclosure that his father had sexually abused his eldest sister. The appellant was aware that his father had served a custodial sentence in respect of this offending (however, he had previously been led to believe that his father's years of absence were on account of him working "*abroad*"). The Probation Report concluded that this therefore amounted to evidence of "*some adverse childhood experiences*".

17. As regards employment and education, the Probation Report noted that the appellant had a speech impediment as a young child which necessitated support during his primary schooling. He is educated to a secondary school level and completed his Leaving Certificate in 2022. He declined to pursue further education on account of the uncertainty arising in the period before and during his trial. He was unemployed at the time of sentencing but had expressed a desire to apply for employment/education or training courses.

18. The Probation Report described the appellant as a "*quiet person*" who had experienced difficulties in mixing with peers in the past; it noted that "*he feels anxious and nervous in social situations*", and; it observed that he indicated social skills deficits. It reported that there was no disclosure of a history of significant mental health issues. The Report further observed that the appellant was not involved in any structured hobbies or pro-social activities, and it was further stated that he has never had a [romantic] relationship.

19. He has no history of substance or alcohol abuse.

Risk Assessment

20. As the Probation Report detailed, the appellant continued to deny that he orally raped the complainant while the pair played a game. He admitted that he had sexually assaulted the complainant by touching her vagina with his hand. The appellant accepted that he behaved in a sexually harmful way towards his cousin. The Probation Report later noted that the appellant "*presented as ashamed and remorseful*" and that he did not engage in any victim blaming or attempts to excuse his behaviour. The Probation Report further stated that there was no evidence to indicate other sexually harmful behaviours.

21. Following the disclosure of his misconduct the appellant was referred by Tusla to the National Inter Agency Prevention Programme (NIAPP) and completed a treatment programme as part of which he engaged in an offending behaviour focused intervention. It was said that he engaged "*extremely well*" with this, particularly in the psychoeducational aspect of the offence module which supported him in developing an understanding of his harmful sexual behaviour, how he came to perpetrate the sexual abuse, and how he can prevent himself from reoffending in future. The NIAPP assessment concluded that the appellant required a treatment

programme/intervention to address his harmful sexual behaviour and to support him in developing the knowledge and skills to grow up to be a mature and healthy adult. The Probation Services concurred with this conclusion, and they further noted that completion of such a programme was necessary to reduce his risk of reoffending.

22. The regular standardised risk assessment tools employed by the Probation Services were not applicable in the appellant's case, on account of his minority at the time at the time the Probation Report was compiled.

Sentencing Judge's Remarks

23. Following the conclusion of the plea in mitigation, the sentencing judge declined to pronounce ruling on sentencing straight away and adjourned the matter initially until the 6th of December 2022. On that date however, the sentencing court was still not in a position to finalise matters and further adjourned the case until the 13th of January 2023. On this date, the sentencing judge delivered her ruling. However, she stayed its execution in circumstances where the defence sought to apply to this Court for bail. The matter was adjourned initially until the 30th of January 2023, and then to the 8th of February 2023, on which date the sentencing judge adjusted her initial sentencing ruling. Bail was refused by this Court on the 15th of February 2023. In the paragraphs which follow, we will summarise the sentencing judge's ruling, having regard to her initial approach on the 13th of January 2023, and her reasons for subsequently varying the initial sentence.

The Initial Ruling

24. In her initial ruling of the 13th of January 2023, the starting point of the sentencing judge's analysis was a brief precis of the factual background to the offending. She noted that the offending for which the appellant was being sentenced comprised four incidents of digital penetration and one incident of oral rape. She acknowledged the circumstances in which the oral rape took place, that it occurred in the course of a game involving the placement of objects into either party's mouth, and she noted that the appellant had told the complainant that what occurred was "*a secret*" and that should she make any disclosure "*he would tell a lie*". It was further acknowledged by the sentencing judge that there was evidence of a chair being placed against the door of a bedroom and that there was an element of force. The sentencing judge then acknowledged the impact on the victim with reference both to the account of the complainant as given in interview with specialist interviewers and to the victim impact statement.

