THE COURT OF APPEAL

The President
Edwards J.
McCarthy J

Record No: 57/17

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

K.C.

Appellant

JUDGMENT of the Court delivered on the 11th day of April 2018 by Mr. Justice Edwards

Introduction

1. This is an appeal against the severity of sentences, amounting cumulatively to eighteen years' imprisonment with four years suspended (i.e., fourteen years' imprisonment to be served), imposed by the Dublin Circuit Criminal Court on the 2nd of November 2016 in respect of the charges on two bills of indictment, namely Bill No's 68/2015 and 1104/2015, respectively. Both of these cases involved sexual offences and the victim in the first of these cases was the appellant's brother DC, and in the second case his stepbrother CM. In the case involving the offences against DC the trial was contested and the appellant was convicted by a jury. In the case involving the offences against CM the appellant there were guilty pleas.

2. A complicating factor is that the appellant had previously received a sentence of nine years' imprisonment for the offences on Bill No 250/2014, to date from the 12th of January 2015. The victim in that case, which also involved sexual offences, was the appellant's sister, M.S. That trial had also been contested and the appellant was convicted by a jury. Both the conviction and the sentence imposed had been appealed to the Court of Appeal. However, both conviction and sentence were upheld. See *The People (Director of Public Prosecutions) v KC* [2016] IECA 155 and [2016] IECA 278. The appellant was already serving this sentence when he was sentenced on the on the 2nd of November 2016 in respect of the charges on Bill No's 68/2015 and 1104/2015.

3. Bill No 68/2015 involved 56 counts of indecent assault in respect of the appellant's younger brother DC. On the 2nd of November 2016 he was sentenced to nine years' imprisonment on each count, these sentences to run concurrently *inter se*, but consecutive to the nine-year sentence that the appellant was already serving, i.e., the sentence imposed on Bill No 250/2014. However, the final four years of the aggregate or cumulative sentence of eighteen years was suspended on certain conditions, leaving a net sentence of fourteen years to be actually served.

4. On the 2nd of November 2016 the appellant was also sentenced to an aggregate sentence of eleven years with two suspended in respect of 22 counts of sexual assault on Bill No 1104/2015, leaving a net sentence of nine years to be actually served, and to date from the 14th of October 2016, being the date on which the appellant was first remanded in custody in respect of those charges. The aggregate sentence of eleven years was comprised of nineteen individual sentences of eight years to be served concurrently *inter se* but consecutive to eleven individual sentences of three years, also to be served concurrently *inter se* and to date from the 14th of October 2016. Although all of the charges involved sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 (the Act of 1990), some of the offences attracted a higher potential penalty because they were perpetrated after 27th of September 2001 when s.37 of the Sexual Offences Act 2001 (the Act of 2001) became operative. Section 37 of the Act of 2001 amended the maximum potential penalty provided for in s.2 of the Act of 1990 as originally enacted, which was imprisonment for up to five years in all cases regardless of the age of the victim. By virtue of amendments to s.2 of the Act of 1990 effected by s.37 of the Act of 2001, which was commenced on the 27th of September 2001, there is now a maximum potential penalty of up to fourteen years' imprisonment for sexual assaults committed on a person under the age of 17 years, and a maximum potential penalty of up to ten years' imprisonment for sexual assaults in all other cases. The sentencing judge accordingly dealt with the counts preferred against the appellant in two groups; imposing eight years for offences committed after the 27th of September 2001, and three years for those committed before that date; and the sentences in the first group were made consecutive to those in the second group.

5. The net effect of all of the above is that the appellant is serving an aggregate sentence of eighteen years' imprisonment with four years suspended, to date from the 12th of January 2015 in respect of the offences of which he was convicted on Bills No's 240/2014 and 68/2015. Concurrent with this sentence, and completely overlapped by it, he is also serving an aggregate sentence of eleven years with two years suspended, to date from the 14th of October 2016, in respect of the offences to which he pleaded guilty on Bill No 1104/2015.

6. The appellant now appeals against the severity of the sentences imposed on him in respect of the offences covered by Bills No's 68/2015 and 1104/2015, respectively.

Background Facts

Bill No 68/2015

7. The fifty-six counts of indecent assault on Bill No 68/2015, in which the victim was the appellant's younger brother DC, included numerous instances of genital touching, masturbation (the victim being forced to masturbate the appellant and the appellant

masturbating the victim) and three instances of anal penetration of the victim. The offending occurred in the period between 1980 and 1985, when the appellant was aged between 18 and 23 years and the victim was aged between 9 and 14 years. The victim was the second youngest child in a large family living together in a house in Dublin. He shared a bedroom with the appellant, another brother and his sister. The complainant alleged that following the first incident the assaults happened regularly over the following five years. The victim was particularly vulnerable at the time that the abuse commenced, as it was not long after he had lost a younger brother in a road traffic accident.

