THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 262/2016

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

D.W.

Appellant

JUDGMENT of the Court delivered 15th May 2018 by Mr. Justice Edwards .

Introduction
1. On the 31st of May 2016 the appellant pleaded guilty before the Central Criminal Court to counts 7 to 25 inclusive on Bill No CCDP0115/2014, being counts of rape, contrary to common law and as provided for in s.48 of the Offences Against the Person Act 1861, as amended, and s.2 of the Criminal Law (Rape) Act, 1981. Each offence concerned the same injured party, MG, and each offence also occurred at a single address in County Cork.

2. On the 25th of July 2016 the sentencing Court heard evidence in relation to the relevant facts, the impact on the victim and the appellant's plea in mitigation. On the 29th of July 2016 he was sentenced on each count to 18 years imprisonment with the final six years suspended on certain terms, all sentences to run concurrently. The sentences were dated to take effect from the 29th of July 2016. The appellant now appeals against this sentence.

The relevant facts
3. Detective Sergeant Michael Corbett told the sentencing Court that on the 31st of July 2013 the complainant made a statement of complaint to Gardaí. The complainant was born in 1963 and her parents lived in a small village in Co Cork. She was one of four children. In 1971 her father died and her mother later re-married. The complainant's new step-father was the appellant, DW. The complainant was about 11 years of age when the appellant moved in with the complainant's mother and her family. Shortly thereafter he began to abuse her. The house in which lived at this time was a three bedroom, semi-detached, property and the appellant would rape the complainant three to four times per week, usually on the landing. It would regularly occur when the complainant's mother was out of the house at Bingo on a Sunday night. On other occasions the appellant would rape the complainant when her mother was out working. He also sometimes raped the complainant upstairs on the landing even when her mother was downstairs, and Detective Sergeant Corbett told the court that on these occasions the complainant would be "gripped by fear" that her mother would come upstairs. On yet other occasions the complainant was raped in the kitchen, in the garden shed and in other parts of the house.

4. Detective Sergeant Corbett's evidence was that the appellant's relationship with the complainant was one characterised by cruelty and abuse in every respect. When the complainant left school at the age of 14 to begin working, every penny she earned was handed over to the appellant who spent most of it on alcohol. Conditions in the house were described as "a living nightmare" for MG. She was not allowed to have friends over or to have birthday parties. The appellant controlled her through physical beatings, rape and other forms of coercion. On one occasion she recalled being asked on a date by a work colleague. When she arrived home she found all her good clothes had been put to soak in the bath so she was unable to go out. On rare occasions she was permitted to attend a local céilí on condition that she be home by midnight; on these occasions if she arrived home late by a minute or two the appellant would subject her to savage beatings.

5. At age 15 MG became pregnant as a result of rape by the appellant. She later gave birth to a boy, D. The appellant coerced the complainant into concealing the child's paternity, forcing her to pass the child off as a work colleague's. Her mother also pregnant again at the same time, and they gave birth within weeks of each other. Her mother and herself shared the task of raising D. After D's birth the appellant left home for a period and got a job in a hotel in a nearby town, much to the annoyance of the appellant. While this provided her with temporary respite from the cycle of sexual abuse, rape and violence at the hands of the appellant she subsequently felt compelled to quit her job and move back home in order to protect her mother from the appellant. When she moved back in, the cycle of sexual abuse, rape and violence resumed. The last of the rape offences to which the appellant pleaded guilty occurred in this period.

6. In her victim impact evidence, which she gave on oath and which is set out in full later in this judgment, the complainant indicated that she became pregnant by the appellant for a second time. None of the charges in respect of which the appellant faced sentencing related to the sexual intercourse that led to this pregnancy. The evidence adduced was silent as to the complainant's age when she became pregnant for the second time, or indeed as to her age when her daughter was born, although it seems clear that it occurred at a time after the last rape offence covered by the indictment was committed. The appellant's presumption of innocence required the court below, and now requires this Court, to proceed on the assumption that this second pregnancy did not arise as a result of rape or any other crime. Nevertheless, the sentencing court did receive admissible evidence that the appellant was continuing to attempt to exert a degree of control and dominance over his step daughter even at this stage and it was entitled to have regard to that evidence, as are we. The complainant's evidence was that when the appellant discovered that she was pregnant on this occasion he pressurised her to have an abortion, but that she successfully resisted this pressure and carried her baby to term. She gave birth to a baby girl, M, on this occasion, which she gave up for adoption. Following this, the complainant moved out of home again, taking D with her. They moved into a rented mobile home in a town in an adjacent county, and the complainant supported herself and D by working in a local supermarket.

7. In 2004, tragedy struck and the complainant's son D died. This was described as a turning point for MG and in 2013 she reported her abuse to Gardaí. On the 9th of December 2013 the appellant was arrested on suspicion of rape, and he was detained at a Garda station under s.4 of the Criminal Justice Act 1984. He was interviewed in detention and made admissions to having full sexual

intercourse with MG over a long period of time albeit that he maintained at that point that all sexual contact was consensual. He was charged with multiple rape offences and he offered to plead guilty approximately one week before he was scheduled to be arraigned and, if necessary, put on trial. However, it was accepted by the Sergeant in cross-examination that the indictment had contained more charges than were pleaded to and that the pleas to counts 7 to 25 inclusive were proffered as soon as an indication was received from the Director of Public Prosecutions that they would be acceptable.

The appellant's personal circumstances
8. The appellant was born on the 11th of August 1946 and was almost 70 years of age at the time of sentence. He has a number of previous convictions. These were all recorded on the 23rd of February 2015 when he was sentenced at Cork Circuit Criminal Court to four years' imprisonment with the final four months suspended in respect of a number of indecent assaults perpetrated on MG's siblings during the same period in which he had abused her. He has no other previous convictions.

9. The appellant has been a serious alcoholic for all of his adult life and he has never worked. He has four children and three stepchildren with his wife, the complainant's mother. He is no longer in contact with any of them.

10. In her plea in mitigation at the sentencing hearing, counsel for the appellant acknowledged that the *"sole real mitigating factor"* was the appellant's plea of guilty, however the sentencing judge regarded the weight to be attached to that as being less than it otherwise might be, in circumstances where the complainant would have been a *"very impressive and difficult witness for the defence to deal with".* Medical evidence indicated that the appellant suffered from alcoholic hepatitis, peptic ulcer disease and hypertension, all of which were said to be related to his long history of alcoholism. At the time of sentencing he was also awaiting an operation in relation to an injury to one of his shoulders and was on certain pain medication to deal with that.