25. In sentencing the appellant, the judge at first instance considered the application of s. 96 of the Act of 2001 to the present case, in particular sub-section (2) of that provision which stipulates that a period of detention should only be imposed as a last resort. Regard was further had by the sentencing judge to s. 143(1) of the same Act, which provides:

> "*The court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and that a place in a children detention school is available for him or her.*"

26. In the circumstances of the present case, the sentencing judge was of the view that a period of detention was warranted. Her conclusion was informed by the presence of serious offences involving the penetration of a very young girl and involving knowledge on the part of the appellant at the time of commission that what he was perpetrating was wrong, and further that he

had told the complainant that he would lie should she disclose his misconduct to anyone. The sentencing judge firmly concluded,

> "*There has to be a deterrent for this type of offending and the significant impact on this young girl has to be marked by this court and this Court is of the view that there has -- there is no alternative but to impose a period of detention.*"

27. The sentencing judge considered the gravity of the offending, and in this vein identified the aggravating factors at play. She referred to: the impact on the complainant; the appellant's attempt to bind her to secrecy; that there were multiple counts involving a penetrative element; the age disparity between the parties and the "*large power imbalance*" that this disparity gave rise to; that the complainant was violated in her own home, a place that should have been safe and secure, and; the disturbing nature of the appellant's offending.

28. As regards mitigation, the following factors enuring to the appellant's benefit were specified: his young age at the time of the offending (13 years); his cooperation with the investigation; that he had no previous convictions; that the defence declined to cross-examine the complainant at trial; his engagement with the Probation Services and NIAPP, and; reports from both of those bodies attesting to his remorse. She also, with reference to s. 96(3) of the Act of 2001, again referenced his age and referred to his level of maturity as a further mitigating factor.

29. The sentencing judge noted that while there were guilty pleas in respect of the four sexual assault counts, no such plea was forthcoming in respect of the s. 4 rape. She went on later to describe the guilty pleas entered by the appellant as "*significant mitigation*" inasmuch as "*it is an acknowledgment that the victim is telling the truth* [...] [and] *it means a victim can avoid the trauma and anxiety of having to participate in a criminal trial* [in respect of the four sexual assault counts]."

30. As per s. 96(5) of the Act of 2001, she considered the best interests of the appellant, the interests of the victim and the protection of society.

31. Having regards to the aggravating factors, and with reference to a previous decision of this Court in *The People (DPP) v. T.D.* [2021] IECA 289, the sentencing judge proceeded to nominate headline sentences. She observed that in *T.D.,* and with particular reference to paras. 32 and 33 thereof, this Court had noted the approach to the sentencing of minors commended by the Sentencing Council (S.C.) in England and Wales. The S.C. had promulgated a definitive guideline on the sentencing of children and young people, which required a completely different approach to the sentencing of minors based on welfare and in which it is recommended that, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence might be adopted in the case of minors in the age bracket between 15 and 17. This Court had gone on to say (at para. 33 of its judgment in *T.D.*) that it was not to be taken as adopting uncritically the guidance provided by the S.C., but that their approach could be regarded as a helpful indicator as to the potential significance of the fact of minority in any assessment of an offender's culpability. The sentencing judge further noted in that context that O.G.P. was less than 15 years of age at the time that he committed the offences in this case.

32. In the circumstances, the sentencing judge nominated the following headline sentences:

- In respect of the s. 4 rape (count no. 1): the sentencing judge stated that were O.G.P. an adult she would have a headline sentence of detention for 8 years, but considering that he

was a minor at the time she would reduce that to a headline sentence of detention for 4 years. Further, taking into account mitigating circumstances including efforts at rehabilitation on his part, the fact that he was a minor, the delay in proceedings, and the statutory requirement to regard detention as a last resort, she reduced this to 2 years.

- In respect of the sexual assaults (count nos. 2 to 5 inclusive): the sentencing judge stated that she would have nominated 4 years and 6 months' detention as a headline sentence were the appellant a mature adult. The sexual assaults could be differentiated from the rape count on the basis that there had been pleas of guilty to these offences whereas the appellant had not pleaded guilty to the rape offence. In the circumstances, considering that the appellant was a minor at the time of his offending and having regard to his guilty pleas, and the mitigating factors in his case, she was prepared to reduce the headline sentence to one of detention for 18 months on each count, to run concurrently to one another and to the sentence imposed on count no. 1.

Submissions by Defence Counsel regarding weight to be attached to complainant's anxiety

33. Immediately following the delivery of the initial ruling on the 13th of January 2023, counsel on behalf of the defence expressed a concern. The trial judge had, in the course of her initial ruling, expressed the view that "*the victim would, no doubt, have been caused additional anxiety at the prospect of a trial taking place*". Defence counsel sought to argue that insofar as the sentencing judge had ostensibly taken this into account, it was a concern that was not grounded in the evidence. In doing so, they sought to clarify the purpose of declining to cross-examine the complainant at trial. Whereas counsel submitted that the purpose was to give rise to a situation where not only did the complainant not have to attend at the trial, she did not even need to know that the trial was taking place. Counsel submitted that there was no evidence that the complainant was even aware that there was going to be a trial, much less that she had been caused additional anxiety. It was said that it was not evident, even with reference to the Victim Impact Statement, that the complainant was even aware of the trial. Counsel on behalf of the prosecution confirmed that the parents of the complainant had been told that her attendance at the trial was not required and that, in fact, she never physically came to the building where the trial took place.

