THE COURT OF APPEAL

CCA 215/15

Birmingham P.
Edwards J.
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

AD

Appellant

JUDGMENT of the Court delivered on the 3rd of October 2018 by

Mr. Justice Edwards.

Introduction

1. On the 2nd of July 2015, the appellant in this case, who faced trial on an eighteen count indictment, pleaded guilty before Dublin Circuit Court to three sample counts of indecent assault contrary to the common law, being counts nos. 1, 5 and 10 on the indictment.

2. On the 23rd of July 2015, the appellant further pleaded guilty to an additional three sample counts of sexual assault, contrary to s. 2(2)(a) of the Criminal Law (Rape) (Amendment) Act 1990 ("the Act of 1990"), as amended by Section 37 of the Sex Offenders Act 2001, being counts nos. 11, 14 and 18 on the same indictment.

3. These pleas were acceptable to the Director of Public Prosecutions on the understanding that the evidence at the sentencing hearing would be presented on a full facts basis.

4. On the 24th of July 2015, the appellant was sentenced. He was sentenced to two years' imprisonment on count no.1, and to two years imprisonment on count no.10, both of which concerned indecent assault. He was further sentenced to three years imprisonment in respect of count no. 11, which concerned sexual assault. Count no.10 was made consecutive to count no. 1, and count no. 11 was made consecutive to count no. 10, amounting to an overall term of seven years imprisonment. Counts nos. 5, 14 and 18 were taken into consideration.

The Facts of the Case

5. The appellant in this case is a married man and, during the course of his married life, he and his wife fostered four children, one of whom is the first named complainant ("F") in the present case. F lived with her biological grand-parents until she was four years old, at which time the appellant and his wife fostered her and raised her as their step-daughter. The appellant's family, including F, lived in Blackpool in England until she was eight, at which time they moved to Dublin. During a six-year period, commencing on the 1st of June 1972 and concluding on the 1st of June 1978, the appellant sexually abused F on numerous occasions. She was between the ages of eight and fourteen during this period.

6. During the trial, Detective Karl Smith gave evidence to the court detailing the nature of the sexual abuse that took place. In brief, a number of these assaults occurred when the appellant was bathing F and her brother, whereby he would rub her genitalia and breasts. The appellant would also habitually come into F's room when the rest of the family were sleeping. The appellant would kneel down by the side of F's bed and put his face right next to hers. The appellant would then proceed to touch her vagina and back passage. F complained to the Gardaí that this would happen *"constantly"* and that the appellant *always "smelled of alcohol but he wouldn't have been very drunk. He would always know what he was doing."*

7. There was another incident when the appellant was 13 and her mother had gone over to England due to the death of her sister. The appellant came into the room, and, *"like normal, he knelt down by my bed and put his hand under the blankets."* The appellant then proceeded to climb on top of her and attempted to put his penis in her vagina but she fought him off, ultimately hitting her head off the bed in the process. There were various other incidents of abuse, including on various trips to Phoenix Park and the playground where the appellant would touch F inappropriately. The abuse stopped when F was around 14 or 15. Counts 1, 5 and 10 related to offending against F.

8. The appellant and his wife also had a son during their married life. The appellant's son married and had a daughter ("N"), granddaughter to the appellant. For a period of four years between 1997 and 2001, the appellant sexually assaulted N on numerous occasions. The abuse began when N was four years old and ended when she was eight. In a statement made to Gardaí outlining the abuse, N recalls how she and her brother would occasionally stay over in her grandparents' house. They would both share a single bed in the back bedroom. On one such occasion, when she was six years old, N woke up to find her nightdress pushed up and her pants pulled down. She could feel the appellant beside her, licking her bottom. This occurred for 15 or 20 minutes whilst N lay there awake and *"frozen".*

9. Another incident occurred when N was seven years old in the appellant's sitting room. As she was walking through the sitting room, the appellant directed her to put her hands on top of the sofa and lean over the arm. She was not undressed but could feel his penis against her bottom, whilst he held her hips. After simulating a thrusting movement for five minutes, the appellant finished doing so and told N to leave.

10. The appellant frequently subjected N to other incidents of sexual assault. There were several other instances of abuse where the appellant touched her inappropriately in the shed in his garden; at a particular public park, in a certain public Library, and at the playground.

11. In 2013, N went to a health centre for the purposes of receiving counselling. She was receiving counselling for a number of

months and, at some stage during these sessions, N disclosed the fact that she had been sexually abused by the appellant. Some time after making this disclosure to her counsellor, N told her mother, and at a later date, her father, about the abuse she suffered at the hands of the appellant. N's father subsequently confronted the appellant about the allegations made against him. After a heated discussion, the appellant admitted to sexually abusing N. Counts 11, 14 and 18 related to offending against N.