8. Although the jury had returned their verdict finding the appellant guilty on the 22nd of October 2015, sentencing was deferred for several reasons, in particular because the sentence in relation to MS was still under appeal. Also the sentencing judge requested a medical report on the appellant's condition. Further, there was uncertainty concerning the applicable maximum penalty, a matter which was the subject of on-going litigation and which uncertainty was destined to be ultimately resolved by the Supreme Court in *The People (Director of Public Prosecutions) v Maher* [2016] IESC 31.

9. On the 30th of May 2016 the appeal against the appellant's conviction for the offences involving MS was dismissed by the Court of Appeal.

10. On the 9th of June 2016, the Supreme Court rendered its decision in the *Maher* case, holding that the maximum sentence available for the offence of indecent assault upon a male was 10 years' imprisonment.

11. Then on the 6th of October 2016 the appeal against the severity of the sentence of nine years' imprisonment imposed in the MS case was dismissed by the Court of Appeal. The court held that although the sentence was severe and one that fell at the upper end of the range of sentences available, it did not fall outside it, and the court was not in a position to identify an error in principle.

12. Before sentencing the appellant on the 2nd of November 2016 for the offences of which he had been convicted on Bill No 68/2015, the sentencing judge sought, and was provided with, and had clearly read, the Court of Appeal's judgment in respect of the appeal against the sentence imposed on Bill No 250/2014.

Bill No 1104/2015
13. On the 14th of October 2016 the appellant pleaded guilty to Count 2 on Bill No 1104/2015, being a count alleging a sexual assault offence against CM. Then on the 21st of October 2016 the appellant further pleaded guilty to counts 3 to 22 on the same indictment, which also alleged sexual assault offences against CM.

14. The abuse of CM began when the complainant was 12 years old, occurring at around two to three times per week from January 2000 until July 2003, when the appellant was 15. The appellant was at the time in a relationship with CM's mother and thus occupied the role of a father figure in CM's life. The evidence was that within the late night to early morning period, the appellant would enter CM's room and approach his bed. The scent of alcohol was apparent to CM. The appellant then proceeded to insert his hand under the duvet and touch CM's penis and scrotum. This began as contact over the pyjamas but progressed to skin-to-skin contact. CM believed that the appellant was also masturbating himself. This was a regular occurrence for CM, being subjected to these intrusions up to two to three times per week. At one point, CM attempted to defend himself by kicking the appellant, but the appellant slammed his arm against the back of the victim's legs. This activity only ceased when CM managed to lock the door by forcefully inserting a piece of wood under the door handle. This did not however prevent the accused from continuing to attempt to gain access. When interviewed, the appellant denied the allegations outright, arguing that CM lacked friends and perhaps resented him as he was not his biological father.

15. Counsel for the appellant stated in the course of her plea in mitigation that she had instructions from her client to convey an apology to CM for what he had done to him.

The Impact on the Victims

DC
16. On the 14th of December 2015 DC gave evidence as to the impact the actions of the accused had on him. In addition to the appellant breaching his position of trust with his younger brother, the effects of the acts perpetrated on DC were compounded by the loss of companionship of his twin brother, who had been hospitalised for a considerable period and had ultimately died as a result of catastrophic injuries sustained in a road traffic accident. DC stated in court: *"I was only nine years of age and my brother, my twin, my best friend was suddenly gone. I was alone and vulnerable and felt exposed. I was no longer part of something or someone"*. DC went so far as to say that the actions of the accused had made his life "a living hell" from which he could not escape.

17. The first incident of anal penetration by the appellant triggered in DC a debilitating stammer which would continue to persist for two decades. The incident of anal penetration which occurred around the period of DC's scouting jamboree resulted in severe medical injuries, which included uncontrolled bowel movements. Whilst such injuries would of themselves be of a severe nature, the impact on the victim here went beyond this, as the child in his formative years was made to suffer from such an embarrassing condition in the company of his friends.

18. The acts of the appellant resulted in severe mental trauma to DC, which would often manifest in the form of intense nightmares. These nightmares were highly distressing nature, such that during the course of one such nightmare DC attempted to jump out of a window, and was injured in doing so, resulting in permanent scarring to his arms and back.

CM
19. The transcript records that a victim impact statement from CM was given to the sentencing judge on the first day of the sentencing hearing, i.e., 21st of October 2016, but was not read in to the record. However, it is clear she had read it and had had regard to it, because she stated (in regard to the offences on Bill No 1104/2015) *"[t]he Court is taking into account the effect that this had on the injured party and continues to have on the injured party."* This Court was provided with CM's victim impact statement on the hearing of the appeal.