34. The sentencing judge responded to this concern as follows:

"*JUDGE: Yes. First of all, I should say* […] *in relation to my comments about the victim being aware of the trial taking place, I would -- I can't imagine that it wouldn't cause some anxiety to know that a trial is coming up, but with regard to my sentence, I don't believe that has added to my sentence in any way. I have endeavoured to weigh up all of the factors, particularly the age and the delay in the matter coming forward and, as I've said a number of times now, these are very serious offences. Each one of them is of a serious nature.*

DEFENCE COUNSEL: Yes.

JUDGE: And I have tried to -- and I have given huge thought to this case.

DEFENCE COUNSEL: Yes.

JUDGE: So, I don't believe -- accepting what you've said --

DEFENCE COUNSEL: Yes.

JUDGE: -- that -- and I didn't -- I wasn't of the view that the victim had been in court at

any point or it wasn't a case where she was in the building and I just wanted to clarify that […]*, but I was never of the view that she was here and waiting around.*"

35. Counsel stressed that what they were not advancing was that the Court should reduce the sentence and vary the ruling it had just pronounced, but he did make it clear that the sentence was one against which they would seek to appeal. In this context he asked the court below to indicate that the warrant would not issue for a period of two weeks to facilitate an application to this Court to consider either a very early hearing date of the appeal against severity of sentence or bail pending such an appeal. The progress of the matter thereafter is described in the appellant's written submissions:

> "*3. Upon the sentence being issued, counsel for the Appellant asked the court not to finalise the same, noting that it was the intention to appeal the sentence. The court obliged by adjourning the finalisation to the 30th January 2023. In the absence of a final order however, it was not possible to file papers with the Court of Appeal office, and thus, the Defence returned to the Trial Judge requesting that the order be finalised and for a stay to be placed on the same to facilitate the lodging of papers. The Trial Judge however, declined to finalise the order in the absence of the parties, and the matter was ultimately adjourned to the 8th February 2023, the Trial Judge did, however, indicate, that would be revising her sentence on the 8th February 2023, noting that a substantial period of detention would follow but did not comment any further.*
>
> *4. On the 8th February 2023, all parties returned to court, and the Trial Judge imposed a revised sentence* [...]".

The Varied Ruling

36. In the course of delivering her varied sentencing ruling on the 8th of February 2023, the sentencing judge addressed a number of issues arising from the previous occasion.

37. It should first be noted that in the intervening period since her initial ruling, she had reviewed the jurisprudence of the Court of Appeal in "*an effort to ensure that this Court was being fair and to ensure fairness to all of the parties in the case*". In particular, reference was made again to *T.D.*, cited previously, and also to *The People (DPP) v. A.O'F.* [2022] IECA 122.

38. The sentencing judge also revisited the concern expressed by counsel for the defence on the 13th of January 2023 regarding the treatment of the impact on the victim arising from the trial of the offence as an aggravating factor. The sentencing judge's clarificatory remarks in that respect were as follows:

> "*This Court, when the matter was before it and when this Court was asked to adjourn finalising matters, it was submitted by the defence that there had been an early indication that the complainant would not be cross-examined and that she could be told she would not be required to attend the trial, and I wish to point out that whether or not a victim will attend at her own trial is not a decision for the defence; it is entirely a decision for a victim and her family, especially as the victim in this case is a young minor and it might very well be a decision of a victim that it might be in her interest to attend at a trial. She might very*

well feel that it is in her interest that she would want to attend, but it is entirely a matter -- but as I indicated before, the reality of this case is that a trial did take place, albeit in unusual circumstances which I have referred to a number of times -- which I had referred to a number of times during my sentence hearing in January of this year and I referred to the fact that there was no cross-examination and no closing speech on behalf of the accused person and I made that very clear in my comments at the time."

39. Turning, then, to the varied ruling, it should be stated that the primary motivation for varying the original ruling of the 13th of January 2023 was to address the concern of delay:

"*Having reviewed matters, I am conscious -- I remain conscious of the fact that the defendant in this case, his offending occurred when he was 13 and a half years of age, he is now close to 18 years of age. I have already referred to delay in relation to this matter and I am conscious of the fact that the defendant is close to majority and I'm also very conscious of the fact that options which might have been available to me had he not been a minor, such as the ability to suspend a portion of the sentence and place him under a lengthy bond and lengthy supervision is not available to this Court, given the fact that he is a minor. And I'm also conscious of the fact that given the fact that he will become an adult in a matter of months, it is likely that some part of the sentence imposed upon him will be spent in a different setting to the more rehabilitative setting of* [the Children Detention School due to receive him]. *And in those circumstances, I am going to adjust the sentence I was going to impose* [...]".