12. Subsequently, on the 9th of September 2014, the appellant confided in a local priest about what he had done. The priest warned him that, as these disclosures were outside the sacrament of confession, he would be obliged to report it to the authorities. Notwithstanding this warning, the appellant proceeded to confide in the priest and, on the 12th of September 2014, the appellant voluntarily presented himself at Mountjoy Garda Station, whereby he requested to speak to a senior member of An Garda Síochána. On the same date, the appellant was introduced to Detective Garda Lisa Sheehan and Detective Sergeant Gavin Ross. After being advised by the interviewing detectives that this was a cautioned voluntary interview and that he could leave at any stage, as well as his right to a solicitor, the appellant replied, *"I do. I know, I came here of my own accord, I want to sort this out".* The detective Gardaí then proceeded to interview the appellant who confessed to sexually abusing F. After being asked if he had abused anybody else, the appellant also confessed to the interviewing Gardaí that he had abused N, his step-daughter, as-well, indicating that *"whatever she says when you speak with her should be taken as gospel".*

13. Subsequently, an investigation took place whereby statements of complaint were taken from both victims, effectively confirming what the appellant had admitted to during his interview of the 12th of September 2014.

The impact on the victims
14. Victim impact statements were provided to the sentencing court for both victims. F states, *inter alia*, that the abuse suffered at the hands of the appellant has made her life *"a living hell"* – that her grandfather was supposed to protect and care for her as opposed to verbally and sexually abusing her. She has suffered for many years, and indeed still does suffer, from flashbacks and nightmares and the abuse has left her *"an emotional wreck".* Her marriage has failed and she is now trying to repair the broken relationships with her own children, relationships that were strained by the trauma F was carrying around from her own past. She still feels very hurt and let down and the abuse has scarred her for life.

15. In her victim impact statement, N states she has been attending counselling and that talking about the abuse she suffered is of some comfort to her, but every time she goes to her counselling session she *"was filled with worry and felt nervous that [she] would bump into [the appellant]".* For years she was alone with the burden of the abuse she suffered, with nobody to talk to about it. She feels like part of herself was taken away because of the appellant and that he ruined her childhood. The abuse also prevented her from having a proper relationship with some of her family since, from childhood, she saw all men as a threat and thus never talked to her mother's grandad, father or brother. Also, as she was abused in her grandfather's house, she could never bring herself to go back to that house, even when the appellant was no longer there anymore. As a result of this, she has missed out on the chance for her own children to get to know their great- grandmother and, indeed, for her to spend more time with her own grandmother. Finally, N finds it very difficult to trust people since the abuse. She is extremely protective of her own children and never lets them stay with anyone apart from her own parents. She hopes that she can move on with her life but states that *"at the moment I feel [the appellant] has won".*

Appellant's personal circumstances
16. Counsel for the appellant indicated to the sentencing court that his client did not wish for any plea to be advanced in relation to *"his health, alcohol [or] his advancing years".* Moreover, the sentencing court did not have the benefit of any pre-sentencing report in assessing the appellant's personal circumstances. However, from the evidence led in the court below, some pertinent details regarding the appellant's personal circumstances emerge.

17. The appellant, born on the 16th of September 1937, was 77 at the time of sentencing (he is 81 now). He began working at approximately 15 years of age and worked consistently throughout his life, predominantly as a baker. The appellant and his wife were foster parents and fostered four children, including F, in a two-year period. The appellant's family lived in Blackpool in England for a period, before moving to Ireland when F was eight years old, where they lived at different stages in two different suburbs of Dublin.

18. The appellant has no previous convictions and, prior to the present offences, it seems, had never come to the adverse attention of An Garda Síochána.

19. Since the appellant's offending behaviour came to the attention of his family and the authorities, he has been banished from the family home. Whilst this is completely understandable from the perspective of the appellant's family, it should be noted that, at the hearing of this appeal, counsel for the appellant informed the Court that the appellant has had one visitor in the three years that he has been in prison. This utter isolation has to be difficult for a man of the appellant's age, notwithstanding the egregious nature of his offending behaviour.

20. It should also be noted, as touched on above, that the manner in which the appellant confronted the allegations made against him is highly unusual. After being confronted by his son, F's father, about the allegation made against him by F, the appellant, after first confiding in a local priest, a couple of days later voluntarily presented himself at Mountjoy Garda Station and confessed to sexually abusing both F and N. He was co-operative throughout the whole process, and indicated in advance, through the medium of his legal representatives, that he would be entering a guilty plea and indeed so pleaded at the first mention date before the Court on the 2nd of July 2015.

