THE COURT OF APPEAL

Appeal No. 86/2018

Edwards J.
Baker J.
Kennedy J.

BETWEEN/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

D. M.

APPELLANT

JUDGMENT of the Court delivered on the 13th day of May 2019 by Ms. Justice Baker

1. This is an appeal from the decision of McCarthy J. of 7 March 2018 in the Central Criminal Court by which he imposed sentences of six and a half years on account of defilement of a child under the age of fifteen years contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act 2006 (the "2006 Act"), and five years on three counts of exploitation, pursuant to s. 3 of the Child Trafficking and Pornography Act 1998, as amended ("the 1998 Act"). All sentences were ordered to run concurrently with the effect that the custodial sentence is one of six and a half years' imprisonment.

2. On 4 December 2017, the appellant pleaded guilty to the offence of defilement and, two months later, to three offences of what is generally described as the charge of "grooming" or exploitation of a child. At the time of the offence of defilement, the appellant was nineteen years of age and the complainant girl fourteen, and she was thirteen at the time of the exploitation offences.

3. The appeal is against the severity of the sentence. The appellant complains that the trial judge made a wrong assessment of the gravity of the offence and that he identified an inappropriately high headline sentence. A discrete ground of appeal relates to the import of a victim impact statement under s. 5 of the Criminal Justice Act 1993 (the "1993 Act") in the sentencing process. Although not initially advanced as a ground of appeal, the appellant has sought to further complain that insufficient regard was had to the penal objective of rehabilitation in the way in which the sentence was structured. It was specifically suggested at the oral hearing that the trial judge ought to have considered partly suspending the sentence he was minded to impose to incentivise the appellant's continued desistence and rehabilitation, and that the failure to do so was an error.

Outline of the offence

4. The offences took place over a period of approximately five months, between December 2011 and May 2012. The complainant and the appellant had met through mutual friends in December 2011, and almost immediately thereafter the appellant began communication with her *via* Facebook after he had made contact with her by sending a "friend request". Thereafter, they communicated through Facebook, Skype, and SMS on their phones. The Skype communication was *via* video link but no recording was made. The appellant, at all material times, knew the age of the complainant and that she was still at school.

5. Within days of their first Facebook communication, the appellant used sexualised language and behaviour in his communication with the complainant, and the first offence of which he is charged occurred just six days after their first direct communication when the complainant exposed his penis and masturbated on camera and invited her to digitally penetrate herself which she refused to do.

6. The next offences occurred in rapid succession thereafter between January 2012 and February 2012, and involved other episodes of the appellant exposing himself on camera and masturbating himself and, on one occasion he invited the complainant to masturbate herself which she did, but off camera. A number of incidents occurred of the same type which involved the appellant exposing his penis on camera, masturbating himself and inviting and inducing the complainant to masturbate herself which she did on camera.

7. The complainant and the appellant met on one single occasion on 31 March 2012, on which occurred the offence of defilement. They met in the company of friends and later went alone to the quiet area in a public park where after kissing for a while, the appellant encouraged and induced the complainant to masturbate him, which she did until he ejaculated. They continued kissing and the appellant then put his hands inside her underwear and digitally penetrated her. She asked him to stop and said that it hurt and he did stop when she so indicated. He then encouraged and induced her to have oral sex and placed her mouth on his penis but immediately stopped. It was clear to him she did not wish to engage in that behaviour.

8. The couple did not meet after that event but did continue with the engagement through Skype thereafter for a period until the events next described.

9. In August 2012, the mother of the complainant noticed messages between her and the appellant and the Gardaí then became involved. Considerable delay ensued in the investigation as a result of the requirement to obtain certain information from the United States concerning the IP address of the appellant. He presented himself for charging on 15 November 2016 to facilitate the progression of the case and entered a guilty plea on the day of the trial, although he had indicated a guilty plea four weeks in advance of the trial and this was later confirmed two weeks before the trial.

10. The respondent points to the fact that the case had been returned some twelve months previously and the appellant had not made any admission then or until close to the trial. The trial judge took the view that the plea was not an early plea.

11. The appellant had no previous convictions, he was working and completing his studies as an apprentice electrician, he had not come to the attention of the Gardaí before the incident or in the period between August 2012 and the date of trial. Very positive references were adduced on his behalf at the sentence hearing and the evidence is that he is cooperative and mannerly in his engagement with prison staff at Midlands Prison where he was transferred on 13 February 2018. He is on enhanced privilege level at the prison and has received no disciplinary reports since his committal to prison.

12. The victim furnished a victim impact statement which we will deal with in more detail later in this judgment but it is clear from her statement and her direct evidence at the hearing that the incidents had a profound effect on her, that she experienced feelings of guilt and a loss of trust in her relationships with others, and that, having regard to her age, her sexual development and ability to sexually engage with others was negatively impacted.