40. Her adjusted sentencing ruling stated as follows:

"*In respect of count number 1, I am of the view that the headline sentence, if that offending had been committed by an adult, would have been eight years, and that is what I would have imposed. In circumstances where the defendant was a minor at the time, this Court is going to impose a sentence, a headline sentence of four years, and I'm conscious that he is still a minor and of the comments I have already made today. And in those circumstances, I'm imposing, in considering the mitigation and his age,* ***a sentence of one year detention****. In respect of two, three, four and five, I had indicated a headline sentence of four and a half years had it been an adult, and I was conscious of the fact that multiple acts of this type of offending had occurred. As I've said before, I'm conscious of his age now and that he was thirteen and a half at the time, and in the circumstances, I had indicated that if he had been a minor, as a minor the Court would impose eighteen months. With mitigation,* ***this Court is going to impose a sentence of nine months' detention. I am making both sentences concurrent, that's in respect of all counts****. I am recommending that the defendant be facilitated to engage with the NIAPP treatment plan. I have already referred to the impact on the victim of this offending, and I don't intend to go through matters which I've referred to in detail any further. And I have imposed – sorry, and I am also imposing a two-year period of post release supervision pursuant to the Sex Offender's Act.*

[Emphasis added to identify sentences imposed]

Notice of Appeal

41. In a Notice of Appeal filed on the date of sentencing, O.G.P. now appeals to this Court against the severity of the sentence imposed on him by the Central Criminal Court. In support of his appeal, he advances seven grounds which are quoted below:

"*The Learned Trial Judge erred in law and in fact in;*

1) *Concluding that an immediate custodial sentence was required in the present case (at least partly) because she was not empowered to impose a suspended sentence or suspended portion of a sentence on the Applicant as he is a juvenile;*
2) *Placing excessive reliance on para 32 on the English jurisprudence referred to in DPP v. TD, which provides guidance for sentencing of 15—17-year-olds, when the Applicant in the present case was 13 at the time of the commission of the offences;*
3) *Placing excessive weight on aggravating features and in particular, the learned trial Judge's conclusion that the fact that the Applicant suggested that he would "tell a lie" if the complainant reported the abuse amounted to a threat;*
4) *In placing inappropriate reliance on the principle of general deterrence considering that the Court was sentencing the actions of a 13 year old boy;*
5) *Concluding that the trial was likely to have caused additional anxiety to the complainant when there was no evidence to support this conclusion and where every effort had been made by the Applicant and his lawyers to ensure that the complainant suffered no additional stress or harm;*
6) *Taking inadequate account of the significant mitigating factors in this case, most particularly the manner in which the Applicant had met the case; and*
7) *Attaching excessive weight to the Applicant's continued failure to accept his guilt in relation to the s4 Rape charge considering that the Court was dealing with a juvenile."*

Appellant's Submissions to the Court of Appeal

42. Counsel on behalf of the appellant stated the concern motivating the bringing of the herein appeal is as follows: While the appellant was sentenced on the 8th of February 2023, that sentence was imposed shortly before his 18th birthday. He is due to turn 18 and a half years on a date in October of this year at which point, as his solicitors and counsel have been informed by the governor of the children detention school where he is currently serving his detention, he will be transferred to a sex offender's wing of an adult prison. Even if he is afforded up to a 25% reduction of his total sentence in remission, he will still have to serve at least up to 31 days, it is estimated, in such a facility. Counsel states that this would be a grave injustice for him in terms of (i) him having committed the offences when he was aged approximately 13 years, and (ii) him having engaged immediately following the making of the complaint with Tusla, NIAPP and the Probation Service, and, following being sentenced, he has engaged with the children detention school where he is now currently detained.

43. While a 31-day-period in an adult sex offenders wing is regarded as an ultimate consequence of the sentence imposed by the Central Criminal Court judge on the 8th of February 2023, it was made clear to counsel at the oral hearing that this Court can only be justified in

intervening where it is established that the sentencing judge at first instance made an error in principle in her approach to sentencing the herein appellant. In response to this, counsel made the following submissions.

