**THE COURT OF APPEAL**

**Birmingham J.**
**Mahon J.**
**Edwards J.**

**CCA 84/12**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**M.A.F.**

**Appellant**

**Judgment of the Court delivered on the 21st day of January 2016 by Mr. Justice Edwards.**

1. In this case on the 21st of February 2011 the appellant pleaded guilty before the Central Criminal Court to five counts of sexual assault of a child contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001, and to one count of oral rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990.

2. On the 28th of November 2011 the appellant pleaded guilty before the same court, and upon the same indictment, to a further eight counts of oral rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, and a further two counts of sexual assault of a child contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001.

3. The appellant was sentenced on the 13th of February 2012 to fifteen years imprisonment in respect of each of the alleged oral rapes, and ten years imprisonment in respect of each of the sexual assaults, all to run concurrently and to date from the date of sentencing, with the final three years of the fifteen years sentences being suspended upon conditions.

4. The appellant appealed against the severity of his sentences on eight grounds specified in his Notice of Appeal. At the hearing of the appeal before this Court counsel for the appellant addressed us on the basis that each one of the individual grounds relied upon fell to be treated under one or other of two broad headings, i.e.: (i) that the sentencing judge had erred in principle in over-assessing the seriousness of the offending behaviour and in doing so had located the case at a too high a point on the scale of potential penalties before consideration of mitigating factors; and (ii) that the sentencing judge had failed to take sufficient account of the mitigating factors established in evidence in the case.

5. Following the hearing of the appeal we retired to consider our decision. We returned to court later on the same day and in short *ex tempore* remarks Edwards J, speaking for the Court, indicated that we were disposed to uphold the appeal with respect to the fifteen year sentences for the s.4 rapes, and to quash those sentences. However we were not disposed to interfere with the ten year sentences for the sexual assaults. It was stated that the appeal in respect of the fifteen year sentences for the s.4 rapes was being allowed because counsel for the appellant had persuaded the Court that the sentencing judge in assessing the seriousness of the offending behaviour with reference to the scale of available penalties and before consideration of mitigating factors had located the case at the wrong point on that scale having regard to sentences imposed and upheld in other cases. It was further indicated that the Court was not persuaded that the sentencing judge had failed to take sufficient account of mitigating factors in the case. It was stated that the Court would give more detailed reasons for its conclusions at a later stage. We will now give those detailed reasons.

6. Before doing so, however, it is necessary to record that the Court proceeded to re-sentence the appellant on the oral rape counts, substituting sentences of thirteen years for the sentences of fifteen years originally imposed, and suspending the final three years of those thirteen year sentences.

**The Facts of the Case**

7. All but one of the counts referred to the abuse of one victim, K., who was aged 8 at the time the offending behaviour commenced. One count of sexual assault referred to a sexual assault on the first victim's sister, R., who was aged 11 at the time of the offending behaviour. The offending behaviour occurred for the most part in the victims' family home, although a number of the offences variously took place in the appellant's flat, the victims' grandparents' home and at a house belonging to an aunt of the victims.

8. The appellant was in a relationship with the victims' mother, in circumstances where unhappy differences had arisen in her marriage to the victims' father, and they had separated. The victims' mother had met the appellant through an internet chat site. A relationship developed between them, and from an early stage of this relationship the appellant commenced staying at the victims' family home. The abuse of K began within weeks of the appellant commencing to stay.

9. The various abuses the subject matter of the charges were perpetrated by the appellant while babysitting for the victims' mother while she was at slimming classes or in circumstances where he had otherwise been entrusted with their care while their mother was out and engaged in other activities.

10. In brief the offending behaviour with K consisted of touching of the victim's vaginal area, rubbing his fingers up and down her vagina while attempting to penetrate her digitally and/or requiring her to take his penis in her mouth and suck it. Typically he would force his penis very far back into K's throat, which she found very sore. He also on occasion placed his penis under her vagina and told her to move up and down, all the while rubbing his penis against her vagina as she moved. The appellant's usual modus operandi was to touch K's vaginal area by placing his hands down her trousers or other clothes. However, occasionally he required her to remove all of her clothing and then molested her. The evidence was that on several occasions the appellant also accessed internet child pornography in the presence of K. In her statement of evidence, as recounted to the sentencing court by the investigating garda, K described *how "the stuff on the computer"* was *"about little girls being videoed and it would show the little girls and the he would always tell me, always put it up and tell me to do this and tell me to do that."* On occasions the abuse of K was accompanied by threats. She stated to Gardaí that she had been scared to tell the appellant that she did not want to take his penis in her mouth lest he would do anything, because he had said to her that if she told anyone he would hit her. On another occasion the appellant told her that if she told anyone she would never see her mother again. The offending with K happened on a very regular basis from

November of 2008 until September 2009. It ceased in circumstances where K did eventually disclose to her mother that the appellant had been abusing her, the mother having become suspicious shortly before that after finding blood on K's underwear.