The sentencing hearing

13. The appellant had pleaded guilty to a number of charges on the indictment, described by the sentencing judge as "a representative sample", and it was indicated at the arraignment that this was acceptable to the Director of Public Prosecutions on the understanding that sentencing would take place on a "full facts basis". The appellant was accordingly to be sentenced for those offences to which he had pleaded guilty, but the sentencing court could take account of the context within which the offending conduct in respect of each count had occurred, and in particular whether the offence to which the guilty plea was entered was an isolated incident or part of a course of similar type offending committed over time.

14. After hearing submissions and evidence, the trial judge delivered his judgment on 7 March 2018. The evidence at the sentencing hearing established that the last communication between the accused and the complainant was on 31 July 2012, and it is clear that it was the intervention of the mother of the complainant that had put an end to the engagement between them. The trial judge heard evidence that after the single meeting between herself and the appellant in February 2012, the complainant was angry with him, but that the communication started up again thereafter.

15. The trial judge heard that the accused had family support, that his father was present in court with him, that he had studied at third level. He has been a great financial and moral support to his mother. The trial judge heard that the appellant had, in his teenage years, become somewhat reclusive and lived a self-isolating life, and had come to live in what was described as a "virtual world" at home and that he had few friends and supports outside of home.

16. The complainant gave evidence at the hearing and said at the time the incidents happened she was suffering from low self-esteem and "vulnerability issues" and was feeling quite low within herself. She said that the accused quickly gained her trust because he was older than her and that she came to confide in him her secrets, fears, and worries. She said that in her personal turmoil, "he made me feel special" and that he had taken advantage of her vulnerabilities at a time when she needed support of a different type.

17. It is clear from the evidence given at the sentencing hearing that the complainant and the accused engaged with one another in regard to their difficulties in their day-to-day personal and family lives, and that the sexually charged material came into the conversations in that context. But the complainant herself correctly identifies what, in truth, happened, and that she developed a trust and friendship with the accused which from his perspective she now believes was not genuine, was self-serving, and damaging to her. That breach of trust is a factor, as in many of these cases, which merits comment.

18. At the appeal hearing, counsel for the appellant argued that while the events are serious, the grooming or exploitation was not like some of those which come before the courts which involve sophisticated targeting or manipulation of identity, and that, from that point of view, the incidents were not of the most serious type.

19. We would observe, however, that the incidents are of a most serious type involving direct sexual grooming of a very young girl, that the appellant knew of her personal vulnerabilities and lack of self-esteem, and that the complainant herself correctly describes the dynamic between them being one of breach of trust. The communication was, in our view, a deliberate and sustained choice by the appellant to gain the trust of a young and vulnerable person for his own gratification. In that regard, the crimes of which the accused has been convicted are crimes of the utmost seriousness because of the age of the complainant, and that age, her vulnerability and the likely impact on her sexual development are factors which, from any perspective, must weigh heavily in a sentencing decision.

20. It is the act itself, the act of grooming in an explicit, self-serving, and highly sexualised way of a child at the beginning of puberty, and the subsequent defilement of the young girl which must be seen as the central focus of the sentence, and not the fact that, unfortunately, society has become aware of a degree of depravity in certain grooming and defilement cases which involve gross manipulation of identity and gross contrivance of a highly sophisticated type by which a young person is manipulated. The absence of sophistication or contrivance will not, it seems to us, result in a reduction in a headline sentence, although its presence may add to the length of the sentence, as it may be seen as an aggravating factor.

The Central Criminal Court's decision

21. The trial judge considered that the plea of guilty was not to be treated as an early plea as the case had been returned for trial some twelve months previously and at that point, the appellant had not made any admission of wrongdoing.

22. He also noted that the complainant had, in a sense, acquiesced to a degree in the sexual contact but that she was too young to consent, and that her perceived acquiescence been procured by manipulation over a period of time and, in that regard, he noted also her very vulnerable age.

23. The trial judge accepted that the appellant was of good character, had a good work record, and had no previous convictions, and the evidence led him to believe that it was improbable the appellant would offend again.

24. The trial judge identified a headline sentence of nine years' imprisonment and, taking account of mitigation, reduced this to six and a half years on the defilement count and five years on the count of exploitation, to run concurrently.

25. The trial judge indicated that he had taken into account the totality of the offending in coming to his final view.

26. With regard to the victim impact statement and the oral evidence given by her at trial, the trial judge expressed a view regarding the legislative provisions by which an injured party is entitled to give evidence of the effect of a crime on him or her: That the courts

are required to take into account the adverse effects of the crime and that the legislature "requires the imposition of a penalty which might be higher than that applicable" before the legislation made provision for victim impact evidence, and that the common law position was different. He expressly said that the legislation was not declaratory of the common law.

Headline sentence
27. The appellant argues that the trial judge erred in law and in fact in identifying a headline sentence of nine years in all of the circumstances. The respondent supports the headline sentence which, it is argued, was well within the range available for the offence and that no error of principle is to be discerned.