44. In essence, counsel contends that the core complaint with the sentencing judge's approach concerns the starting point of her analysis. As described in this judgment, the sentencing judge had regard, at first remove, to what the appropriate headline sentence would be if the appellant was an adult when he committed the offences. This was assessed with reference to the scale of offending described in *The People (DPP) v. F.E.* [2019] IESC 85. She concluded that the appropriate headline sentence would have been one of 8 years. From this and having considered the dicta of this Court in *T.D.*, previously cited, she deducted 4 years to reflect a 50% reduction in the adult headline sentence to account for the appellant's juvenile status. She then deducted 3 years for mitigation. Counsel described this approach as "*work[ing] downwards*" and he submitted that it represented an error in principle. The correct approach, it was said, was to have regard to the text of s. 96(2) of the Act of 2001 and to have recourse to custodial disposal *only* as a last resort. Counsel argued that when sentencing juveniles there are two possible approaches. The first is to approach sentencing on the basis which the sentencing judge adopted i.e. to identify what the appropriate adult headline sentence would be and then work downwards. This approach was criticised by counsel at the hearing of the appeal as giving rise to a phenomenon whereby children are in effect treated as "*little adults*", a phenomenon it was submitted that the Court should be cautious to avoid. The second approach described by counsel is to recognise the sentencing of adults and children as separate areas. However, to achieve this, it was said that it would be necessary to formulate guidelines distinct from *F.E.* and specifically tailored for child offenders, the starting point of which would be non-custodial disposal as per s. 96(2) of the Act of 2001. In this context, it is emphasised that the objective of child detention is not exclusively punitive or deterrent in nature, though such objectives may play a part, it is also rehabilitative.

45. The principle that recourse to non-custodial disposal should be a last resort was described in written submissions as "*the philosophy that under pins the Children's Act 2001*". Counsel argued that the sentencing judge's conclusion that she was not empowered to impose a suspended, or at least part-suspended, sentence in circumstances where the appellant was a juvenile at the time of sentencing conflicted with this philosophy and as such represented an error of law.

46. A further additional flaw with the sentencing judge's approach was isolated. Aside from erring with respect to the starting point of her approach, it was further said that the premise of her "*downwards*" approach was wrong inasmuch as she had misplaced reliance upon *T.D.* which was, and is, it was argued, not an authority for sentencing in the present case. Whereas it was observed that *T.D.* concerns the sentencing of persons aged between 15 and 17 years at the time of offending, the present case involved a juvenile aged approximately 13 years at the material time. In this respect, reliance upon *T.D.* by the sentencing judge gave rise to a sentence that was disproportionate to the individual appellant and to his particular offending.

47. As regards the issue of delay, which inevitably arises in the light of the prospect of the appellant serving a "*spill-over*" period in an adult prison, little could be said of it aside from an acknowledgment/observation that it was principally a consequence of the dilatory progress of matters through the criminal justice system. While counsel did concede that perhaps more could

have been done on the appellants part to expedite progress, it was nonetheless stressed that efforts were in fact made on the appellant's part and that the delay could not truly be said to lay at his door. It was further stated in written submissions that neither party were at fault for the delay. It was also argued that the delay and its possible consequences as regards where the appellant might ultimately serve his detention should have been adequately considered by the sentencing judge when imposing sentence. It was said that had the appellant's case been processed in a timelier manner, he would have been able to benefit more from the protections afforded under the Children's Act 2001. However, the consequence of not factoring this into sentencing the appellant is that he will now serve a period in an adult prison.

48. In written submissions, complaint was made regarding the respective weights afforded by the sentencing judge to various factors. Principally, counsel criticised the sentencing judge's treatment of the running of a trial in respect of the s. 4 rape as an aggravating factor. It was stressed by counsel that the defence sought to mitigate against the impact of such a trial upon the complainant, most significantly by deciding not to cross-examine her. It was said at oral hearing that while counsel on behalf of the defence sought to manage the appellant's risk in advance of and during the trial, they did so while acting as responsibly as they possible could within the criminal trial system. Moreover, it was emphasised both in written and oral submissions, and indeed it was stressed at the time of sentencing before the Central Criminal Court, that there was no evidence that the complainant was even aware that the trial was ongoing, and to this end it has been repeatedly highlighted that the complainant was never in the building when the trial was ongoing.

49. At the oral hearing, the Court asked counsel to reflect on the position with respect to intervention by the executive as opposed to the judiciary, and whether the prospect of temporary release was one available to juveniles. In response, counsel brought to the Court's attention a document entitled "Sex Offenders Management Policy" published by the Irish Prison Service and dated the 22nd of April 2009. It was said by counsel that technically speaking the governor of any prison institution has the power to release an inmate on temporary release. However, it was described by counsel that as a matter of public policy, sex offenders are not so released. In the circumstances of the present case, it was observed by counsel that he was limited in terms of what remedy he could ask this Court to provide on appeal. Whereas if he was representing an adult offender, he said that he could argue for a more nuanced approach involving *inter alia* part-suspension, community service orders, backdating, or a reduction in the overall sentence; in the context of the present case the tools at the Court's disposal were limited i.e. either quash the sentence (which would give rise to an injustice to the complainant, it was said) or alternatively affirm it (which, it was submitted, would be an injustice to the appellant).