The sentencing judge's remarks
21. The sentencing judge, in sentencing the appellant, stated inter alia that: -

> *"[I]t seems to me I must assess a sentence for [the appellant] in a global fashion. The counts that are before me are representative counts in relation to certain periods of time when he abused these children. So, obviously in sentencing I must also take into account a maximum sentence prescribed by law at the time, and I must do the best I can to impose upon him a sentence that is fair and just to him, and also fair and just to the people of Ireland, taking into account that he has committed crime. Now, in deciding what to do about him, first and foremost, I must take into account what he did. These are serious counts. I must take into account also the position [the appellant] was in when he abused. He was in a position of trust in relation to both of the girls. I must take into account the prolonged nature of the abuse. I must take into account the number of incidents of abuse as best I can determine. Obviously, these are the factors on one side I must take into account. I also must take into account the mitigation, the mitigating factors. Obviously, the major mitigating factor is the fact that he made -- he, when confronted, he admitted his wrongdoing. It seems he consulted a priest and it seems after that he made admissions to the guards after being confronted by his son. He followed those admissions with an early plea. I must also take into account -- I think I can take into account that [the appellant] is*

remorseful for what he did. I must take into account the age of [the appellant], he's 77 years at this stage, and I must also take into account that his general health situation. I must take into account in relation to that matter that, obviously, a prison sentence for [the appellant] will be more difficult by reason of his age. Now, obviously the severely aggravating factor is the crimes themselves, and the position that [the appellant] was in when he committed the crimes. That goes without saying. As I've indicated in my opening remarks, I must sentence him globally for what he did. I have two periods of time when he abused greatly his daughter and his granddaughter.

So, I think the appropriate cumulative sentence I'm going to impose upon him is going to amount to [be] (sic) a term of seven years imprisonment. Now, what I propose to do in relation to count No. 1, I'm going to impose upon him a two year custodial sentence. In relation to count No. 10, I think is the last count dealing with [Ms. F's] situation, I'm going to impose upon him a two year custodial sentence. And in relation to count No. 11, this is the first Count in relation to his granddaughter, [Ms. N], I'm going to impose upon him a three year custodial sentence. And all of those sentences are to run consecutively, which amount to a seven year custodial sentence. I've approached the matter, I suppose, to some degree in reverse. I have decided what the global sentence should be, taking into account the facts of the case, the wrongdoing involved and taking into account the mitigating factors. Now, there is mitigating factors well made by Mr Bowman on behalf of his client but I must impose upon him a severe custodial sentence, even taking into account his age, taking into account what he did over the periods of time mentioned in the counts. The numbers are huge, I think. Obviously, what's been said by the guard in relation to the activities speak for themselves, but it's a serious, serious fall from grace by [the appellant]. He abused his daughter and granddaughter and he abused hugely the trust in the matter. Therefore, unfortunately, I feel I must impose upon him a pretty long sentence, taking into account his age."

Grounds of Appeal

22. Counsel for the applicant appeals against the severity of the sentence on the following grounds:

a) The sentencing judge failed to consider adequately the possibility of a partially suspended sentence, in particular having regard to his guilty plea, his work history, the likelihood of re-offending and his family circumstances.

b) The sentencing judge erred in principle in structuring the sentence in arriving at a *"global"* figure for all three counts without identifying the 'headline sentence' for each individual count by locating the offending behaviour on the scale of gravity. The sentencing judge, in working backwards from the global sentence of seven years, imposed the maximum sentence for both counts of indecent assault and a mid-high range sentence of three years for the count of sexual assault.

c) Similarly, the sentencing judge failed to identify the extent to which, if at all, the various mitigating factors present in the case were taken into account.

Appellant's submissions

23. The appellant's central objection to the sentencing court's decision is the manner in which the sentencing judge arrived at the global sentence of seven years for the three sample counts in question. Counsel for the appellant takes issue with the fact that the sentencing judge effectively approached the issue in reverse. Firstly, he arrived at a global sentence of seven years. From here he decided that the first two counts of indecent assault would attract the maximum sentence of two years each and that the final sample count of sexual assault would attract a mid-high level sentence of three years. As a result of this unorthodox approach, the appellant argues that it is impossible to decipher a number of key *"milestones along the sentencing roadway"*, as counsel for the appellant puts it.

24. For instance, the appellant argues in his written submissions that it cannot be deciphered from the sentencing judgment what headline sentence was arrived at in respect of each sample count of offending behaviour. The Court's attention was drawn to the well-settled line of jurisprudence, including the recent decision of this Court in *The People (Director of Public Prosecutions) v. Davin Flynn* [2015] IECA 290, in support of the proposition that a sentencing court should assess the gravity of the offending conduct in the first instance, in order to locate a headline sentence within the range of available penalties. The assessment of gravity must be carried out by reference to the moral culpability of the offender and the harm caused by the offending behaviour. However, in the present case, the appellant argues that no such assessment of gravity was carried out. Rather, as already mentioned, the sentencing judge in the present case imposed the maximum sentence for the two indecent assault sample counts without any reference to how the court located the offence at the very top end of the scale of gravity in respect of these two counts.