The impact on the victim.
11. In a lengthy statement which she read to the court the complainant spoke of the serious impact the abuse had had on her:

> *"A. Okay, thanks. I was only a little girl of 11 and you, D.W., raped me. I didn't understand what you were doing to me at the time. I cried as it hurt. You warned me that I was never to tell anyone. D.W. was my stepfather. He was the one who was supposed to try and be a father figure to me but it turned out he was a vicious controlling bully who drank a lot.*
>
> *…*
>
> *I wasn't allowed friends at home, I never had birthday parties as any normal little girl would have due to his constant drinking. I was ashamed in school as I wouldn't have some books, I would have to share with my friends as there was no money. I didn't even have my own bedroom as he would tell me where to sleep every night. I was afraid of him all the time. I would try and wake early before he would wake up as he would call me out on the landing and rape me but it didn't matter, he would always find a way to get me on my own. As he would send my mother to the shop, he controlled me and everyone in the house. If I didn't get raped I got beaten. As weeks went by D.W. would rape me on a constant basis. He threatened me I was never to tell anyone. He would rape me upstairs on the landing, even though my mother would be downstairs. Every time my Mam went to bingo I knew I was going to be raped. I was terrified and dreaded every time my mother would go out. I was like a slave to DW. He continued raping me whenever it suited him. My life in that house was a living hell. The fear I had of him was horrendous. I could never concentrate in school as I knew what was facing me when I got home. I felt so alone as I knew I couldn't tell anyone. I then got pregnant at 15 years old by DW when he raped me.*
>
> *…*
>
> *My mother was also pregnant at the time. I had to tell everyone it was someone I worked with that got me pregnant as he threatened me again. I had a beautiful little boy … and went back to work and my mother minded him. DW continued to rape me at least once a week and a few years later I was devastated as he had made me pregnant again. He wanted me to go for an abortion. I carried my baby for nine months with absolutely no one knowing only him. One morning I got bad pains. I just knew I needed to get a doctor. I left my house and walked a mile in pain, then hitched a lift 20 miles feeling so afraid and so alone. I went to the first doctor I could find. He said I was very near having my baby, so he called an ambulance straight away. I just got to the hospital when my little girl … was born…. I was broken hearted as I knew I could not keep her as I couldn't bring her back to this house where I knew my daughter would be at risk of him. It was heart breaking making the decision to give her away. I had to do this to keep her safe. I knew she would go to a better place so I had to give her up for adoption. Broken hearted I went home and took my son, D, and rang the Samaritans for help. I moved out but DW followed me but shortly after that I took my son and moved to a different county. That was the last I saw of that monster. Then in 2004 I lost my son D at the age of 24. I was devastated and heartbroken and I really thought I couldn't take anymore but it was my two beautiful children from my marriage that kept me going and got me through this. The hardest thing a parent has to do is bury their child, so DW, I blame you for the loss of my two beautiful children. I was still carrying the secret of giving my little girl away and did so for 30 years. Not a day went by that I didn't think of her. I always wondered what she looked like and prayed she was happy until one day I got a letter to say my daughter was looking for me. I was shocked, scared, happy, all different emotions. I went to one person who is a dear friend. I knew I could trust her. I broke down totally as finally I could disclose my secret I had painfully carried for 30 years. Recently I had a flash back as I travelled the road that I would have hitched a lift on when I was nine months pregnant. Memories flood back, feeling alone, terrified and helpless at the time. When I go back to visit my old family home I still have a huge fear when I go upstairs to that landing. The memories are fresh in my mind of being raped by DW here and this is what I still feel at the age of 53. You took everything from me, my children, my freedom, my body of a little girl, my education, my confidence. You made me feel worthless. It took me years to survive and overcome his brutality. While the horrific rapes and abuse that I experienced had a devastating impact physically and emotionally on my life, I have not allowed it to destroy me. I was an innocent child when you had the power over me but now I have the power over you. I have a very happy life."*

The sentence imposed
12. In sentencing the appellant the sentencing Judge made the following remarks:

> *"JUDGE: Very well. The evidence in this case has to be approached in the usual manner in order to construct a proportionate sentence, which is fundamentally a two stage process. In the first instance we must try to arrive at an*

appropriate headline or notional sentence to be applied in principle, having regard to the relative gravity of the offending in question with reference to the range or spectrum of available penalties. This must then be adjusted in most cases downwards, to refer to any applicable mitigating circumstances. The sentence to be imposed is that appropriate to the crime, but also that appropriate to the crime committed by the offender in question. So proportionality requires that relevant circumstances that are personal or particular to the accused must be taken into account and given proper weighting so as to arrive at a proportionate conclusion. The gravity of the offence is measured not by reference to the inherent ingredients of the offence, but by a consideration of the moral culpability of the offender for the offence and the harm done.

In this case, it must be observed that it is a very grave case, having regard to those considerations. It is also necessary to take into account on the issue of gravity any particular circumstances bearing on moral culpability which are personal or particular to the offender, and these can be either aggravating or mitigating factors. There are a number of matters that fall within this category, in this case matters of an aggravating variety. The intrinsic moral culpability depends on the offenders' criminal intention at the time that he or she committed the offence. In this case, it is clearly an intentional matter as opposed to criminal conduct which was engaged in on a reckless or by reference to some lesser state of mind. So it is clear in this case that it must fall within the highly intentional category of offending. So in assessing these matters, clearly a rape offence can in certain circumstances attract a life sentence. It seems to me however that these are rare, just as completely suspended sentences for this offence are rare. Within the range between a suspended sentence and a life sentence in my view sentencing for these offences falls into three categories dependent on the gravity of the offence. There's the lower end, the middle end and the upper end. In general terms I believe that the lower end runs up to penalties attracting about seven years' imprisonment or so, the middle range of gravity tends to attract penalties of between seven and 14 years, and the more serious upper end type offending attracts penalties above that. That is a general approach to the matter.

Factors effecting gravity in this case when viewed against the background of the possibility of a life sentence consist of the abuse of a position of trust in relation to a step child carrying with that the age difference between the offender and the victim. A further aggravating factor is the young age of the victim when her abuse commenced, she was 11 and it continues for a period of approximately five years. Another factor that is relevant is that this took place in and about the home where a child should expect to be safe. It also had the additional trauma that on two occasions, Mr W's activities resulted in pregnancies for a very very young girl. The offending continued for a prolonged period and was surrounded by a background of violence where the victim was beaten in the context of the overall process of abuse that was carried out in this case. A phrase from the victim impact report I think adequately describes the situation that the unfortunate Ms G found herself in, she was in effect the slave of the accused man. She was treated as such, abused, beaten and treated in a way that no child should ever be treated. This conduct was appalling and inhumane.