28. Both sides, but particularly the appellant's side, have referred us to, and have placed reliance, upon comparators. We have previously emphasised that it is important that comparators are correctly used. In *People (DPP) v. Maguire* [2018] IECA 310 we commented that:

> 97. Comparators are a useful tool in sentencing cases, both at first instance and at appellate level, providing that their limitations are acknowledged and understood. It is trite, and a statement of the obvious, to observe that no two cases are the same and that every case depends on its own facts. Moreover, account must be taken of the ability of judges to exercise legitimate judicial discretion in the imposition of sentences within accepted margins of appreciation. This discretion comes into play at various levels ranging from determining the gravity of the case, to deciding on the extent of mitigation to be afforded, to determining how pursuit of the recognised objectives of sentencing should be balanced in the circumstances of the individual case, to choosing between available penalties and to the structuring of the sentence to best deliver a just and proportionate sentence. Accordingly, any temptation to superficially compare cases, and outcomes, in the hope of discerning a manifestly consistent approach must be resisted as involving a largely meaningless quest. Equally, cases proffered as comparators do not represent binding precedents, at least in terms of assessments of gravity, or the extent of allowances to be afforded in mitigation, or as to outcomes. A judgment in a case offered as a comparator might, of course, have concurrently determined a novel issue of law, and if so could represent a binding precedent for future cases with respect to that issue of law, but not as to factual determinations or outcomes.
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> 98. All of that having been said, comparators can provide evidence of discernible trends in sentencing for different types of offences, and non-binding, but none the less valuable, guidance in terms of how courts in previous cases may have variously approached different aspects of the sentencing exercise, and indications of what weight may have been afforded to different relevant factors.

29. More recently, in *The People (DPP) v. K. C.* [2019] IECA, we said:

> "93 […] We agree with the respondent that the two cases produced by the appellant as comparators (or three if the O'Regan case is included) are of little assistance. Direct comparisons are largely meaningless, as no two cases are sufficiently similar for that to represent a legitimate exercise. Moreover, while a representative series of comparators can legitimately be presented as indicating a trend in sentencing, to rely in that regard on just two or three cases will in many cases be insufficiently representative for that to be a meaningful exercise. There has to be a representative sample. If the offence(s) concerned was/were uncommon, and two or three cases was all that could be found following diligent research, such a small sample might be acceptable. However, that is not the case here. It is a regrettable fact that indecent/sexual assault and rape offences, particularly in a situation where the abuser has been a family member and/or in a position of trust, have been, and seemingly continue to be, very common and there are numerous judgments dealing with sentencing for this type of offending. In saying this we are not to be taken as discouraging the use of comparators. On the contrary, we unreservedly welcome the assistance that proper recourse to comparators may provide. The point we wish to make is that it is important that they are used correctly and that they are not relied upon inappropriately."

30. The parties in the present case have invited direct comparisons with the circumstances of the case under appeal. Bearing in mind the caveats we have expressed concerning how to appropriately use such material, we will consider and engage with the submissions that have been made to us based on comparators *de bene esse*.

31. The first observation we would make with regard to the headline sentence is that the offence of which the appellant was convicted was that under s. 2(1) of the 2006 Act, which provides as follows:

> "Any person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment."

32. A lower range of potential sentences is provided for an offence committed under s. 3(1) of the 2006 Act, which involves the defilement of a child of between fifteen and seventeen years.

33. To be potentially relevant, any comparators relied upon should, in general, relate to sentencing for an offence or offences under s. 2(1), and not s. 3, of the 2006 Act. Cases involving sentencing for s. 3(1) offences are likely therefore to be of very limited value in the present case.

34. Despite this, the appellant seeks to place reliance on the judgment of Mahon J. in *The People (DPP) v. Farrelly* [2015] IECA 302, where the conviction was of defilement of a child under seventeen years of age, contrary to s. 3 of the 2006 Act. The appellant was aged twenty-seven, and the injured party sixteen, and initial contact was made through Facebook and exchanges of telephone text messages. The complainant disclosed her age to the appellant, and they engaged in sexual intercourse at their first meeting and on subsequent occasions. That appellant had no relevant previous convictions but did have a previous conviction for drunk driving and road traffic matters. He was sentenced to three years' imprisonment on each of the counts with a suspended sentence of twelve months.

35. The Court of Appeal considered that there was an error in principle in the sentence and that the correct sentence was two years' imprisonment, as the circumstances did not warrant a custodial sentence of the length directed. The three-year sentence was set aside and replaced by a sentence of twelve months, the unserved period of which was suspended. The Court took account of the fact that no aggravating factors were identified, that the accused had a number of testimonials, including a very positive report from the Governor of the prison in which he was detained, and that it was desirable that he would return to the active fathering role which he had taken to his young children. The age of the complainant was a factor, as was the fact that the trial judge appeared to have contemplated a non-custodial sentence as a real option but did not fully evaluate that option in the course of his sentencing decision. There was a plea of guilty, and both parties were relatively young.