25. Notwithstanding this written submission, it was conceded by counsel in his oral submissions to this Court, that, in terms of the sexual abuse on F, there were aggravating factors which justified locating this offending behaviour at the top end on the scale of gravity. Similarly, in terms of the sexual assault sample count against N, the appellant does not seem to take issue with the sentence of three years *per se*. Rather, in both cases his complaint appears to be focussed primarily on the inability to decipher what the sentencing court's headline sentence was, or indeed how it was reached.

26. Further, the other central plank of the appellant's case is that, even if the maximum sentence was warranted on each count, on account of the gravity of the offence, the undoubted mitigating factors should have served to reduce each of the sentences. Whilst the sentencing judge did identify the various mitigating factors in the case, the appellant argues that no demonstrable appreciation of the mitigating factors can be identified due to the fact that the maximum sentence was imposed for both of the indecent assault sample counts. Counsel for the appellant submits that there were mitigating factors present in respect of the offending behaviour against each victim, which should have resulted in lesser sentences than the statutorily prescribed maximum sentences which were imposed. These mitigating factors should have been discounted from each individual headline sentence, as opposed to applying mitigation to the totality of the offending behaviour. However, the appellant maintains, even if a global discount was applied to reflect mitigation it is impossible, in the absence of any identifiable headline sentence, to know what actual discount was afforded for mitigation.

27. Thus, in relying on the constitutional requirement that sentences be proportionate to the gravity of the offence and the personal circumstances of the offender, the appellant argues that the sentencing judge erred in principle in failing to adequately make allowance for the mitigating factors in the case. We were referred to *The People (Director of Public Prosecutions) v. Kelly* [2005] 2 IR 321, and *The People (Director of Public Prosecutions) v. O Neill* [2012] IECCA 37, in support of the proposition that significantly greater weight should have been given in this case to the fact that the appellant has no previous convictions.

28. Finally, the appellant argues that the sentencing judge failed to consider suspending part of the sentence in the circumstances of this particular case. Counsel for the appellant argues that the sentencing judge ought to have considered suspending part of the sentence so as to incentivise rehabilitation post-release. Indeed, this was requested by counsel for the appellant after the sentence had been handed down. However, the sentencing judge refused this application on the basis that the appellant would be eighty by the time his seven-year sentence is concluded and would not need post-release supervision at that stage.

Respondent's submissions
29. The respondent accepts that the sentencing judge did not follow this Court's recommended best practice as outlined in the *Davin Flynn* case. However, the respondent relies on a couple of decisions of this Court as authority for the proposition that a failure to adhere to best practice will not automatically lead to the sentence being overturned [*The People (Director of Public Proseuctions) v. Martin Reilly* [2016] IECA 43; and *The People (Director of Public Prosecutions) v. Viorel Salageanu* [2016] IECA 232]. Rather, as was held in the Reilly case (at para 20), the sentencing decision may be upheld if *"the final sentence does not appear to represent to us a deviation from what might reasonably have been expected in a case such as this."*

30. The respondent submits that the 'global' sentence of seven years was proportionate in circumstances where the sentencing judge only sentenced the offender on three sample counts, notwithstanding the evidence that the appellant had committed numerous sexual assaults during the periods in question. Indeed, the respondent submits that this consideration was explicitly referenced by the sentencing judge in articulating his reasoning for the sentence handed down. The respondent directed the Court to the following portion of the sentencing judgment in reliance on this proposition:

> *"The counts that are before me are representative counts in relation to certain periods of time when he abused these children …. [The appellant] seems to have abused his daughter over a period from the 1/6/72 to the 1/6/78, almost a six-year period. He abused his granddaughter over a period from the 30/3/1997 to the 30/3/2001. He did it on numerous occasions and a huge number of occasions in relation to his daughter. Also, there was a good number of occasions where he abused his granddaughter"*

31. The respondent submits that the imposition of the maximum sentence in respect of the indecent assault counts was appropriate in circumstances where it was incumbent on the sentencing judge to sentence the appellant in relation to the totality of the offending behaviour.

32. Further, in response to the submission that the sentencing judge failed to specify the extent, if any, to which he was taking into account the mitigating factors in the case, the respondent argues that all of the relevant mitigating factors were explicitly referred to in the decision, including the *"major mitigating factor is the fact that he…consulted a priest and it seems after that he made admissions to the guards after being confronted by his son. He followed those admissions with an early plea' and the fact that 'a prison sentence for [the appellant] will be more difficult by reason of his age".*

Discussion and Analysis
33. The issue of global sentencing was recently addressed by this Court in its decision in *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121. This was in the context of an undue leniency appeal in respect of sentences imposed for a spree of burglaries where the DPP complained that, amongst other things, the sentencing judge had erred in opting not to take a global approach to sentencing. We said in regard to that:

> *"11. It is said that the judge erred in failing either to identify pre-mitigation headline sentences for each of the individual offences or a global headline sentence reflecting the totality of the offending behaviour. The Director says that this was a case where quintessentially a global headline sentence was called for. In support of this submission, she says that residential burglary is a particularly serious offence and that here the respondents had effectively embarked on a burglary spree in a manner that was clearly planned and pre-meditated. It was important that there should be a clear statement as to the sentence that such behaviour merited.*
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> *12. We consider it appropriate at this point to make some general observations with respect to this submission. Where multiple offences have been committed in a spree there is nothing in principle wrong with a court taking account of the overall gravity of the offending conduct viewed globally, indeed it is desirable that it should do so. Where a court is sentencing for multiple offences committed in a spree, the fact that they were committed in a spree should be regarded as an aggravating factor. That it was part of a spree renders the gravity of each individual offence more serious and the overall offending conduct must consequently be regarded as more serious than any individual offence considered in isolation. There are a number of ways in which this increased gravity can be reflected. The first is to impose proportionately higher offences for each individual offence and simply make them all concurrent. The second is to assess gravity in respect of each individual offence without reference in the first instance to the fact that they were committed in a spree and then, having done so, to at that point seek to reflect the aggravating circumstance of the spree by having recourse to at least some degree of consecutive sentencing. However, going further and nominating a global headline sentence, while certainly possible, complicates the sentencing process as we will explain. Before doing so, however, we feel it necessary to highlight some pertinent issues.*
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> *13. The first of these is that even if a global headline sentence is nominated, there ultimately requires to be an individual sentence for each individual offence, or at the very least a sentence or sentences for one or more offences with the others taken into consideration. It is preferable, however, not to have regard to the latter expedient. This was made clear in the case of The People (Director of Public Prosecutions) v Higgins (Unreported, Supreme Court, 22nd of November 1985) where Finlay C.J., in his judgment (with which Walsh J, Henchy J, Griffin J, and McCarthy J concurred) observed:*
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> *'…the accused having been convicted on a number of charges arising out of the same incident but varying in the sense of their seriousness, the learned trial judge imposed upon him a sentence in respect of one count only and took the other counts into consideration. Having regard to the possibility that always exists of a court of appeal setting aside on some technical or other ground the conviction on a particular count, but leaving undisturbed the convictions reached on other counts on the same indictment, even though they arise out of the same incident, this would appear to be an undesirable and unsatisfactory procedure. Appropriate sentences should, in my view, be imposed on all counts in respect of which an accused person is convicted by the jury.'*
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> *14. Consistent with this, Professor O'Malley in his well regarded work, 'Sentencing Law and Practice' (3rd Ed), suggests (at para 31.55) that the statutory provision on foot of which other offences may be taken into consideration, namely s.8 of the Criminal Justice Act 1951:*

'was intended solely to allow defendants to ask for uncharged offences to be taken into account in order to forestall the possibility of a later prosecution for those offences. Yet, it is not uncommon for courts to take into account offences of which a defendant has actually been convicted. They impose a sentence for one offence and take the rest into consideration. Strictly speaking, a sentence should be imposed for each offence of conviction, though the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive.'

15. Secondly, any individual sentence imposed cannot lawfully be disproportionately severe to the particular offence for which it is being imposed. However, the sentence imposed for the offence of conviction may be increased as a result of other offences properly being taken into consideration, provided the maximum penalty is not exceeded.

16. Thirdly, we suggest that quite apart from the issue identified in the penultimate paragraph above, a further reason exists as to why the option of taking an offence or offences into consideration requires to be used sparingly in this type of case, i.e., where an accused is being sentenced for a series or spree of similar offences, namely, that it carries with it the risk that an impression may be given either to the offender, or to a relevant victim, or to both, that the offender is in some respect getting "a free ride" in respect of an offence or offences for which discrete sentences are not imposed. (A "free ride" was how the Manitoba Court of Appeal put it in R v Wozny 20 MBCA 115, a case cited in that regard by Prof. O'Malley in the work previously cited, at para 15.39).

17. The principal of proportionality in sentencing is a constitutional requirement and has to be at the forefront of every sentencing judge's mind. In State (Healy) v Donoghue [1976] IR 325 (SC) 353, Henchy J opined that cumulatively Article 38. 1, Article 40.3.1 , Article 40.3.2 and Article 40.4.1o of the Constitution necessarily imply, 'at the very least, a guarantee that a citizen shall not be deprived … where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances'.

18. Proportionality in this context means proportionality in its ordinary meaning (see Whelan & Lynch v Minister for Justice [2010] IESC 34, [2012] 1 IR 1 (54); see also Osmanovic v DPP [2006] IESC 50, [2006] 3 IR 504 [34] (Geoghegan J) endorsing the comments of Flood J in People (DPP) v W.C. [1994] 1 ILRM 321 (HC) 325 concerning proportionality in sentencing), and has a different meaning to the proportionality referred to in the context of the constitutional 'doctrine of proportionality' as expounded in Heaney v Ireland [1994] 3 I.R. 593.