The other factor that needs to be considered here is that it appears that in the background of this offending other sexual offences were being carried out in relation to other members of the family. I can't punish Mr W twice in relation such matters, but this is undoubtedly a factor that I'm entitled to take into account in assessing the gravity of this particular offending. In this context, one is also entitled to the effect of the offending on the victim. Her impact statement as given live in evidence is something that I will comment upon at the end of the case. But in terms of expressing the impact, I think it's reasonable to say that she was totally deprived of every benefit and aspect that a young child is entitled to expect in terms of family life. She -- this offending has produced devastating physical and emotional impact so eloquently described by Ms G in her evidence.

So taking all of those matters into account, it is clear to me that the gravity of this offending lies at the very highest end of the spectrum. I have to have regard to rulings of the Court of Appeal in fixing a notional sentence. The most recent one that's fresh in my mind involves the adjustment of a sentence of my own downwards, it must be said, and whereas would for my own part stand by the original sentence my personal opinions are not what counts in terms of sentencing, I'm bound by the guidance which is on offer from the superior courts, and I propose to have regard to that. The case is DPP v. RK, a recent decision of the Court of Appeal, where in relation to gravity, the victim in that case was a very young child who between the ages of six and eight and a half was serially abused by a partner of her mother, including anal rape. The Court of Appeal felt in contra distinction to my own view that a headline or notional sentence of 15 years was appropriate in relation to that matter. Comparisons in these cases are invidious, odious even. But bad and all as RK is, having regard to the prolonged and deep abuse in this case I in fact regard this case as a notch above it in terms of gravity. Some of the aggravating factors present in this case were not present in the previous case.

Accordingly, it seems to me that I should approach the rape offences in this case by way of imposing concurrent sentences of a substantial nature. The calculation of which will begin by reference to a period of 18 years as the appropriate notional headline sentences. Then, turning now to the mitigating factors which must be dealt with by way of deduction from the notional or headline sentence, Ms Farrelly in a very brief but very able and very focused plea correctly identified the plea of guilty in this case as being the main, if not only mitigating factor. I do however propose to have regard to other matters personal to the accused in terms of adjusting the sentence and that is his age and his medical issues. I do not propose to have regard to rehabilitation as a relevant concept in this case, I am going to deal with his personal conditions in the matter -- in the manner that I will subsequently indicate. I also take into account in a small way the remorse expressed on his behalf in the course of the sentencing hearing.

I propose therefore to approach the discount in relation to the matter in two ways. The Court of Appeal in RK indicated that a suspension of a period to reflect a discount in a very long sentence is not an appropriate way to proceed. So taking that direction on board, I propose to reduce the headline sentence in the first instance to refer to the pleas, the admissions to the gardaí and the remorse by a factor of four years. That leaves a sentence of 14 years. To refer to the matter of age and medical issues, it may well be that Mr W will not see the light of day again, he is now 70 and not in the best of health, which is entirely of course self-induced, his health issues are related to an entirely wasted life indulging -- over indulging in alcohol and misbehaviour. So it's very difficult to have any sympathy for him, he seemed to have very little sympathy for his victim. But on the off chance that there may be some light at the end of his particular tunnel, I think it's proper to have regard to his age when he comes to serve his sentence and his personal condition. As I say it may well be that natural events will overtake this. But if he lasts so long I will suspend in respect of those matters the last two years of the sentence on condition that he enters a bond either here or before the governor in the sum of €300, to keep the peace and of be good behaviour for a period of two years post release. And that he places himself under the supervision of the Probation Services, and that he comply with all of their requirements and directions."

Grounds of Appeal
13. The appellant appeals against the severity of his sentence on the following grounds.

(i). The sentencing judge erred in placing the seriousness of the matters before the sentencing court as being at the highest end of the spectrum, leading him to give this matter a headline sentence of 18 years' imprisonment.

(ii). The sentencing judge failed to have any or any sufficient regard to the remorse shown by the appellant.

(iii). The sentencing judge failed to have any or any sufficient regards to the fact that the appellant entered a plea of guilty in early course.

(iv). The sentence imposed by the sentencing judge was disproportionate and failed to have any sufficient regard to the circumstances and character of the appellant such that the appellant's age and his medical situation were not adequately taken into account by the sentencing judge when giving sentence.

(v). The sentencing judge failed to have any or any sufficient regard to the prospect of rehabilitation in structuring the end of the sentence appropriately and allowing sufficient time for rehabilitation.

(vi). The sentencing judge failed to have any or any sufficient regard to the proportionality of the sentence imposed with regard to overall sentencing guidelines and in light of the above outlined grounds.

Submissions
14. It has been argued on behalf of the appellant in relation ground no (i) that notwithstanding the egregious facts of the case as established in evidence, and the aggravating circumstances, that the sentence imposed in this case was out of kilter with comparators. In that regard this Court's attention was only in fact drawn to one judgment, *namely The People (Director of Public Prosecutions) v R.K.* [2016] IECA 68, but on the basis that that case *"contained a useful summary of relevant cases of a relatively similar nature".*

15. That case involved serious sexual abuse which took place over an almost three and a half year period, from 1st July, 2009 to the 26th November, 2012, the abuse commencing when the victim was only 6 years of age, her abuser being in a relationship with her mother, and he being aged 18 years when the abuse commenced. The abuse itself involved masturbation of the child victim, as well as oral rape with the appellant ejaculating into the victim's mouth, digital penetration of the victim's vagina which on one occasion caused bleeding, and nine or ten occasions of anal penetration by the penis.

16. The victim had suffered very significantly due to the abuse, requiring her to engage in fortnightly psychotherapy, which it was envisaged would continue indefinitely. The sentencing judge in the RK case outlined the aggravating factors as:

- The breach of trust.
- The very young age of the victim.
- The progressive nature and regularity of the abuse.
- The profound and continuing effect on the victim.