36. We regard that comparator as offering relatively little assistance in the determination of the headline sentence in the present case.

The importance of age

37. Quite apart from the questionable utility of any direct comparison, the fact that the Oireachtas has imposed a maximum sentence of life imprisonment for defilement of a minor under s. 2(1) of the 2006 Act means that the present case must be regarded as different in quality from the charge of defilement under s. 3(1) of the 2006 Act and that whether the child falls into the age range identified in s. 2(1) or s. 3(1) of the 2006 Act is a central factor in considering the gravity of the crime and the appropriate headline sentence.

38. We agree with the proposition advanced by counsel for the respondent in reliance on the authority of *The People (DPP) v. Conroy* [2018] IECA 350, that the age of the child is a core consideration in assessing the seriousness of the offence. In that case, the complainant was fourteen and a half years, approaching the upper age limit for an offence under s. 2 of the 2006 Act. At para. 12, Birmingham P. noted that the injured party was close to her fifteenth birthday and that, had she been fifteen, the maximum sentence would have been reduced from life to five years. In that context, he considered that the correct approach would be to start at a pre-mitigation sentence of not more than five years, or perhaps lower. There, the appellant had been sentenced to four years, with twelve months suspended, for an offence contrary to s. 2 of the 2006 Act. The offence involved oral sex and manual masturbation. The complainant had drunk a lot of alcohol and she and the appellant had never met previously, although they had been friends on Facebook and had friends in common. The contact on the day in question happened because she contacted him by text as he was the only person she knew who had a car and, because she had been drinking, she did not wish to phone her parents. He was nineteen and she was nearly fifteen.

39. Birmingham P. considered that there were aggravating factors present in the offence as the injured party was inebriated and obviously unwell and had relied upon the appellant to take care of her in that vulnerable state. He noted an apology by text, the admissions and co-operation with Gardaí, and the fact that the young man had never been in any kind of trouble before and showed indications of deep remorse. He also noted certain personal factors in the make-up of the appellant regarding his intellectual abilities and that he had left school very early. The court nominated a pre-mitigation sentence of four years, reduced to two years after taking mitigation into account.

40. While it might be said that the acts of sexual engagement in *The People (DPP) v. Conroy* are broadly similar to those in the present case, in that there was only one incident of sexual contact, and as the accused had encouraged the young girl to perform oral sex on him. The accused in the present case had attempted to achieve that result, but had not succeeded. Nonetheless, it seems to us that the essential difference between *The People (DPP) v. Conroy* and the present case is the age of the injured party, and while four years was regarded as the headline sentence in that case, is it clear that Birmingham P. regarded the age of the young girl as critical and that the incident had occurred at a time when she was close to the age at which the maximum sentence would have been much lower. There was also no element of premeditated grooming or manipulative behaviour leading to the act of defilement.

41. The present case involves deliberate sexualisation and manipulation and breach of trust of the complainant over a period of six months while she was thirteen and the defilement offences must be seen as having arisen in that context which, in our view, makes the offence in the present case qualitatively different from that in respect of which Birmingham P. reduced the sentence in *The People (DPP) v. Conroy*.

42. The appellant also relies on the decision of the Court of Appeal in *The People (DPP) v. J. S.* [2015] IECA 254, in which Edwards J., giving judgment for the Court, helpfully reviewed the case law under s. 3 of the 2006 Act. There, the accused was sentenced to six years in respect of an offence under s. 3 of the 2006 Act to which he had pleaded guilty. There were three separate victims, all of them teenagers, and contact was made through a social networking website called "Tagged". The Court of Appeal considered that the trial judge erred in principle and that the offences were to be treated as lying in the mid-range rather than high-range, that the trial judge had failed in the exercise of his discretion regarding a suspension of portion of the sentence and afforded insufficient discount from mitigation. Because there were three victims, the net sentence of eighteen months after mitigation, taking the total matter into account, warranted a higher sentence of three years.

43. We consider that the reliance by the appellant on that judgment for the purposes of identifying the headline sentence in the present case is not appropriate, as, in *The People (DPP) v. J. S.*, the girls in each case were aged between fifteen and sixteen. The offences arguably were of a more serious nature as the acts of defilement involved full sexual intercourse and various other sexual acts. It is true that, in that case, contact was had through a pseudonym on a social networking website and that the appellant, at 36, was much older than the victims.

44. The age of the complainant in the present case is very different, as she was a very young girl, barely into puberty, and at an age where the Oireachtas has marked the correct approach to sentencing as carrying a maximum life sentence. The headline sentence identified as three years in *The People (DPP) v. J. S.* does not offer any useful guidance in a context where the statutory maximum is so different. Indeed, if one analyses the judgment in *The People (DPP) v. J. S.*, a sentence of three years is more than half way on the statutory scale between zero and five years for an offence under s. 3 of the 2006 Act, and accordingly, the offences were, in that regard, treated as lying on the mid to serious range.