19. The former Court of Criminal Appeal has said in The People (Director of Public Prosecutions) v McCormack [2000] 4 IR 356, at 359, that '[t]he sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.' Accordingly, a sentence has to be proportionate in both of these respects.

20. The totality principle is potentially engaged whenever a court is seeking to reflect the overall gravity of two or more offences for which an accused faces sentencing, either by means of overlapping sentences, or wholly consecutive sentences. It permits a court to adjust the final sentence, and some or all of its individual components, as required to reach an overall figure that is proportionate both to the gravity of the offending, but also to the circumstances of the individual offender.

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

22. The main criticism of this approach is that it may result in artificially inadequate sentences having to be imposed for individual offences in order to give effect to the principle.

23. However, it is open to a court to adopt a different approach, but one which again may bring the totality principle into play. Certainly, if this approach is adopted there will require to be an acute focus on proportionality at every stage. It is open to a sentencing court, where it is sentencing for multiple offences, before considering what actual sentences should be imposed in respect of individual offences, and whether and to what extent individual sentences should be concurrent or consecutive inter se, to determine in the first instance a global pre-mitigation sentence reflective of the overall gravity of the offending conduct.

24. Clearly, in making such a determination, any global figure selected by the sentencing court is required to be proportionate to the gravity of the totality of the offending conduct, but no more than that.

25. Then, with the selected global headline sentence as a reference point, the court must proceed to assess gravity in the case of each individual offence and by resort to a combination of concurrent and consecutive sentences to ensure that the cumulative total aligns with the global headline figure selected, by making adjustments up or down as required. (This may not prove to be as easy as it might appear at first glance because, as pointed out earlier, no one sentence should be disproportionately severe to the offence for which it is being imposed.) Appropriate discounts should then be applied to each individual component sentence to reflect mitigation.

26. If the discounting for mitigation has been appropriate and proportionate to the offender's personal circumstances, as it should be, the accumulated post-mitigation individual sentences, structured as previously determined with respect to whether they should be concurrent or consecutive inter se, will yield a final figure that meets the overall proportionality requirement.

27. However, if a sentencing judge is in any doubt as to whether his/her presumptive final figure is in fact proportionate, then, once again, in application of the totality principle, he/she should step back and consider whether that presumptive final figure requires further adjustment in the interests of achieving overall proportionality.

28. The advantage of the global headline sentence approach is that it is arguably the approach to sentencing [for] multiple offenders [sic, should read offences] that may be most effective in achieving a degree of general deterrence. The nomination of a global headline sentence, which may well be highlighted in any media reporting of the case, will

communicate very clearly how the court views the overall gravity of the offending conduct that was committed in the course of the spree. This is what the DPP believes was required in the present case. However, the disadvantage of the approach is that it is complicated to give effect to correctly.'

29. It is a matter for individual sentencing judges to adopt the approach with which they are most comfortable, and which seems to them most appropriate in the circumstances of an individual case."

34. The approach adopted by the sentencing judge in this case approximates to that described in paragraphs 23 to 26 inclusive of our judgment in *Casey*. However, the sentencing judge's approach was to use post-mitigation sentences throughout, rather than pre-mitigation sentences. This is another way of getting to the same destination, but not one that we would recommend for precisely the reason identified by the appellant in his submissions, namely that it is impossible to determine the degree to which there has been discounting for mitigation. The process by means of which the post mitigation components of the ultimate global figure were determined upon is not apparent. Consequently, it is more difficult for an appellate court, faced with a complaint of lack of proportionality on the part of the sentencing judge, to determine whether or not that is so.

35. This is not the first time this issue has arisen. The dilemma it presents is well captured by Thomas O'Malley in his work entitled "*Sentencing Law and Practice*", 3rd ed, at paragraph 5-28 where he states:

"Judicial opinion has varied over whether a court should always begin by determining a sentence for each offence before deciding if they should be concurrent, partly concurrent or consecutive, and before applying the totality principle. The other approach would be to decide first on the overall sentence appropriate for the totality of the offending conduct and then, if necessary, indicate sentences for the particular offences and combine them in such a way as to arrive at the desired total. Without being absolutely prescriptive, it is suggested that the first approach is preferable, although it is not always followed in Ireland. The sentences imposed for the various offences will remain on the offender's record and it would be unfair if he or she were recorded as having received a higher sentence than an offence might have merited had it not been combined with other sentences. This may have significant consequences if the offender is reconvicted in the future. When reviewing previous convictions, courts usually take note of the nature and severity of the penalties imposed. Secondly, one or more convictions may later be quashed following appeal or review, but the offender may still be liable to serve sentences for surviving convictions. Again, it is important that those sentences should be no longer than the relevant offences objectively merited."