17. The sentencing judge in that case then went on to determine that the appropriate headline sentence for the offence charged of rape contrary to s.4 of the Criminal Law (Rape)(Amendment) Act 1990 count was 18 years. One of the grounds of appeal in the RK case, which the appellant in the present case believes is relevant to this case, was that the sentencing judge had erred in principle with regard to the rape count in determining the headline sentence to be one of 18 years. It was contended by the appellant in the RK case that a headline sentence of that order was out of line with, and disproportionate to, the sentences that had typically been applied in other cases involving similar type offences>

18. A number of such cases were considered in detail in the judgment and, it was submitted, the offending conduct in the various cases cited in *RK*, as well as the offending conduct in the *RK* case itself, could not be said to be of lesser gravity, and indeed would in certain cases appear to be of a greater gravity, than what was established in evidence in the instant case.

19. In *RK* this Court took the view that the appropriate headline sentence should have been one of 15 years, and it has been submitted by the appellant in the present case that a headline sentence at that level in this case would be in keeping with sentences imposed in similar cases. The appellant contends that a headline sentence in line with RK would be quite adequate to reflect the gravity of the offending conduct in the present case.

20. Returning to the *RK* decision, this Court having started at 15 years imprisonment then discounted by three years to reflect the mitigating circumstances in the case, and further suspended the final two years of the resultant twelve year sentence to incentivise rehabilitation. The final outcome, therefore, in term of a custodial sentence to be actually served (assuming the appellant adhered to the conditions on foot of which there was a partial suspension of his sentence), was imprisonment for ten years.

21. It was submitted that in the present case the facts as established in evidence, including the aggravating factors which were identified by the sentencing judge, did not entitle him to consider the instant case was a "notch" above the *RK* case.

22. It was submitted that the sentencing judge when identifying factors affecting the gravity of the offences approached the matter on the basis that the appellant's offending conduct resulted in two pregnancies rather than one pregnancy. There was no conviction in respect of an offence of rape or of defilement of a child relating to the incident of sexual intercourse that resulted in the second pregnancy.

23. Further, it was complained that the sentencing judge also stated in his sentencing remarks when considering the gravity of the offences that the background of the offending behaviour in the instant appeal was that there were other sexual offences being carried out by the appellant in relation to other members of the family. This was notwithstanding the fact that the appellant had pleaded guilty already to those offences and had been sentenced to imprisonment in respect of same.

24. It was further complained that the sentencing judge had also stated in his sentencing remarks, when considering the gravity of the offences, that there was a background of violence where the injured party was beaten in the context of the overall process of abuse. However, there was no evidence that the offences to which the appellant had pleaded guilty and in respect of which he was being sentenced occurred with any accompanying violence. The evidence established that the household was clearly a very unhappy and miserable place for the injured party, and that physical beatings unfortunately formed part of her life there but, it was submitted, those beatings were not part of the rapes which she had suffered.

25. In response to these submissions counsel for the respondent has maintained that the nature of the offending in this case, which was grave, prolonged and frequent, and attended by a list of significant aggravating factors, necessitated the imposition of a headline sentence at the highest end of the scale. Professor O'Malley, in *Sentencing Law and Practice*, 3rd Ed, makes the following comments regarding sentencing for serial child sexual abuse (at para 13-35):

> *"In practice, a court dealing with serial child abuse will be more concerned with identifying an overall sentence which fairly reflects the totality of the offending and the offender's personal circumstances. The gravity of the offending conduct, its duration, frequency and intensity are the key considerations for this purpose. At the top of the scale of gravity are those cases where the offender has abused one or more children over a long period, beginning when the victims were very young and involving serious abuse including rape. More often than not, there will also have been a serious breach of trust, as the offender is likely to be a parent (almost invariably the father), guardian or close relative of the victim. In circumstances of this kind, and especially when the abuse has been serious, degrading and prolonged, one or more life sentences may be imposed. Life sentences have been upheld in some cases in the Supreme Court and the Court of Criminal Appeal, even where the offender eventually pleaded guilty."*

26. It was submitted that the present case contains all of the factors identified by Professor O'Malley as accompanying the most serious of child sexual abuse cases. The sentencing judge determined upon a headline sentence of 18 years imprisonment, which, while in the highest bracket, is substantially lower than a life sentence. The effective sentence of 12 years ultimately imposed, after mitigation was taken into account, was considerably lower than this, and was entirely appropriate in the circumstances of the case.

27. It was submitted that the sentencing judge was entitled to conclude that the offences in the present case ranked above those in *RK* in terms of their gravity. The sentencing judge acknowledged that he was also the sentencing judge in *RK*. In passing sentence, he compared the facts of both cases and outlined the aggravating factors in each. He concluded that based on the prolonged and deep abuse in the present case, and certain of its aggravating factors which were absent from RK, its gravity was of a slightly higher level than that case.

28. The sentencing judge made reference to the devastating physical and emotional impact of the offending on the injured party, as described in her Victim Impact Statement. He noted that the offending took place over a prolonged period, and occurred in the family home in which a child should expect feel safe. He cited a phrase from the Victim Impact Statement to the effect that the injured party was effectively a slave of the appellant, and treated as such. Overall, he concluded that the offending deprived the injured party of every benefit a young child is entitled to expect in terms of family life.

29. Those aggravating factors identified by the sentencing judge in this case, which were absent from *RK*, were as follows:

> (i). The appellant's offending conduct rendered the complainant pregnant.
>
> (ii). The offending continued over a prolonged period and was surrounded by a background of violence where the victim was beaten in the context of the overall process of abuse.
>
> (iii). In the background of this offending, other sexual offences were being carried out in relation to other members of the family. The appellant was convicted of indecent assault of other siblings in the household and was serving a term of imprisonment in respect of those convictions at the time of the sentencing hearing.

30. It was accepted that the appellant is correct that only one of the injured party's two pregnancies resulted from conduct in respect of which he received a conviction. However, it was submitted that, as an aggravating factor, the qualitative difference between causing one pregnancy and causing two was not hugely significant. This was particularly so where the first pregnancy occurred when the injured party was only fifteen years old and the impregnation occurred during the course of a series of rapes to which the appellant has pleaded guilty. This, it was submitted, would have been viewed as the particularly grave aggravating factor in the case, and not the subsequent pregnancy which took place a number of years later.

31. Moreover and in any event, although the second pregnancy was not to be regarded as the fruit of criminal conduct, it is a relevant personal circumstance of the appellant that he is the father of a second child born to the complainant, albeit one that does not reflect well on the appellant, given the relationship of step-father and step daughter, the age difference between the parties, the relative youth of the complainant, the evidence of continuing attempts to dominate and control the complainant extending, in this instance, to exerting pressure on her to have an abortion, and the fact that such was his continuing malign influence that the complainant felt she had no choice but to give M up for adoption.