Director's Submissions to the Court of Appeal

50. At the oral hearing of the appeal, counsel on behalf of the Director adopted the position that the issue taken by the appellant was not with whether there should have been a custodial period but rather it related to the length of the custodial period to be served. It was submitted by counsel that if for argument's sake the sentence imposed was one which could have been completely dealt with by way of detention as opposed to detention with 31 days' spill-over in an adult prison, would the sentence still have been regarded as erroneous? Counsel further criticised

the appellant's characterisation of the 31-day spill-over period as problematic, and stated that this was not a case of someone being "*locked up and the key thrown away*"; the spill-over is not so excessive as to give rise to an error in principle, if indeed it is excessive at all.

51. As regards the treatment as an aggravating factor of the appellant's decision to contest the s. 4 charge, counsel on behalf of the Director submitted the following. First, it was conceded that while there was no plea for the s. 4 rape charge, the manner in which the defence had approached the trial meant that many of the mitigating consequences that would have arisen if there had been a plea still obtained, and this had been reflected in the overall leniency of the trial judge's approach to sentencing the appellant. It was further said that while a sentencing court must strike a balance between the two sides of a case, between the offender and the offence, the Children's Act already weighed the balance in favour of the child offender and the question was whether the sentencing court further weighed the scales in the appellant's favour in the circumstances of the case. While counsel conceded that the appellant's maturity was a factor to be weighed in the balance and that the objective in sentencing children is not punitive, counsel nevertheless asked how, in the context of a s. 4 rape trial, is rehabilitation of the offender to be approached and how is the offender's remorse to be evaluated?

52. Counsel submitted that, having regard to the totality of the case and the sentencing constraints, the court below did not make an error in principle. Further, and having regard to the circumstances of the case, it was said that the sentencing judge appropriately sentenced the appellant and the fact that there is a potential 31-day spill-over does not represent an error of principle such as to merit a quashing of the sentence.

The Court's Analysis & Decision

53. We must state at the outset that we find no error in the sentencing judge's approach. On the contrary it is apparent to us that the sentencing judge approached the matter with scrupulous care and with the appropriate level of awareness and sensitivity to the appellant's youth and immaturity at the time of committing these very serious and violatory offences, on the one hand; while at the same time recognising the effects on the victim and the significant impact the appellant's offending has had on her.

54. In relation to ground no. 1, we do not consider that the trial judge was in error in concluding that an immediate custodial sentence was required. Sight cannot be lost of the fact that this case involved an incident of oral rape and multiple penetrative sexual assaults. The offences are very, very serious and we completely agree that, were the court dealing with a mature adult, the indicative headline sentences nominated by the sentencing judge as applicable to such a situation are correct. Eight years would be an appropriate headline sentence for the rape, and four years and six months would have been appropriate headline sentences for the sexual assaults.

55. While it is the case that the offences were committed by a 13-year-old boy and not by a mature adult and that therefore on account of the offender's youth and immaturity his culpability may be inferred to have been significantly reduced, he was nonetheless aware of that what he was doing was very wrong. The evidence was that he took active steps to ensure that what he was doing remained secret. He placed a chair against the door handle of the room in which he was perpetrating his abuse so that nobody could come in while he was engaged in it. Further, he

applied coercive pressure to the victim not to tell anyone, to keep it a secret. He clearly knew that what he was doing was wrong. We do accept, however, that on account of his youth and immaturity he may not have fully appreciated the significant effects that what he was doing would have on his victim.

56. Accordingly, while the appellant's culpability must be treated as having been significantly reduced by virtue of his youth and immaturity, such that the sentences applicable in the case of a mature adult would be completely disproportionate in his case we nevertheless consider, that notwithstanding the ethos of the Children Act 2001, and the injunction that is contained in s. 143(1) of that Act to the effect that detention should be a last resort, that the custody threshold was unquestionably exceeded in the context of this case, certainly in terms of the setting a headline sentence. The absence of an option to suspend the sentence or to impose a partially suspended sentence is irrelevant in our view. The sentencing judge had to operate with the tools in her sentencing toolbox. There are numerous non-custodial sentencing options provided for in the Children Act 2001, but there will always be cases, and this was one of them, where the custody threshold is exceeded and it is necessary to sentence somebody to detention. We find no error on the part of the sentencing judge in concluding that an immediate custodial sentence was required in the present case.