45. Counsel for the respondent argue that the most relevant comparator is the decision of the Court of Appeal in *The People (DPP) v. D. C.* [2015] IECA 256 where the offence involved grooming and defilement, and sexual assault. There, a six-year sentence was imposed with two years suspended following a plea of guilty on a count of sexual exploitation of a child by inducing him to engage and participate in a sexually indecent or obscene act contrary to s. 3 of the 1998 Act. There, contact had occurred through an adult dating website where the injured party had obscured the fact that he was under eighteen. Communication had occurred by phone and text messages of a sexualised nature and the injured party, who was fifteen, agreed to meet up with the accused who was then forty years of age with the intention of having a sexual encounter.

46. The sexual encounter was described by the trial judge as "disgusting, disgraceful, horrific, embarrassing and humiliating", and she found that the accused was in a position to and did, in fact, dominate and exploit the young boy by reason of his age, naivety, and innocence. The effect on the injured party was catastrophic and he had attempted suicide.

47. The Court of Appeal reviewed the evidence and considered that the trial judge had attached too much weight to the aggravating factors and had, as a consequence, over-assessed the seriousness of the offence. As Edwards J. said, at para. 18 of his judgment on behalf of the Court:

> "seriousness is to be weighed with reference to both culpability and harm done, and with due regard to the range of available penalties".

48. Further, the Court of Appeal noted that whilst a sentence of up to life imprisonment was available, the starting point of six years was too high. It took account of the fact that there was one meeting, that the sexual contact did not involve physical violence of gross humiliation or degradation or anything penetrative. It also noted that the behaviour engaged in was for personal sexual gratification and not for any form of commercial gain. The Court did note the significant psychological distress of the victim, but that it had relatively little assistance regarding the interplay between the offence and other "personal adversities" which might have contributed to the overall state of distress from which the victim suffered. The sentence was reduced to four years with two years suspended.

49. The Court of Appeal did not accept the argument by the appellant that the trial judge had fallen into error in failing to have regard to the fact that the injured party had inputted a wrong date of birth of his own initiative when accessing an adult dating website, and that the appellant was not to be penalised for this. The Court also considered that sufficient discount was given to adequately reflect the mitigating factors.

50. In our view, a significant and material difference between the result in *The People (DPP) v. D. C.* and the present case is the age of the victim and the fact that, unlike in the present case, the sexual contact involved no penetration or attempt at penetration. The offence in *The People (DPP) v. D. C*. was one of sexual assault, not defilement.

Conclusion on headline sentence

51. We have found the decision in *The People (DPP) v. D. C.* to be of only limited assistance. It was helpful in terms of the correct general approach to cases of this type, but it is clearly distinguishable on its facts in numerous respects, not least having regard to the age of the victim and the attempt at penetration.

52. Having considered the culpability of the offender's conduct, and the harm done, we are satisfied that the trial judge did, in fact, over-assess the gravity of the case and, in consequence, erred in fixing a headline sentence of nine years, which was too high. That positions the offence in the high range of offending and, in our view, the correct approach ought to have seen it placed in the mid-range.

The issue of s. 5 of the 1993 Act

53. We referred earlier to a further discrete complaint, potentially relevant to the fixing of the headline sentence concerning a comment by the trial judge that a more severe sentence might be merited in a case where the victim has made a victim impact statement under s. 5 of the 1993 Act. What the sentencing judge, in fact, said was:

> "One takes into account the effects upon the victim as required by legislation. I've long taken the view which requires courts to take into account the adverse effects of a crime on a victim is not something declaratory of the common law, but requires the imposition of a penalty which might be higher than that applicable before that change in law was brought about."

54. Section 5 of the 1993 Act, as substituted by s. 4 of the Criminal Procedure Act 2010, reads as follows:

> "(1) This section applies to—
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> (a) a sexual offence within the meaning of the Criminal Evidence Act 1992,
>
> (b) an offence involving violence or the threat of violence to a person,
>
> (c) an offence under the Non-Fatal Offences Against the Person Act 1997, and
>
> (d) an offence consisting of attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b) or (c).
>
> (2) (a) When imposing sentence on a person for an offence to which this section applies, a court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed.
>
> (b) For the purposes of paragraph (a), a 'person in respect of whom the offence was committed' includes, where, as a result of the offence, that person has died, is ill or is otherwise incapacitated, a family member of that person.
>
> (3) (a) When imposing sentence on a person for an offence to which this section applies, a court shall, upon application by the person in respect of whom such offence was committed, hear the evidence of the person in respect of whom the offence was committed as to the effect of the offence on such person.
>
> (b) – (e) […].
>
> (4) Where no evidence is given pursuant to subsection (3), the court shall not draw an inference that the offence had little or no effect (whether long-term or otherwise) on the person in respect of whom the offence was committed or, where appropriate, on his or her family members.
>
> (5) – (6) […]. "