32. The respondent maintained that all of the comparators reviewed by the Court in RK were capable of being distinguished from the circumstances of the present case, and that they are of only limited assistance.

33. It was further submitted, both in terms of the prolonged period during which the abuse occurred, and the associated beatings and general cruelty shown to the complainant throughout this period, that it was established in *The People (Director of Public Prosecutions) v Gilligan* [2004] 3 I.R 87 that a sentencing court can take account of the wider facts and circumstances surrounding the commission of an offence or offences, and concerning the context within which it (or they) was (or were) committed; and that the court is not confined to hearing evidence sufficient only to establish the ingredients of the offence or offences for which the accused is to be sentenced.

34. In relation to grounds (ii) and (iii) the appellant has argued that the sentencing judge only had brief regard to the plea of guilty, and the appellant's remorse, and that he did not receive adequate credit on either account. We were reminded by counsel that the judge was statutorily obliged by virtue of s.29 of the Criminal Justice Act 1999 to have proper regard to the plea and to take into account when the intention to plead guilty was made known, and the circumstances in which this indication was given. We were also referred to the Supreme Court's decision in *The People (Director of Public Prosecutions) v McC* [2007] IESC 39 where it was stated:

> *"It has long been the settled jurisprudence in this jurisdiction that a plea of guilty is a mitigating circumstance which*

normally attracts some reduction of sentence. The amount of any reduction depends greatly on the stage in the proceedings at which it is offered. An admission forthcoming at the early stage of an investigation may be of quite considerable value, whereas at the opposite end of the spectrum a plea offered midway through a trial or at the outset of a retrial may have very little value. In the latter situation the victim of a crime will have already endured both the anxiety of awaiting the completion of an investigation and then the delay following a decision to prosecute before the trial actually comes on for hearing. The victim of the crime may have undergone cross-examination before the plea is tendered. Other instances where a plea may have little value might include cases where every possible avenue of legal redress to halt the prosecution is availed of by an accused before a plea is ultimately tendered on the eve or morning of trial. Nonetheless, it is undeniable that throughout the entirety of the jurisprudence in this country a reduction of some sort normally attends a guilty plea."

35. On the issue of remorse, it was pointed out than an apology was offered through counsel, and there was no reason not to regard this expression of remorse as genuine. The pleas of guilty were, moreover, a facing up by the appellant to the fact that he had done wrong and a taking of responsibility. They were therefore to be regarded as an earnest of the remorse expressed by the appellant through his counsel.

36. In response, counsel for the respondent has argued that not only did the sentencing judge in this case clearly have regard to these mitigating factors in passing sentence, but he substantially reduced the sentence in response to them.

37. It was submitted that the sentencing judge's reduction of the sentence was proportionate to the evidence adduced in mitigation. The mitigating factors cited by the sentencing judge, in particular the plea of guilty, were significant, and the appellant was entitled to a reduction in his sentence in response to them. It was submitted that the four-year reduction in sentence he received (before the eventual suspension of a further two years of his sentence) was substantial, and fairly took account of these mitigating factors.

38. In relation to grounds (iv), and (v), it is suggested that no, or no sufficient account was taken of the appellant's age or his medical situation; of the need to incentivise rehabilitation, and of the requirement that sentences should be proportionate not just to the gravity of the offending conduct, but also to the personal circumstances of the offender.

39. It is said that it was not enough for the sentencing judge to simply acknowledge that the appellant was a man of 70 years with medical issues. It is complained that there was no proper engagement with this aspect of the case, and no evidence of any rigorous examination or analysis by the sentencing judge of how the appellant's age and health would impact on him in a custodial setting. Further our attention was drawn to *The People (Director of Public Prosecutions) v O'Brien* [2015] IECA 1, where the then President of this Court remarked:

"42. It is legitimate and proper for a judge to take into account a guilty person's age and state of health and other personal characteristics when deciding on sentence. Old age and ill-health are generally to be considered as mitigating factors. But that is to be distinguished from circumstances of such infirmity of body or mind that would make it exceptionally oppressive and unjust for the person to undergo a term of imprisonment."

40. In relation to rehabilitation we were referred to the oft quoted passage from the Court of Criminal Appeal's judgment in *The People (Director of Public Prosecutions) v O'Driscoll* (1972) 1 Frewen 351:

"The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest way of life and indeed the public interest would best be served if the criminal could be induced to take the latter course. It is therefore the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case - not only in regard to the particular crime but in regard to the particular criminal."

41. It was submitted that in failing to allow for a greater suspended period at the end, the sentencing judge failed to provide any encouragement to the appellant to avail of an opportunity to reform. As the appellant was now free of intoxicants an opportunity to reform had presented itself. It was submitted that the trial judge was in error in failing to adequately incentivise reformation in the circumstances.

42. Finally, while acknowledging the discretionary nature of sentencing, and that in any particular case a sentencing judge has to attempt to strike the appropriate balance between the well established and long recognised penal objectives of retribution, deterrence and rehabilitation, it was submitted on behalf of the appellant that the trial judge got that balance wrong in the circumstances of this particular case.

43. Finally, in written submissions in support of ground no (vi) counsel for appellant urging upon this Court that greater emphasis should have been placed on the incentivisation of rehabilitation, and suggested disproportionality in the sentencing process on account of the failure to do so. In so submitting, counsel referred to one philosophical idea which is sometimes advanced as underpinning the objectives of retribution and deterrence, which it is contended were inappropriately prioritised in this case to the detriment of rehabilitation, namely the concept that punishment should represent "just deserts". The purpose of the reference was to suggest, as some philosophers and jurists have done, that such an approach is outdated and that it is one that is liable "to lead to injustice in many cases." This was followed with the submission that "our principles of sentencing as they stand require an individuated approach", and in support of this we were referred to following well known, and frequently cited, passages from the judgment of Denham J in *The People (Director of Public Prosecutions) v M* [1994] 3 I.R. 306, where she stated (at p.317):

"Sentencing is neither an exercise in vengeance, nor the retaliation by victims on a defendant. However, the general impact on victims is a factor to be considered by the court in sentencing ... The nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing, for this is an action between the State and the appellant and not an action between the appellant and the victims."

And (at p. 318)

"Sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed inter alia in a plea of guilty, which in principle reduce the sentence."