36. Accordingly, although it was not an error of principle per se to have approached matters in the way that the sentencing judge did, it was not best practice for the reasons indicated. If, in the circumstances, we conclude that the approach adopted resulted in any individual sentence or sentences being disproportionate to the gravity of the relevant offending conduct, or to the circumstances of the offender, we would be unable to uphold them, and the resultant global sentence figure, **unless** that disproportionality had later been compensated for by way of an appropriate adjustment (and we wish to make clear that having to resort to this would have been sub-optimal for all of the reasons suggested by O'Malley) in arriving at the ultimate global sentence figure.

37. In respect of the indecent assault counts, which were pre-1981 offences and the victim was a female, the maximum potential penalty was two years' imprisonment at the time they were committed. The Oireachtas later increased the penalty to 10 years for such offences committed between 1981 and 1990, but the increased penalty doesn't apply in this case as the offences involving "F" were committed in the 1970's. It is also noteworthy that the types of offending conduct that were embraced by the old offence of indecent assault of a female have since 1991 been distributed between the new offences of sexual assault and aggravated sexual assault created by the Act of 1990. The offence of sexual assault (which involves conduct amounting to the former indecent assault but without serious violence or the threat of serious violence or causing injury, humiliation or degradation of a grave nature to the person assaulted, now attracts a maximum penalty of five years. The aggravated version of the offence, which comprises a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted carries up to life imprisonment.

38. Be all of that as it may, a person must be sentenced, and the gravity of his or offending conduct must be assessed, with reference to the range of penalties applicable at the time that an offence was committed. Doing so does not, however, prevent a sentencing judge, who is sentencing an offender on sample counts for a course of offending that has gone on over a lengthy period, from treating the sample offences as being aggravated by the very fact that they were committed during a course of similar offending that went on for a lengthy period. In addition, if other offences are being taken into account it is in order to reflect this fact in a somewhat higher sentence than the offence considered on its own would otherwise merit.

39. In this case, although the appellant had pleaded guilty to three counts of indecently assaulting F, the sentencing judge only imposed a sentence on two counts and took the other one into consideration. We reiterate the reservations previously expressed by this Court, in the *Casey* case cited above, about matters being taken into consideration where the offender has pleaded guilty to such an offence on arraignment. Ideally there should have been discrete sentences on each count.

40. Be that as it may, in sentencing the appellant for these offences, the sentencing judge was obliged to assess the gravity of the indecent assaults with reference to the offender's culpability and harm done, and to locate the offences on the scale or spectrum of available penalties. We consider that even though the available range of two years would have embraced all potential forms of indecent assault of a female, including what is now aggravated sexual assault, and notwithstanding that the indecent assaults in this case were not of that variety, it was nevertheless legitimate for the sentencing judge to regard the gravity of the present offences as being serious due to the multiplicity of aggravating factors associated with their commission, which included the age of the victim, the age disparity between the victim and the appellant, the breach of trust involved, and the fact that they were committed during a course of similar offending that went on for a lengthy period; and the harm done. In addition, as it was the intention of the sentencing judge to sentence on just counts nos. 1 and 10, and to take count no 5 into consideration, the sentences on counts nos. 1, and 10, respectively, could in theory have been made higher than would otherwise be merited on that account. In practice, however, any such increase could only be very slight in the circumstances of the present case because it is likely that if a discrete sentence had in fact been imposed on count no. 5, it would almost certainly have been made concurrent to either, or both, of counts nos. 1, and 10, respectively, as it involved the same victim and the same type of offending.

41. In all of these circumstances, was it justifiable for the sentencing judge to have selected the maximum possible penalty as his starting point? On balance we consider that it was not, save in one incidence, notwithstanding that the offences were serious. The exception relates to the incident described in evidence as happening when F was 13 and her mother had gone to England, and in which the appellant got in to F's bed, then climbed on top of F and attempted to put his penis in her vagina. We believe this to have been count no. 10. Although, not charged as such, this was in reality an attempted rape, and starting at the maximum of two years would certainly have been justified in that case. The other indecent assaults, however, did not go beyond non penetrative touching

of the victim's breasts and genitalia, and starting at the maximum would not have been justifiable in those cases. It was not justifiable because if, for example, the form of offending had been oral rape, or digital penetration of the vagina or anus, or if the indecent assaults had been associated with violence or extreme degradation, the same penalty would have to have been imposed. We therefore consider that to have started at the maximum penalty for all of the indecent assaults, and not to have differentiated between them in terms of their gravity, was an error of principle.