55. The contents of a victim impact statement, or evidence heard from a victim, is simply part of the general body of evidence relevant to sentencing issues receivable at a sentencing hearing. It has specific potential relevance in terms of the assessment of gravity, in as much as gravity is assessed with reference to the offender's moral culpability and the harm done. Evidence, whether given *viva voce*, or by means of a statement as provided for in the statute, as to the impact of the offender's conduct on the victim, assists the sentencing judge in determining the degree of harm done and the weight to attribute in the assessment of the gravity of the case. It was always the law that "harm done" was a factor to be considered in the assessment of gravity. What s. 5 of the 1993 Act did was give the victim, in a case to which the section applies, a voice in the proceedings by allowing him or her to articulate at the sentencing stage in his or her own words the effect of the offence. However, victim impact evidence enjoys no elevated status and no particular or special weight is to be given to it as a consequence of s. 5 of the 1993 Act.

56. The position is correctly set out by Flood J. in *The People (DPP) v. M. C.* (Unreported, High Court, 16 June 1995), at pp. 13 and 14:

> "The court, where evidence has been heard under the provisions of section 5, has a duty to take this evidence into account in determining the sentence to be imposed on an accused. This evidence is to be weighed in the same way as any other portion of evidence considered by the court in the sentencing hearing. It is also important to note that any evidence given under section 5 is subject to the same rules as to admissibility, and weight, as any other evidence in a criminal case. The fact that an injured party has elected to give evidence pursuant to section 5 is not to be treated, of itself, as either an aggravating or a mitigating factor in determining sentence. Section 5 cannot, and does not, purport to make any change to the manner in which a court is obliged to carry out its constitutional duty to independently select an appropriate sentence for a particular accused."

57. Professor O'Malley, in *Sentencing Law and Practice* (3rd ed, Round Hall, 2016), at para. 10.14 says as follows:

> "The terms of s. 5 of the 1993 Act suggest that the sole purpose of victim impact evidence is to assist the sentencing court. It is a matter which the court, by virtue of that statutory provision, is obliged to take into account. Courts are not explicitly obliged to increase sentence because of victim impact, although they may clearly do so".

58. We would comment with respect to the last sentence in this short passage from Professor O'Malley's text that an increase could be contemplated only where receipt of victim impact evidence has resulted in the court having a clearer and better appreciation of the harm done. It would not be justified simply because the victim has given impact evidence.

59. We have considered carefully the impugned portion of the trial judge's sentencing remarks. Although it is somewhat to speculate, we consider it possible that the trial judge may have meant to convey the idea that the clarity available to sentencing judges since the enactment of s. 5 of the 1993 Act has resulted in the trial judge being in a better position to fully assess the gravity of a criminal act, and consequentially might lead to higher sentences in some cases where victim impact evidence is available. In our view, the trial judge merely expressed himself infelicitously. Insofar as his actual words are open to the literal interpretation sought to be attributed to him by counsel for the appellant we feel obliged to conclude that the trial judge's *ipsissima verba* reflect, *prima facie*, an error of principle as to the intended operation of the section.

Mitigating factors

60. The view has been expressed that when a complainant is between fifteen and seventeen years, a lower sentence might be warranted if the injured party had consented to the sexual act or acts concerned. Professor O'Malley in *Sexual Offences* (1st ed., Round Hall, 1996), at p.107, notes that the maximum sentence of five years for unlawful carnal knowledge under the then Criminal Law Amendment Act 1935 "will generally attract a considerably lower sentence if there is evidence that the female consented". He reiterates his comment regarding consent as a mitigating factor in *Sexual Offences* (2nd ed., Round Hall, 2013), at p. 600:

> "[A]ctual consent on the part of the protected person is a mitigating factor, and it may carry significant weight when both parties are in the same group."

61. He suggests that such principle might be inferred from *The People (Attorney General) v. Kearns [1949]* IR 385 "although the issue in that case was mistake as to age".

62. In the present case, the appellant argues that there was a degree of consent by the complainant, and that this should be viewed not so much as a mitigating factor of the type that would suggest a discount from the headline sentence, but rather as a factor tending to reduce the appellant's moral culpability and the gravity of the offence. We do not consider that a degree of alleged "consent" by the complainant could operate as a mitigating factor to reduce the appellant's moral culpability in the circumstances of the present case. The complainant could not, as a matter of law, have given any form of consent to the offences of which the appellant has been convicted. The comments of Professor O'Malley relied on by the appellant do not, in our view, offer much assistance when a complainant is barely fourteen years of age and where apparent consent is obtained through prior manipulation, as in the present case.