11. The sexual assault of R took place in May of 2009 at the family home. R was in the kitchen and had gone to the sink to get a drink of water. The appellant came up behind her and started touching her around the breast area. He rubbed his hands over her breasts, while saying to her "oh, I wish I could make you come". As he was doing so he was pushing himself up against her, moving closer to her against the counter. R told him to stop and that she had to go to bed. Later he came up the stairs, knocked on her door and said he was sorry. He then went out again, and she went to sleep. R disclosed the incident to her mother once K had made her disclosures.

12. The appellant was arrested following the making of the complaints and was detained and questioned. In the course of being interviewed he made a number of admissions. Following the appellant's release from detention a file was sent by Gardaí to the Director of Public Prosecutions, who directed that a prosecution be commenced. In the meantime the appellant had left the jurisdiction. He required to be returned on foot of a European arrest warrant for the purpose of being charged and placed on trial. The indictment as initially preferred contained 44 counts. The appellant offered pleas to six counts on the 21st of February 2011. It is accepted that those pleas were entered on the first opportunity. However, pleas to just six counts were not acceptable to the Director of Public Prosecutions. In the circumstances the matter was then adjourned to the 28th of November 2011 for trial in respect of the remaining counts on the indictment. On that date the appellant pleaded guilty to a further ten counts, and this was acceptable to the Director of Public Prosecutions.

**The Victim Impact Reports**
13. In a victim impact statement K, who was by then aged 11, indicated, *inter alia*, that after the disclosures everyone at home was upset and she felt guilty that people were upset. She blamed herself. Notwithstanding the appellant's arrest, she worries that he might come back and take her. She feels scared if anyone mentions his name. Her head gets sore when she thinks about what happened. She finds it hard to concentrate on her work at school and is worried about failing her tests because even though she tries hard to do her work she just cannot concentrate.

14. A victim impact statement from R was also placed before the sentencing Court. In it R, who was then aged 14, states, inter alia, that following her disclosure she was very upset and really worried about what was going to happen next. For weeks after, she could not sleep at all and found it hard to go outside because people were asking about the guards being at her house, and she felt that everyone was talking about her. She stated that she had to go to see a psychologist for over a year in an effort to cope with her thoughts and feelings about what happened. Going to psychology helped her realise that what occurred was not her fault, although she had been inclined to blame herself. She stated that she still feels scared when she thinks about what the appellant did and worries about such a thing happening again. She finds it hard to trust people, and sometimes worries about having a boyfriend in the future in case he would hurt her. R stated that she is angry at the appellant because of what happened. She feels strongly that it was not something that someone should have to go through, and have to live with having gone through. She does not like to watch TV programs that remind her of what occurred. R also states that she has found it hard to concentrate at school, and to make the move to secondary school while it was all going on. Sometimes she finds it hard still living in the same house because it can bring back bad memories of what happened. Most of all, she does not like being in the kitchen and her bedroom. R would like to move house and leave the bad memories behind.

**The appellant's personal circumstances**
15. The sentencing court heard that the appellant was born on a date in 1958, was originally from an address in Northern Ireland, has three siblings (brothers), was married but separated at the time of sentencing, has two grown children and had been employed as an operator / trainer with a computer equipment manufacturer.

16. The sentencing court was also told that the appellant had a number of previous convictions. Starting with the most recent:

- on the 8th of July 2010 he was convicted by a court in Northern Ireland of four offences. These consisted of four separate breaches of risk of sexual harm orders. The risk of sexual harm orders were made following notification to the Northern Ireland authorities of the abuses in the present case. He received sentences of four months' imprisonment for each offence, all to run concurrently.

- on the 22nd of August 1988 he was convicted by the same court of the offence of taking part in a procession which failed to comply with notice, and received an absolute discharge.