57. Having concluded that an immediate custodial sentence was required the sentencing judge went to great lengths to minimise it to the maximum extent that she felt that she could do, consistent with her judicial declaration to administer justice without fear or favour and in accordance with the law. She was clearly conscious of her statutory duty to approach the sentencing exercise with due regard for the welfare of the child, while at the same time having to impose a proportionate sentence that reflected the gravity of the offence on the one hand and the personal circumstances of the offender on the other hand. So assiduous was she to arrive at a just outcome in this case, consistent with the ethos of the Children Act 2001, that she revisited her initial decision, and ultimately imposed an even more reduced sentence than she had initially been inclined to impose. We should state that even if she had not done so, we think it unlikely that her initial sentence would have been interfered with. However, in reducing the sentence for the s. 4 rape to one year's detention she went to the absolute limits in our view of her legitimate discretion in showing leniency. In our view, the ultimate sentence of one year's detention for the rape offence represents the irreducible minimum that would have been appropriate in the circumstances of this case, having regard to the nature of the offending and the manner in which it was perpetrated, and notwithstanding the acknowledged mitigating circumstances arising in this case, including the appellant's efforts at rehabilitation, for which the appellant was entitled to due credit .

58. With respect to ground no. 2, the sentencing judge committed no error of principle in having due regard to the decision of this court in the *T.D.* case, previously cited. She did not in any way misinterpret our decision in that case. On the contrary, she correctly noted that we had expressly stated that while we were not to be taken as uncritically adopting guidance provided by the Sentencing Council of England and Wales, we had been prepared to note it and to regard it as being at least a helpful indicator as to the potential significance of the fact of minority in any assessment of an offender's culpability. In that decision we had noted that the English guidance

recommended that, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence could be applied to a minor in the age bracket 15 to 17. We neither approved nor disapproved of this level of reduction, but alluded to it merely as illustrative of the approach adopted in the neighbouring jurisdiction of significantly reducing the headline sentence that would otherwise apply in the case of a mature adult to take account of an offender's youth and immaturity. The point being made was that the general approach of affording a significant reduction in those circumstances seemed sensible to us. Counsel for the appellant rightly points out that the appellant in the present case was younger still when he committed the offences the subject matter of this appeal. The sentencing judge was alive to this. She was disposed to reduce the headline sentence that would apply in the case of mature adult by 50% to take account of the appellant's minority, and we consider that in doing so she acted entirely within her legitimate range of discretion. We are not persuaded that she committed any error of principle in doing so.

59. As regards ground no. 3, we do not accept that the trial judge placed excessive weight on aggravating features. The trial judge's duty, in accordance with her judicial declaration, was to administer justice without fear or favour. She was required to impose a proportionate sentence that reflected on the one hand the gravity of the offending conduct, and on the other hand that reflected the personal circumstances of the offender. In properly assessing the gravity of the offending conduct it was necessary for her to take account of the aggravating circumstances in the case. We are satisfied that she properly did so. We do not consider that it was inappropriate of her to treat the fact that the appellant had suggested that he would "*tell a lie*" if the complainant reported the abuse, as being a threat. It was clearly said with coercive intent. The whole purpose of him saying that was to suggest to the complainant that, because he was readily prepared to lie, any disclosure by her would be pointless as she would not be believed. It was properly a matter for the judge to have regard to, and there is no evidence from the transcript to suggest that she attributed undue weight to it as a factor. We again find no error in how the trial judge dealt with this aspect of the case.

60. As regards ground no. 4, we note that it was complained that the sentencing judge placed inappropriate reliance on the principle of general deterrence. The first thing to be said is that the sentencing judge did not specifically mention general deterrence. What she said was, "*there has to be a deterrent for this type of offending*". It is difficult to quarrel with that statement. Deterrence is a legitimate objective to pursue in sentencing, and it may operate both generally and specifically. There was actually a case here for some specific deterrence. This was not one-off offending. It was repeat offending, albeit that the rape offence was a once off. While there was no suggestion that the appellant had committed further offences since the complainant had made her disclosures, and we again acknowledge, as did the sentencing judge at first instance, that he has taken meaningful steps towards rehabilitation, there was still a case for offering a modicum of specific deterrence in the determination of and structuring of any sentence to be imposed. There is nothing to suggest that the sentencing judge acted disproportionately in doing so. Looking at the sentencing judge's sentencing remarks in the round there is nothing to suggest that the sentencing judge had determined upon imposing an exemplary sentence on this appellant, set at an inappropriate and disproportionate level, in furtherance of the objective of deterrence. The

remark she made was offered merely as a part justification for her view that the custody threshold was exceeded and that, as she put it, "*there is no alternative but to impose a period of detention*". We have already expressed our agreement with her conclusion in that regard. We find no error of principle, and reject ground of appeal no. 4.