63. The appellant makes the further complaint that the trial judge erred in failing to partly suspend the sentence in order to encourage continued desistence and to incentivise rehabilitation. We are satisfied that the decision to suspend some or all of the sentence was entirely a matter for the discretion of the trial judge. He would not have been open to criticism if he had exercised that discretion but equally, he is not to be criticised for not having done so. We find no error of principle on that account.

Child Exploitation Offence

64. Whilst the appeal was focused on the defilement sentence, some argument was had regarding the sentence of five years on the exploitation offences, and because the trial judge fixed the sentence taking into account the totality of the offences.

65. The appellant relies on the decision of *The People (DPP) v. Hussain* [2015] IECA 22, in which the Court of Appeal gave useful guidance as to the relevant factors to be considered in sentencing under s. 3 of the 1998 Act. There, the Court identified a range of offending which might be characterised as child exploitation to include prostitution, child pornography, rape, buggery, aggravated sexual assault, and incest. It was argued that the gravity of the offences in the present case is on the lower end of the scale and did not amount to anything akin to exploitation of a child for commercial gain. The Court of Appeal was clear that the gravity of the offence ought to be considered within the wide definition of sexual exploitation encompassed in s. 3 of the 1998 Act.

66. We note that certain remarks of Edwards J., giving judgment on behalf of this Court in *The People (DPP) v. D. C.*, at para. 21, contain a similar proposition:

> "Accordingly, the potential life sentence available covers cases that could range from non-contact voyeuristic conduct such as the opportunistic photographing of a child in a state of undress, engaged in for the purposes of producing a single child pornographic image, not for commercial use or dissemination, taken for the offender's personal sexual gratification only, and involving a single victim who might not even be aware that he or she was being so exploited: to forms of exploitation involving grossly depraved and humiliating physical sexual conduct associated with gratuitous physical or mental violence, torture, or degradation and causing profound suffering to the child or children concerned, involving outrages repeated many times, involving widespread dissemination, involving major commercial gain, and perhaps involving many concurrent victims."

67. The appellant argues that the offence of which the accused was convicted in the present case falls far short of the type of

exploitation to which the 1998 Act applies, as explained in *The People (DPP) v. Hussain* and in *The People (DPP) v. D. C.* and that the five years on the counts of exploitation in the present case cannot be justified at the level of principle. It was also argued that the trial judge inappropriately assessed the type of exploitation to which the accused pleaded guilty, and that his approach to that offence wrongly influenced his approach to the offence on the defilement charge.

68. We agree that the exploitation of which the appellant was convicted is not of the grossly depraved type to which Edwards J. refers, and that the appellant did not use or seek to use the material for commercial gain. However, there was a sustained sexual exploitation and gaining of trust of the victim over a period of six months, and the befriending of the victim, the repeated communication through Skype of a highly sexualised nature, and the age of the victim, all position the present case in the mid-range in respect of the exploitation charge, notwithstanding that there was no recording, dissemination, no commercial use of the material, no degradation or acts of depravity.

69. The grooming offences are of a more serious type from that the subject of the decision of the Court of Appeal in *The People (DPP) v. D. C.* as the contact between the accused and the complainant was sexualised in nature and the accused encouraged a very young girl to display herself to him, to masturbate on camera, and, in our view, the circumstances in *The People (DPP) v. D. C.* are insufficiently similar for it to be of meaningful assistance here. In our view, the offences did lie in the mid-range of the exploitation offences. We therefore find no error of principle on the part of the trial judge in assessing the gravity of these offences.

Decision on the appeal

70. In circumstances where we have identified errors of principle on the part of the trial judge leading, we believe, to a sentence on the defilement count under s. 2(1) of the 2006 Act that was too severe, we will quash the sentence imposed by the court below, and proceed to a re-sentencing of the appellant.

71. As is our usual practice, both sides were invited to submit to the Court, on a contingent basis, any additional material that they would wish to have taken into account in the event of a re-sentencing. The appellant has provided additional information to the effect that he is doing well in prison and we will take that fully into account.

72. Having regard to all of the circumstances of the case, it seems to us that the correct headline sentence, bearing in mind that the maximum sentence is life imprisonment, and bearing in mind the age of the child, is seven and a half years. In arriving at this view, we have carefully considered and have taken fully into account the culpability of the offender and also the harm done, as revealed in the evidence, including the victim impact evidence.

73. The victim, in the present case, gave an articulate and insightful victim impact statement and gave evidence which was equally insightful. She showed a remarkable degree of insight into her own vulnerability and the way in which the appellant used that to his advantage and, as she put it, "to gain what he wanted", to manipulate her in the way he did. She said that after her mother discovered the evidence of the online communication between them, their relationship became difficult but that she and her mother have rebuilt the relationship now although there was a lot of tension in their household for quite a while.