- On the 24th of November 1976, he was convicted by a different court in Northern Ireland of three offences of carrying firearms with intent, for which he received three concurrent sentences of 10 years imprisonment. He was also convicted at the same time of possessing firearms in suspicious circumstances for which he received a further sentence of five years to run concurrently with the sentences for carrying firearms with intent. He was also convicted of hijacking of property, for which he was sentenced to 10 years imprisonment, which was also made concurrent. He was further convicted on that occasion of belonging to a prescribed organisation, for which he received a sentence of five years imprisonment, which was also made concurrent. He was further convicted of possession of a firearm and ammunition with intent to endanger life or property, for which he was sentenced to 10 years imprisonment, which was also made concurrent. He was further convicted of possession of possessing a firearm and ammunition in suspicious circumstances, for which he was sentenced to 5 years imprisonment, which was also made concurrent. He was also convicted of acting with intent to endanger life or property, for which he was sentenced to 15 years imprisonment, which was also made concurrent. He was also convicted of possessing explosives with intent to endanger life or property, for which he was sentenced to 15 years imprisonment, which was also made concurrent. He was also convicted of making explosives under suspicious circumstances for which he was sentenced to 10 years imprisonment, which was also made concurrent.

- On the 22nd of March 1973 he was convicted by another court in Northern Ireland of disorderly behaviour, and received a conditional discharge of 12 months.

17. The sentencing court was further informed that following the disclosures by the victims in this case the appellant was assaulted, and injured, by the victims' father. The father was subsequently prosecuted for assault causing harm.

**Reports and Testimonials**
18. The sentencing court was asked, and agreed, to receive and consider the contents of two expert reports concerning the appellant's mental health history and his psychological state. The first was a report from a Consultant Forensic Psychiatrist and the second was a report from a Forensic Psychologist.

19. The psychiatric report stated, *inter alia*, that the appellant presented with a history of depressive symptoms and related self harm in the aftermath of the exposure of his sexual offending behaviour. This was consistent with a depressive adjustment reaction. It recommended that there should be intermittent psychiatric follow up with respect to his depressive symptoms. It further stated that the appellant had expressed willingness to engage in a sex offender treatment programme.

20. The psychiatrist further noted that the appellant had a history of harmful use of alcohol. While it was not a significant factor in the offences at issue, it is now an additional risk factor for recidivism. The appellant was advised to attend alcohol and drugs counselling in order to support a long term strategy of voluntary abstinence. The psychiatrist assessed the appellant, using the SVR 20 assessment protocol, as presenting with factors associated with a high risk of recidivism.

21. The report from the psychologist was lengthy and detailed. The essence of its contents can be gleaned from the conclusions section which stated:

> "[M.A.F.] presents as depressed man who communicates in a socially appropriate manner. Although lacking in self-confidence, he is forthright and provides some insight with regard to activities within his life, specifically those associated with sexual offending behaviour.
>
> Family and environmental life created maladaptive coping mechanisms from a very young age. A volatile relationship had always existed for [M.A.F.] with members of society, having witnessed violent trauma during his childhood and early teens and joined the Irish Republican Army (IRA) at this time. Sexual abuse within [his] home and consistent high levels of anxiety, during a time of pivotal educational as well as moral development, further hampered positive moral and educational development in [M.A.F.]. This has contributed to various feelings and circumstances, which may have predisposed [M.A.F.] to achieve emotional relaxation throughout life by abusing alcohol.
>
> Violence, alcohol and increasing depressive co-morbidity appears to have manifested and created superficial, but consistent, egocentric narcissism. Feelings of power caused this man to believe that he could disrespect societal norms and laws. Growing fascination with the sexual abuse of minors further compounded a malevolent belief structure, and this again manifested as sexual offences against two minors of eight and eleven years of age. This behaviour was premeditated, as well as impulsive, and persisted for at least six months.
>
> [M.A.F.] displays a good educational level, with comprehensive ability to verbally and numerically reason. His abstract reasoning ability was low. However, given the documented presentation and his education achievements to date, it is clear that this man is fit to understand the parameters and directions of the Court. He has ability to understand the ramifications of his behaviour for the victims, and the subsequent sentencing which will be administered by the Court. However, some poor emotional labelling and abstract reasoning has resulted in decreased amount of empathy for others and inadequate perception of social cues. Psychotherapeutic input should address these issues.
>
> [M.A.F.] presents with an overtly aggressive manner, poor emotional expression; this aspect of his personality must be stabilised, if his risk of re-offending in the future is to reduce from hi to moderate.
>
> Life continuing without alcohol use and/or aggression would provide [M.A.F.] with healthy options with which he could harness the energy of significant intellectual potential. Therapeutic, educational and peer support would aid this plight, as highlighted under the **'Immediate Recommendations'** section of this report.
>
> At this particular time, [M.A.F.] presents with a moderate level of psychopathy but a high risk of re-offending in a sexual manner. Strict boundary setting and therapeutic support, as well as consistent supervision and some degree of social isolation from potential stimulatory cues, may decrease this level. However, should the aforementioned recommendations not be put in place, it is likely that his level of risk of engaging in further re-offending behaviour, sexual or otherwise, may increase from high to an absolute high in the future. Should the adequate supports be put in place, his risk is likely to decrease to moderate during the next two to four years.
>
> With regard to risk of re-offending, in light of the statements written in the preceding paragraphs of this document, his criminal history and psychological presentation, [M.A.F.] presents with a high risk of re-offending in a similar or any other manner.
>
> Should [M.A.F.] continue to completely free himself from sexual deviant behaviour, engage in and comply with any therapeutic treatment, education and parameters of prison life, it is likely that he may reduce this risk over the coming years. Further assessments would be warranted, in order to continually evaluate [M.A.F.]'s risk of psychopathic presentation, as well as predisposition to engage in offending behaviour."