44. Responding in respect of grounds (iv), (v) and (vi), counsel for the respondent submitted that the trial judge did take account of the appellant's age and medical condition, and contended that the suspension of the final two years was a direct response to this. While acknowledging that it is well settled that old age and ill health may justify a reduction in sentence, it was submitted that providing that these issues can be adequately dealt with in prison, they should not preclude the imposition of a substantial sentence for very serious crimes. In support of this submission we were referred to a lengthy quotation from this Court's judgment in *The People (Director of Public Prosecutions) v O'Brien* [2015] IECA 1, a case also relied upon by the appellant and cited earlier. Ryan P, giving judgment on behalf of the Court, said:

> *"There is no rule that prevents those who are ill from being sent to prison and the courts have recognised that such circumstances can be dealt with in custody.*
>
> *Similarly, advanced age is relevant but not in any way a bar to a custodial penalty. The unfortunate experience of recent times in this and other countries is that such persons have come before the courts with considerable frequency to answer charges of historic abuse and, when convicted, many have faced imprisonment.*
>
> *Mr O'Malley in the second edition of his book on Sexual Offences observes that "Reasonably heavy sentences were imposed on some elderly offenders, but leniency was generally extended to those who were in advanced old age, ill health or both, and all the more so where the offences were at the lower end of the spectrum." He goes on to record a case comparable with the instant one and where a sentence of life imprisonment was imposed on a man aged 73 who was convicted of 87 counts of sexually assaulting, raping and orally raping daughters aged between five and 11 years and of sexually assaulting his son between ages three and six.*
>
> *A terminally ill man of 74 years who had weeks or months to live was sentenced by the Central Criminal Court to imprisonment for 18 months because of the gravity of the abuse of five daughters.*
>
> *In The People (DPP) v J.M.[2002] 1 IR 363 , the accused was 84 years of age and medical reports indicated that his physical and mental health were in an advanced state of deterioration which the Court of Criminal Appeal considered to be the most important reason for suspending the sentence. It was not the function of the Court to extend mercy to the offender; that was for the executive under the Constitution. The Court had to reach a just and proportionate sentence in the particular circumstances of the accused.*
>
> *In D.P.P. v, E.M. (ex tempore, Court of Criminal Appeal, 7th November, 2011) a sentence of 15 years for sexual assault was upheld where the accused's medical conditions were not deemed to be life threatening and could be dealt with by appropriate medical treatment while in custody:*
>
> > *'The present case… relates to… an elderly gentleman who suffers from diabetes, he has some cataracts, and therefore is visually impaired, and had some other health difficulties, none of which are life threatening in any way, and all of which presumably can be dealt with in the usual way by the appropriate medical treatment when he is in prison.' "*

45. In the *O'Brien* case, the appellant was 74 years of age and suffered from a range of ailments. This Court found that his medical situation was not one which would make prison impossible to tolerate, and held that the sentencing judge's suspension of nine years of a twelve-year sentence was an excessive response to it. It, therefore, increased the sentence to one of twelve years with the final three years suspended.

46. It was submitted that the present case is comparable to O'Brien. The list of ailments that the accused suffered from in that case was at least as extensive as in the present one, and he was of a more advanced age by some four years. There is no evidence that the appellant's medical situation will make prison impossible to tolerate for him. Therefore, while the sentencing judge was entitled to find that his age and medical condition warranted the suspension of a portion of his sentence, it was submitted that the suspension of just two years was proportionate in all the circumstances.

47. On the question of rehabilitation the respondent acknowledges that the general principles contained in the case law relied upon by the appellant are well settled and uncontroversial. However, it was submitted, a sentencing judge is entitled to conclude that in the circumstances of a particular case it is not appropriate to suspend large portions of a sentence that is otherwise merited on the basis of a mere possibility, or the theoretical prospect, of reform or rehabilitation. In almost every case that comes before the courts, some prospect of rehabilitation can be pointed to. Sentencing judges are not obliged to uncritically reduce or suspend sentences in response to the possibility of rehabilitation, and are entitled to take an alternative view of the prospects of this to that put forward by the defence.

48. It was submitted that the evidence of a determination to reform was slight. There was minimal evidence in that regard at the sentencing hearing. The abstinence from alcohol was a consequence of incarceration, and was to be distinguished from the efforts of an offender who has taken active steps in his own rehabilitation.

49. Moreover, and in any event, the sentencing judge did cite the possibility that there might be some light at the end of the appellant's particular tunnel, and ultimately suspended the final two years of the appellant's sentence on certain terms. These were that he enter a bond to keep the peace and be of good behaviour for a period of two years post-release, and that he place himself under the supervision of the Probation Services, and comply with all of their requirements and directions. While rehabilitation may not have been the sentencing judge's primary objective, it was submitted that this suspension in fact serves a rehabilitative function. It was submitted that any further suspension of the Appellant's sentence was not warranted, having regard to the evidence before the sentencing judge.

50. Finally, on the question of proportionality, it was submitted on behalf of the respondent that the sentence imposed was indeed proportionate, and that it ought to be upheld.

Discussion, Analysis and Decision

51. It seems appropriate to address the issues in the order in which they have been dealt with in the submissions. We must therefore deal in the first instance with ground of appeal no (i), namely: that the sentencing judge erred in placing the seriousness of the matters before the sentencing court at the highest end of the spectrum, leading him to give this matter a headline sentence of 18 years' imprisonment.

52. The first thing to be said is that it is manifest from the sentencing judgment that the sentencing judge approached his task meticulously and with great care. His approach to sentencing was fully in accord with the best practice recommended by this Court, and he focussed in the first instance on an assessment of gravity as he was required to do. In that regard he correctly had regard to circumstances bearing on moral culpability, both intrinsic and individual to the offender. He also had due regard to the harm done, which in this case was very great indeed.

53. While there is no doubt but that the headline sentence of eighteen year's imprisonment nominated by the sentencing judge was at the high end of the scale, the issue for this court is whether it was within the scope of the sentencing judge's legitimate range of discretion i.e., within the considerable margin of appreciation that must be afforded to him.

54. While a sentence of eighteen years was arguably at the very outer limits of his legitimate range of discretion, we do not consider that it was outside of that range. Even if a member or members of this Court might perhaps have started at a somewhat lower point on the scale, that is immaterial in circumstances where the headline sentence nominated was within the sentencing judge's legitimate range of discretion. Once the headline sentence was within the range, and we believe that it was in the egregious circumstances of this case, there was no error of principle.