74. She said she felt "ashamed and embarrassed", and although people had made it clear to her that nothing that happened was her fault, that she could not see that for a long time. Again, with remarkable insight and eloquence she says "it's something that happened to me and not that I made happen". She says she is protective of younger people in her life, and that she still has to deal with feelings of anger, resentment, hostility, distress, and insecurity and that she is suspicious of people and will still question their motives.

75. She is now in a relationship with a boyfriend she cares for, but says that it took a long time for him to prove himself to her, and that she still, from time to time, needs reassurance from him. She said that she still can be "transported back" to a time when she is thirteen or fourteen years old when she sees or hears somebody that looks like the appellant and that "suddenly I am that insecure young girl again and no idea what she's doing and a craving for someone to come along and help". These memories bring her unease and fear from which she suffers a physical pain.

76. The complainant has also shown a considerable degree of personal strength in her efforts to work towards recovering from the incidents and overcoming the impact that they had on her. She says that she has "gained responsibility in taking control of how I am feeling" and that she is open in her relationships and now much more able to take into her own hands her response to her life and the ways in which she can achieve personal happiness.

77. The effect of the criminal acts on her were grave and long lasting and she has shown remarkable fortitude and strength of character in the way in which she has attempted to come to terms with these crimes which were inflicted on her at a very young and vulnerable age and which impacted on her enjoyment of her childhood and early adulthood. She is to be respected and admired for her clarity of thought and her fortitude.

78. The reduction of the headline sentence proposed by this Court does not fail to recognise the gravity of the impact of the offence on her, but reflects more broad and general principles of sentencing, including the fact that sentencing performs a number of functions in society, including deterrence, both general and specific, protection of vulnerable persons, and a factor that weighs heavily in the present case, imports an obligation on the sentencing court to consider the risks of re-offending and the desire, in furtherance of the general common good and of the welfare of the accused, to facilitate and encourage the rehabilitation of that person and his or her ultimate re-entry into society.

79. To take account of mitigation in general, we consider that it would be appropriate to reduce the nominated headline sentence of seven and a half years' imprisonment to a term of five years' imprisonment. This is to take account, inter alia, of the good character of the accused and the fact that he had a good personal and work history leading up to the offence and had never, either before the offence or thereafter, in the long period of time it took the case to come on for trial, come to attention of the Gardaí.

80. This Court agrees with the trial judge that the appellant's plea was not an early plea of guilty. Nonetheless, the trial judge was correct that he is entitled to some mitigation for indicating an intention to plead guilty, and then actually pleading guilty, having regard to the great distress that was likely to be caused to the complainant if she had had to give evidence.

81. We note that the accused did write a letter to the complainant in which he took full responsibility for his acts, and this, albeit that it was late, does present as genuine remorse, and because in this case, as in many cases, the complainant's feelings of guilt, objectively speaking unjustifiable feelings, may well have been somewhat alleviated by the fact that the accused has taken full responsibility for the wrongful acts he committed against her.

82. We note the argument made by counsel for the respondent that the fact that an accused in a sexual exploitation or defilement case was previously of good character might not be a factor of particular importance in cases where the event giving rise to the conviction occurred over a long number of months. In that context, notwithstanding the fact that the accused did not come to Garda attention prior to the incident in question, he did engage for a period of almost a year in wholly unacceptable, criminal, intrusive, and invasive communication with a very young girl in circumstances where he knew her age and came to know her personal vulnerabilities and frailties, and, to that extent, he cannot be described as a person of good character to whom is to be attributed a single wrongful criminal act. The offences of which the accused was convicted are offences which took place over a period of time against a young girl whose sexual development was impacted in a most serious and criminal way, and that is the central element of the crime of which the accused was convicted.

83. We accept that the difference of age between the complainant and the accused is not as high as in other cases, but the fact remains that the accused was an adult and the complainant a young child barely into puberty.

Suspension of part of sentence?
84. It remains to be considered whether it might be appropriate in the circumstances to suspend in part some of the post mitigation sentence of five years in order to incentivise future desistence and continued reform and rehabilitation.

85. The suspension of some or all of a sentence may incentivise continued desistence in an offender who is at low risk of re-offending and his continued reform and rehabilitation. Having regard to the fact that the evidence overwhelmingly suggests that there is little risk of reoffending, that the appellant remains of good character, and the fact that he sustained a good working and family life after the offences had come to light, and during the long period of time before this case was brought to trial, we consider that this is a case in which the suspension of a portion of the post-mitigation sentence of five years is correct. We will suspend one year of that sentence for a period of one year following the appellant's release subject to the appellant entering into his own bond in the sum of €100 and agreeing to submit to supervision by the Probation Service during the period of the suspension, as well to as the usual condition to keep the peace and be of good behaviour.

Conclusion and summary
86. For the reasons stated the sentence on the defilement charge is to be reduced to five years with the last year suspended, to run concurrently with the sentence on the exploitation charges.