22. The sentencing court also received, and considered, a testimonial letter from the appellant's daughter, who spoke positively of his role in her life as her father.

**The sentencing judge's remarks.**

23. In the course of sentencing the appellant, the sentencing judge stated:

> *"I've been told a good deal about the accused's terrorist convictions and the consequences alleged to have flowed from these. The only relevance I see this being capable of having would be to contraindicate any mitigation sought on the grounds of previous good character. In relation to the accused's difficulty with alcohol I have regard to the ruling of Murray Chief Justice as he then was that the voluntary consumption of drugs and alcohol, not only afford no defence, but also afford no mitigation in one's responsibility to society. I do not have regard to the frequent references made to suicide as anybody can feed me a threat of suicide through a social worker, probation officer, psychologist, psychiatrist or lawyer, if I do not bend to their will. Insofar, as the accused is alleged to have had a dysfunctional background I have regard to the ruling of Geoghegan Justice, in DPP v. Martin Stafford, that this affords little if any mitigation. I'm required by law to one, identify the range of penalty available; two, place the case, having regard to its particular facts and circumstances, at its appropriate place on that scale; and three, identify such facts as may be found in favour of the accused and on the basis of those discount from the figure arrived at in phase two above. The range of penalty available is obviously from suspended sentence to imprisonment for life. I take account of the following; one, the inherent gravity of the crimes themselves, particularly the rapes; two, the breach of trust involved; three, the age of the victims; four, the disparity in age between the accused and the victims; five, the multiplicity of the offences involved; and six, the time over which the offences extended. I assess the offences as meriting a penalty of 15 years imprisonment. I*

*sentence the accused on the rape counts to 15 years imprisonment and on the indecent assault counts to 10 years imprisonment. All sentences to run concurrently and to date from the 26th October 2010. In favour of the accused are his pleas of guilty and genuine remorse. He took active steps to ensure that if anything happened to him, his victims would know that he took full responsibility for what had happened and that there was no responsibility of guilt attributable to the victims. To take account of these matters I will suspend the final three years of the rape sentences on the accused entering into a bond, self in the sum of €1,000 to have no contact with his victims in perpetuity, the bond to be entered into before the prison governor. I direct that the accused undergo 18 months post-release supervision and I am obliged by law to inform him that he may be liable to further terms of imprisonment in the event of the breach of any condition of post-release supervision."*

**Discussion**

24. It is clear that the sentencing judge sought to follow best practice in the sentencing exercise. He correctly stated that what was required was that he should *"one, identify the range of penalty available; two, place the case, having regard to its particular facts and circumstances, at its appropriate place on that scale; and three, identify such facts as may be found in favour of the accused and on the basis of those discount from the figure arrived at in phase two above."* In the view of this Court, however, he erred in his judgment on the second step of the process *i.e.,* in determining where the case required to be located on the scale having regard to its peculiar facts and circumstances.

25. This was undoubtedly a very bad case, with all of the aggravating features identified by the sentencing judge, and indeed others that he did not mention such as the exposure of K to child pornography, and the threats issued. If there were no factors tending to reduce the appellant's individual culpability, we would agree with the trial judge that the circumstances of the rapes were sufficiently egregious as to merit a headline sentence of fifteen years before application of mitigation.