55. Moreover, and with reference to the sole comparator to which the sentencing judge was referred, namely the *RK* case, it is of significance that the sentencing judge in this case was also the sentencing judge in that case. He expressed the view that the offending behaviour in the present case was *"a notch above"* that in the *RK* case, and he was uniquely placed, and arguably best placed, to make that assessment. Certainly his view in that regard should be afforded great deference and we have been prepared to attach significant weight to it, particularly in circumstances where, as pointed out by counsel for the respondent, there were significant aggravating features present in this case that were not also present in the *RK* case.

56. In the circumstances we are not disposed to uphold ground of appeal no (i).

57. Moving then to grounds of appeal no's (ii) and (iii), we reject without hesitation the suggestion that the sentencing judge gave an insufficient discount for the pleas of guilty and the remorse shown by the appellant. The sentencing judge discounted by four years from his headline sentence in the first instance to reflect these factors, which represented a discount of just over 22% on the headline sentence. This was in our estimation an adequate discount for the plea of guilty and remorse shown.

58. In terms of ground of appeal no's (iv) and (v) we note that the sentencing judge went on to suspend a further two years of the headline sentence to take account of the appellant's age and ill-health, as well as, we think it is correct to say, to incentivise rehabilitation. We will have something further to say with respect to the penal objective of rehabilitation in dealing with ground (vi). However it is sufficient for the moment to note that the suspension of a further two years of the headline sentence meant that the time to be actually served in custody (assuming the appellant keeps to the conditions on foot of which his sentence was partly suspended) represented an effective further discount of another 11% from the headline sentence, yielding a resultant overall effective discount of 33%. We are satisfied that this was entirely adequate to reflect all of the available mitigation in the case and to incentivise rehabilitation. The point is well made made by the respondent that the appellant's abstinence from alcohol in recent times represents little in the way of evidence of any true desire to rehabilitate, as this is just a consequence of his incarceration. It is correct to say that it is not a matter to be viewed in the same light as evidence of pro-active steps taken by an accused to seek out and avail of a rehabilitative program. There was no track record of any efforts in the latter regard prior to the appellant going into custody. It is, of course, sincerely to be hoped that the appellant will, during his time in custody, seek to comprehensively address his alcoholism by participation in AA and other addiction programs. However, no degree of addiction or substance abuse problem can adequately explain or mitigate away, or even substantially reduce the appellant's culpability, for the perpetration of serial rapes, sexual abuse and physical abuse upon a child in the position of the complainant in this case. In the absence of evidence of any significant earnest of an intention by the appellant to meaningfully address not just his substance abuse issues, but also his dysfunctional view of appropriate family relationships, and of what is sexually appropriate, the sentencing judge was entitled to treat the plea for additional mitigation based on an asserted determination to reform with a healthy degree of scepticism.

59. In so far as the issues of the appellant's age and state of health are concerned, we are satisfied that these were acknowledged and sufficiently taken into account. We agree with counsel for the respondent that the passages from the *O'Brien* case, on which he has placed reliance accurately reflect the law, and are apposite in this case. There was no evidence before the sentencing court to suggest that either his age and/or his state of health were such as would make it unduly oppressive and unjust that he should have to serve a substantial prison sentence. The appellant may find prison somewhat harder to cope with given his age and state of health, but this was adequately recognised by the suspension of two years of the sentence by the court below. The appellant has committed grave crimes which require that he serve a substantial custodial sentence.

60. The final issue is ground (vi) which relates to proportionality, and the contention that the court was in error in placing undue emphasis on the penal objectives of retribution and deterrence to the prejudice of the objective of rehabilitation, leading to a sentence that was disproportionately severe.

61. We have previously expressed the view that the paradigm for the process of sentencing that enjoys the widest currency in this jurisdiction is that it represents an appropriate balancing of the concurrent, but sometimes conflicting, penal objectives of retribution, deterrence (general and/or specific) and rehabilitation. Moreover, at the heart of this balancing exercise, is the constitutionally mandated requirement that every sentence should be proportionate, both to the circumstances of the crime and to those of the perpetrator. Retribution, deterrence and rehabilitation are therefore the main objectives that are currently pursued by the Irish Courts in the process of sentencing, and indeed this has been the position since the foundation of the State. Moreover a policy of penal welfarism, developed in the late Victorian and Edwardian eras, was adopted by the State on its foundation and has operated ever since.

62. The fact that the Irish courts proceed on the basis that Irish penal policy is fundamentally penal welfarist in nature is today reflected in the jurisprudence that mandates individualisation in sentencing. It is not sufficient to construct sentences solely with regard to the gravity of the crime. Account must also be taken of the personal circumstances of the offender, and the sentence must be proportionate to the crime as committed by that offender.

63. Clearly, the penal objective of rehabilitation can readily be accommodated within this paradigm. But what about the other recognised objectives of retribution and deterrence? They are surely not redundant. However, while a review of the jurisprudence on Irish sentencing law will yield up some judicial discourse on the topic of rehabilitation, one will search in vain in the judgments of the Irish superior courts for any examination of what exactly is meant or understood by the concept of "retribution." The same is true of "deterrence" save to the superficial extent that from time to time judgments acknowledge an appreciation that punishment, or the threat of it, has or may have a deterrent effect. However, nowhere will one find any exploration of the philosophical ideas that

underpin these widely acknowledged, and daily applied, sentencing objectives.

64. Counsel for the appellant has alluded in her submissions to the "just deserts" theory of retribution. It will suffice for present purposes to address it relatively briefly. The purpose of the reference was to suggest that undue emphasis on retribution (and for that matter deterrence) as a penal objective may in some cases lead to injustice.

65. The "just deserts" theory is just one of many retributivist theories in the academic literature. Moreover, each retributivist theory has it proponents and its detractors, and to point out, as counsel for the appellant does, that the just deserts approach as a justification for retributive punishment has attracted significant criticism, is really of little assistance. This is so, not least because the sentencing judge neither explicitly nor implicitly indicated that his punishment was motivated by an espousal of the "just deserts" theory of retribution.

66. In its purest form the just deserts theory reflects the Kantian idea that repaying crime with punishment is simply doing justice and is a good in its own right. It assumes that criminal conduct is wrongful according to a societal consensus and hence deserving of censure through punishment. The traditional "just deserts" approach focuses almost entirely on the gravity of the offence and what is "deserved" in consequence of it. It thinks of justice as requiring that transgression of authoritative limits on conduct must be answered by a like, or at any rate commensurate, infringement inflicted on the transgressor. In common with other proportionalist sentencing schemes it seeks to ensure that similar crimes are treated similarly. Proponents of this approach argue that it is likely to yield the result that is most proportionate to the distress, grief or outrage caused by a particular offence and to have a manifest deterrent effect.