42. Moreover, even if the maximum available penalty was a justifiable starting point, and we have accepted that in one case it was, what the sentencing judge in fact did was to go further and to select the maximum possible penalty as the post-mitigation penalty, meaning that he was not prepared to afford any discount at all for mitigation. This was in circumstances where there were quite substantial mitigating circumstances in the case. The appellant had in effect self-reported his offending conduct. He was fully co-operative with the investigation. He had pleaded guilty at the earliest opportunity. Moreover, it is the understanding of the court that the intention to plead guilty may have been intimated before any question of possible disclosure of medical records would have arisen, which is further to his credit. The requirement to have to disclose sensitive private records can be further distressing for a victim. He was genuinely remorseful, and he was elderly at the date of sentencing. While it would have been unorthodox to do so, and far from best practice, the failure to afford discount for mitigation at this stage could have been compensated for by discounting later from any pre-mitigation global figure to give a final post-mitigation global figure. Although the sentencing judge claimed that his global figure of seven years was a post-mitigation figure, the objective evidence does not suggest that any, or certainly any significant, discount was in fact afforded. The failure to afford an adequate discount for mitigation in the case of the indecent assaults was an error of principle.

43. Turning then to the sexual assault counts. In this instance, although the appellant had pleaded guilty to three counts of sexually assaulting N, he only imposed a sentence on one count and took the others into consideration. We again make the point that, ideally, there should have been discrete sentences on each count.

44. The maximum potential penalty was five years in this instance. The nature of the offending conduct comprising the sexual assaults for which the appellant faced sentencing involved inappropriate touching of the complainant's unclothed body at different times, including entering her bedroom while she was in bed, pushing up her nightdress and pulling down her pants, and then licking her bottom as she lay in bed; and on another occasion simulating sexual intercourse by thrusting against her clothed body. Once again, these again were sample counts. In circumstances where sentencing was taking place on "a full facts" basis, it was again legitimate for the sentencing judge to regard the gravity of the offences before him as being serious due to the multiplicity of aggravating factors associated with their commission, which included the age of the victim, the age disparity between the victim and the appellant, the breach of trust involved, and the fact that they were committed during a course of similar offending that went on for a lengthy period; and the harm done.

45. In this instance, all we know is that the sentencing judge determined upon a post-mitigation sentence of three years, which suggests that he started somewhat higher than that. Though it is to speculate, it seems quite likely that his starting point would have been four, or possibly five, years. If he started at five he would have been too high in our view. Once again this not a case that justified the maximum sentence for sexual assault as a starting point. However, we consider that a starting point of four years would have been within the acceptable range. The appellant was also then entitled to a discount to reflect the not insignificant mitigating circumstances in the case, and we consider that it would have been appropriate to discount by 25%, leaving a post mitigation sentence of three years. In the circumstances, we consider that his ultimate sentence of three years for the sexual assault count was within the range of sentences open to the sentencing judge. While the process by means of which he arrived there lacks some transparency we would not be disposed to interfere with it, save for the fact that it is a component in a global sentencing structure that involves consecutive sentencing, and that has been skewed by errors of principle in assessing the appropriate sentences to be imposed for other components in the structure, namely the sentences for the indecent assaults. In the circumstances, though we would agree with the sentence imposed for the sexual assault offence if it had been imposed on a stand alone basis, we feel it necessary to quash the entire global sentence and re-sentence the appellant on all offences.

Re-sentencing

46. We will impose discrete sentences on both counts nos. 1 and 5 respectively. In the case of those offences we determine the appropriate headline sentences to be sixteen months imprisonment in both cases, and we will discount from that by 25% to reflect mitigation, resulting in post-mitigation sentences of twelve months on those counts.

47. The sentences on counts nos. 1 and 5 are to be concurrent inter se.

48. Consistent with what we have said already we will nominate the maximum sentence of two years' imprisonment as being the appropriate headline sentence for the most serious indecent assault, namely that charged on count no. 10. We will again discount from that by 25% to reflect mitigation, resulting in a post-mitigation sentence of eighteen months on that count. However, we consider that in circumstances where the nature of the offending conduct in this case was substantively different to that in the other indecent assault offences, it merits being made consecutive to the sentences on counts nos. 1 and 5 respectively. Accordingly, subject to the issue of totality, the cumulative sentences for the indecent assaults will amount to two-and-a-half-years' imprisonment.

49. Moving then to the sexual assault offences, we have already indicated that we agree with the post-mitigation sentence of three years imposed by the sentencing judge on count no. 11. However, we consider it appropriate to also impose the same sentences on counts nos. 14, and 18 which the sentencing judge had merely taken into consideration. We will make the sentences for all of the sexual assault offences concurrent inter se, but as they involved a different victim we will make them consecutive to the sentence imposed on count no. 10.

50. The overall revised global sentence, before consideration of totality, is therefore five-and-a-half-years' imprisonment. We consider this to be a proportionate global sentence and do not consider it necessary to effect any further reduction on foot of the totality principle. Neither do we consider it appropriate to suspend any portion of the final sentence.

51. The revised and final global sentence figure is therefore five-and-a-half-years' imprisonment.