26. However, notwithstanding the adduction of extensive psychiatric and psychological evidence in the reports cited above, the sentencing judge appears to have taken no account of the particular evidence contained in the psychologist's report that:

> *"Violence, alcohol and increasing depressive co-morbidity appears to have manifested and created superficial, but consistent, egocentric narcissism. Feelings of power caused this man to believe that he could disrespect societal norms and laws. Growing fascination with the sexual abuse of minors further compounded a malevolent belief structure, and this again manifested as sexual offences against two minors of eight and eleven years of age."*

This evidence, which was uncontroverted, bore directly on the issue of individual culpability. Such evidence could never excuse the abuse that was perpetrated, but it was undoubtedly relevant to the assessment of this particular accused's moral culpability.

27. In submissions to this Court, counsel for the appellant placed heavy reliance on the remarks of Barron J in *The People (Director of Public Prosecutions v McCormack* [2000] 4 I.R. 356 where he said:

> "Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The 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."

28. To have fixed the headline sentence at fifteen years, having regard to the facts and circumstances of this case, was in our view inappropriate as it failed to take account of the psychological make-up of this particular appellant. As previously indicated, we consider that a headline sentence of thirteen years was in fact the appropriate one in the circumstances of the particular case.

29. As far as mitigation is concerned, the trial judge correctly identified the pleas of guilty and the appellant's expression of remorse, which he accepted as being genuine, as being relevant mitigating factors. He rightly pointed out that the appellant *"took active steps to ensure that if anything happened to him, his victims would know that he took full responsibility for what had happened and that there was no responsibility of guilt attributable to the victims".* It bears commenting upon, however, that seven of the eight pleas to oral rape were only proffered on the morning of the trial. The trial judge would have been entitled to take account of the time at which the majority of the pleas were entered, having regard to the terms of s. 29(1) of the Criminal Justice Act 1999, and although timing is not expressly mentioned by him, it is a consideration that this Court is entitled to have regard to in considering the adequacy of the overall allowance made for mitigation where a component of that includes an allowance for having pleaded guilty.

30. In so far as the sentencing judge expressed his understanding of the views expressed by Murray C.J. (which we infer is a reference to the judgment in *The People (Director of Public Prosecutions) v. Keane* [2008] 3I.R. 177) relating to the potential mitigating affects of consumption of alcohol, it seems to us that whether or not the sentencing judge's understanding was fully correct (see in that regard the judgment of Clarke J in *The People (Director of Public Prosecutions) v Fitzgibbon* [2014] IECCA 12, and this Court's very recent judgment in *The People (Director of Public Prosecutions) v Hall* [2016] IECA) is not really material in the circumstances of this particular case, the appellant's own psychiatrist having expressly stated in his report that alcohol was not a significant factor in the offences at issue. What occurred was not precipitated by addiction to alcohol. The trial judge was therefore correct in concluding that alcohol could not be regarded as a mitigating factor in this case.

31. The trial judge further expressed the view that the appellant's dysfunctional background afforded him little mitigation, relying on views expressed by Geoghegan J. in the Court of Criminal Appeal in the case of *The People (Director of Public Prosecutions) v Martin Stafford* [2008] IECCA 15. While the trial judge's understanding of the *Stafford* judgment is also controversial (see again the judgment in *The People (Director of Public Prosecutions) v Fitzgibbon* [2014] IECCA 12, and in *The People (Director of Public Prosecutions) v Hall* [2016] IECA), he did not in fairness say that he was discounting the evidence in that regard as providing no mitigation at all. He felt that he was constrained to afford "little mitigation" on account of it, in light of the views expressed by Geoghegan J. Whether or not he was so constrained this Court considers that, in the particular circumstances of this case, the trial judge was certainly obliged to take account of the appellant's background, and its psychological consequences because of how it impacted on the issue of moral culpability. If he was not prepared to treat it as mitigation in the conventional sense, and he was arguably right in that respect in the instant case, he should, as we have already indicated, have taken it into account in his assessment of the seriousness of the offending behaviour as committed by the particular offender. Of course, such evidence should not be taken into account in both respects, as that would involve double counting.

32. We consider that the preferred approach in this case would have been to take account of the appellant's psychological dysfunctionality in assessing the seriousness of the offending behaviour as committed by this particular offender. Adopting that approach, we consider that the suspension of the final three years of the headline sentence represented an appropriate allowance for such mitigation as is available in the case, and the sentencing judge committed no error of principle in determining that to be the

case. This Court has therefore followed the sentencing judge's lead in that regard and has also suspended the final three years of the sentences of thirteen years that it has now imposed.