61. Turning then to ground of appeal no. 5, we reject this ground of appeal *in limine*. We entirely agree that the trial judge was entitled to infer likely anxiety on the part of the complainant in regard to the impending approach of the trial. We think it is fanciful to suggest that she would not have known of the trial. As the trial judge rightly pointed out, whether or not a victim will attend her own trial is not a decision for the defence. It is a decision for the appellant and her family, and it is reasonable to infer that, notwithstanding that she was approximately aged only 11 years at the time of the trial, there would have been some discussion within the family about it and that she would have known about it. In any case, there is nothing to suggest that the trial judge attached excessive importance to the anxiety factor. In assessing the gravity of the case she was obliged to take account of the harm done to the victim. In that regard, the most significant matter was that the offending conduct had comprised penetrative sexual abuse that was profoundly violatory of the young girl concerned. She makes clear in her victim impact statement how it affected her. In addition, and as a matter of common sense, there would also have been associated anxiety connected with the existence of legal proceedings. In alluding to that, the sentencing judge did not place excessive weight on it as a factor, but she was right to take it into account.

62. Ground of appeal no. 6 complains that the sentencing judge took inadequate account of the significant mitigating factors in the case, and particularly the manner in which the applicant had met the case. We find it very difficult to see how the appellant can contend that the sentencing judge erred in taking inadequate account of the mitigating factors in the case. Having determined upon a headline sentence of 4 years for the rape offence she discounted from that by 75% ultimately to reflect mitigating circumstances, including how the appellant met the case but also the delay factor in the case. By any yardstick there was a very substantial discount for mitigation, and we see no basis for any legitimate complaint. For the avoidance of doubt we are satisfied that the sentencing judge was fully alive to the fact that the complainant had not been required to attend court, and had not been subjected to cross examination. However, as the judge rightly pointed out, this was not the same as the appellant having pleaded guilty. It did not communicate or mean that the complainant was to be treated as being believed. It did not mean that the appellant was taking responsibility for his actions. An accused is not to be penalised at sentencing for having contested his trial. If he has pleaded guilty, he is entitled to a discount in mitigation. The accused here did not plead guilty. He was not therefore entitled to the credit that goes with a plea. Nevertheless, we are satisfied that the sentencing judge, in her careful and very detailed sentencing remarks, did acknowledge and take account of the fact that in contesting the trial the appellant had sought to minimise the potential for further distress being caused to the complainant. We are not disposed to uphold ground of appeal no. 6.

63. Finally, ground no. 7 complains that the sentencing judge attached excessive weight to the appellant's continued failure to accept his guilt in relation to the s. 4 rape charge considering that the court was dealing with a juvenile. There is no rule in law suggesting that it matters not, in the

sentencing of a juvenile, whether the accused has pleaded guilty or not guilty. The same rules apply in the case of a juvenile as apply in the case of an adult. An offender is not to be penalised for contesting a charge, but if they plead guilty they can avail of the significant mitigation that goes with that. We find no error on the part of the sentencing judge in differentiating between the rape offence, to which the appellant had pleaded not guilty, and the sexual assault offences, to which he had pleaded guilty. He received an appropriate additional discount for having pleaded guilty to the sexual assaults. It was not appropriate that he should receive such a discount in the case of the rape offence because there was no plea of guilty. Nevertheless, and notwithstanding this, he received a very substantial discount of 75% off the headline sentence of 4 years' detention for the other mitigating circumstances in his case. He has no legitimate basis for complaint, and we reject ground of appeal no. 7.

64. We wish to say in conclusion that while it is unfortunate that the appellant may have to serve a short period in an adult prison when he is transferred from the children detention centre where he is currently being held, that is unavoidable. It would not be appropriate to interfere with the sentence imposed by the sentencing judge at first instance absent a clear error of principle. We have already expressed the view that the sentence of one year's imprisonment for the rape offence, which subsumes the lesser sentences imposed on the sexual offence counts, was in the circumstances of this case the irreducible minimum that the sentencing judge could have contemplated. To have gone lower than that so as to engineer a situation where the appellant was likely to be released from the children detention centre where he is presently being held in advance of being transferred to an adult prison would not have been a legitimate exercise of the judge's discretion. Where a sentence is to be served is a matter for the executive. The judge's function was to impose the appropriate sentence for the crime as committed by the particular offender. We are satisfied that she properly and faithfully did that in accordance with her judicial declaration and we do not consider that she can be legitimately criticised, notwithstanding that as a consequence of her order the appellant may well have to spend some time (defence counsel has suggested it may be approximately 31 days) in an adult prison before being released.

Conclusion:

65. The appeal must be dismissed.