67. However, quite apart from the just deserts theory there are numerous other retributivist theories of punishment. Another frequently cited possible justification for retribution is to mark the disapprobation of society for the wrong that the offender has committed, i.e., to convey censure or blame.

68. If one ignores the possible existence of a concurrent desire to incapacitate and/or deter, other justifications for retributive action, some of them very ancient, do exist but are rarely, if ever, acknowledged, much less are discussed, in Irish jurisprudence. An extreme possible justification based on the *lex talionis* as expounded in the Book of Exodus is certainly one, namely that a wrongdoer should give *"life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe".* Clearly the notion of literal equivalence would have us raping rapists, and murdering murderers, and understandably requires immediate rejection on that basis. However more proportionate retribution might perhaps be justified in the spirit of the *lex talionis.*

69. Vengeance is another possible justification but is yet another one that is invariably rejected as being untenable in any civilised society. This is reflected in one of the few Irish judicial pronouncements of relevance in this area, that of Denham J in *The People (DPP) v M*, who stated *that "[s]entencing is neither an exercise in vengeance, nor the retaliation by victims on a defendant"*

70. To redress perceived unfair advantage taken by the offender; to "shame" the offender as a means of morally educating him or her; to show that society is in control and in an exercise of its dominion is effecting a diminishment of the dominion or self determination of the offender; and to demonstrate that there are consequences (harm-equalising sanctions) for failure to demonstrate self-restraint, thereby securing vindication of the basic rights of law abiding citizens, are yet others.

71. Retributivist thinking also sometimes lays claim to the ideas of repentance and atonement common to a number of religious traditions.

72. This is by no means an exhaustive list.

73. The point of this excursion into legal philosophy is to emphasise that there is no one dominant theory of retribution. However, what all these theories have in common is the view that it is inherently right or good that something negative should be done to those who do wrong. Retributivism is centred around a perceived moral imperative that wrong doing or evil committed should result in a response that involves the offender suffering in some way.

74. In terms of deterrence, there are again numerous theories, and again what all these theories have in common is that punishment is necessary to prevent future crimes. It has a utilitarian value in that it is calculated to produce future good.

75. In his work on *Sentencing Law and Practice*, 3rd Ed, Thomas O'Malley makes the following pertinent comments, at para 2-24:

> "2-24 Punishment theorists usually advance and defend their preferred justifications with great conviction and tenacity. Legislators, judges and lawyers, by contrast, seldom devote much thought to the matter, at least in the abstract. Yet, every time a judge imposes a sentence for an offence, whatever its nature or gravity, he or she is motivated, consciously or subconsciously by some purpose. Judges are seldom committed to the pursuit of any one goal such as retribution or deterrence. Nor should they be, given the wide variety of circumstances reflected in the offences they are called upon to sentence. Yet, in the most routine or mundane of cases, a judge will probably think in terms of sending out a message about the serious consequences of engaging in the conduct in question, or the need to punish the offender, or the desirability of giving the offender an incentive to refrain from further criminality. These objectives broadly correspond with deterrence, retribution and rehabilitation respectively."

76. We completely agree with these sentiments. Moreover, although it must be acknowledged that Irish penal policy, as reflected in our sentencing law, is biased in favour of penal welfarism, that requires no more than that the personal circumstances of the offender should receive proper consideration and be appropriately taken into account in the process of sentencing. In terms of current jurisprudence, this idea is reflected in the frequently cited statement of the former Court of Criminal Appeal in *People (DPP) v McCormack* [2000] 4 IR 356 *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".* Indeed, ever since State (Healy) v Donoghue [1976] IR 325 this idea has been recognised as having a constitutional status. In that case Henchy J opined that cumulatively Article 38. 1, Article 40.3.1o , Article 40.3.2 o and Article 40.4.1 o 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"*

77. That the accused's personal circumstances must be appropriately taken into account does not mean that retribution or deterrence are no longer legitimate penal objectives, or that rehabilitation is necessarily to be prioritised over retribution and/or deterrence as a penal objective. There was something of a misapprehension that the law had moved in favour of the latter idea following the decision of the former Court of Criminal Appeal in *The People (Director of Public Prosecutions) v GK* [2008] IECCA 110.

However, the issue was clarified by this Court in The People (Director of Public Prosecutions v O'Brien [2018] IECA, where we said:

> *"46. In the past it has been suggested by the former Court of Criminal Appeal in The People (Director of Public Prosecutions) v GK [2008] IECCA 110 that a court in sentencing, or an appellate court in reviewing a sentence, "must examine the matter from three aspects* ***in the following order of priority****, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence" (this Court's emphasis), thereby suggesting that the penal objective of rehabilitation is always to be afforded the highest priority. While we do not now think that this is necessarily a correct statement of principle, and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence, or retribution and incapacitation."*

78. There is simply no reason to think that retribution and/or deterrence are any less valid or legitimate today as penal objectives than is the penal objective of rehabilitation, even in circumstances where, as we acknowledge almost invariably occurs, a sentencing judge neither mentally addresses, nor articulates, in terms of any abstract or philosophical theory of retribution and/or deterrence, what it is that he or she is trying to achieve by his or her sentence. In our judgment the appropriate balancing of the accepted penal objectives of retribution, deterrence and rehabilitation are, in the absence of statutory guidance, uniquely matters for the exercise of judicial discretion and the required balancing exercise is fully capable of being conducted by ordinary judges on the basis of their colloquial or quotidian understanding of the concepts at issue, and without any specific need to have recourse to abstract penal theory or legal philosophy.

79. In the present case, it is reasonable to infer from his judgment that the sentencing judge did consider that on the evidence before him retribution and deterrence required to be prioritised over rehabilitation. This was a decision that was legitimately within his discretion. It does not follow from the fact that retribution and deterrence were ostensibly prioritised over rehabilitation that the resultant sentence was necessarily a disproportionate one. On the contrary, the sentence in this case was constructed with the greatest of care, and in our view was properly reasoned and justified on the evidence. We are completely satisfied that it passes the proportionality test and, in consequence of that, that ground of appeal no (vi) must therefore be dismissed.

Conclusion:
80. In circumstances where we have not seen fit to uphold any of the appellant's grounds of complaint we dismiss the appeal against severity of sentence.