20. In his victim impact statement CM describes how as a result of being abused by the appellant he is very nervous and anxious around people, and how this anxiety affects his work as well as his social relationships. He says the appellant "made my childhood a nightmare which continues to this day." The appellant describes suffering from significant depression arising out of self-perceived social ineptitude in consequence of being abused. He has serious problems sleeping, and does not get to sleep until 4am most nights even at this remove from the traumatic events of his childhood. His depression also results in regular loss of appetite, and has led to himself harming by cutting.

The appellant's personal circumstances
21. The appellant was born on 25th November 1962 and accordingly is now aged 56, and was just short of 54 at the date of his sentencing. He is a married man and it was stated in evidence that he still enjoys the support of his wife. The appellant and his wife have a young daughter, who was four at the date of the sentencing. He has another daughter, now grown up, from a previous relationship.

22. As is recorded in the earlier judgment of this Court in delivered on the 6th of October 2016 in the proceedings arising from Bill No 250/2014, he has a good work history, including having spent some 25 years working for a window company.

23. The appellant has 30 previous convictions. These include his conviction by a jury in late 2014 on sixteen counts of indecently assaulting MS, for which he received a sentence of nine years' imprisonment on one of those counts, with the other fifteen counts being taken into consideration. Aside from this he has a number of other convictions mainly for road traffic and public order offences, with one conviction for larceny going back to 1991.

24. The appellant suffered a stroke after going into custody, but has made a good recovery from this.

The course of the sentencing hearing
25. The sentencing judge, having heard evidence concerning the facts of both cases on the 21st of October 2016, heard a plea in mitigation and was reminded by counsel for the appellant of the need to take account of the principles of proportionality and totality in the event that she was considering the possible imposition of consecutive sentences. She was further asked to note that while the Court of Appeal did not interfere with the 9-year sentence imposed at first instance in relation to the offences on Bill No 259/2014, and involving MS as a victim, it was nevertheless of the view that the sentence rested at the top end of the scale.

26. The sentencing judge wished to know how the details of the offences relating to MS compared with those involving DC, because *"if the Court of Appeal are saying it's on the higher end…that's why I want to be exact on it"*.

27. The sentencing judge was then given details of the nature and frequency of the appellants offending conduct against MS, and was apprised of the fact that while DC had been subjected to penile penetration, MS had not been so subjected. She was informed that the maximum penalty available in both of the cases under comparison was 10 years' imprisonment. She was also told of the substantial impact the offences perpetrated on MS had had on her.

28. The judge decided that she would not finalise matters on that date as she needed to consider the issues further, and she adjourned the matter to the 27th of October 2016. On the adjourned date, the sentencing judge asked counsel on both sides to further address her on consecutive sentencing, in circumstances where, being of the view that the offences involving DC were *"of a very, very, very serious nature"*, she was actively considering having recourse to consecutive sentencing. The DPP submitted that the overlap in offending in relation to MS and DC, the appellant's siblings, was a potential aggravating factor to be considered in determining the appropriateness of consecutive sentencing.

29. Conversely, counsel for the appellant submitted that there were numerous cases involving two, and sometimes three complainants, where all counts had been tried together, and where sentences lower that the nine years that had been imposed on Bill No 259/2014 had been imposed. He submitted that if the MS and DC offences had been tried in the same trial, it is unlikely that a very much greater sentence would have been imposed. It was submitted that while the court had a jurisdiction to impose consecutive sentences, the imposition of consecutive sentences in sexual cases was somewhat unusual, and normally was reserved for cases involving depravity or extreme seriousness. Whilst there were multiple complainants, counsel for the appellant submitted that it was not unusual for offences involving siblings to be sentenced in the same indictment and sentences of less than nine years in such cases had been imposed and upheld. in relation to multiple siblings in the same indictment to produce a sentence of less than 9 years. Adherence to the principles of proportionality was called for, given the historic nature of the offences.

30. To enable counsel to obtain and to open relevant authorities to the court, the sentencing judge decided to adjourn the matter for yet a further week to the 2nd of November 2016 for finalisation.

31. On the 2nd of November 2016 the appellant was sentenced in respect of both DC and CM. The court again heard submissions from the appellant relating to the imposition of consecutive sentencing and the totality principle. The appellant referred the court to *The People (Director of Public Prosecutions) v JC (No.2)* [2016] IECA 97 and *The People (Director of Public Prosecutions) v ML* [2015] IECA 144; two cases in which father figures committed sexual offences against multiple victims. Counsel for the appellant advocated against using the 9-year sentence on Bill No 259/2014 as a starting point due to its severity, arguing that had the offences been tried together, the resultant sentence would have more closely matched the sentences in the two cases submitted as comparators.

The Sentencing Judge's Remarks

Re Bill No 68/2015
32. The sentencing judge began her sentencing remarks by considering the nature of the relationship between the appellant and the victim, the age disparity, and the nature of the offending conduct involved in the 56 counts of indecent assault before her. She noted that it began with masturbation and escalated to what she characterised as anal rape, of which there were three specific incidents, which she detailed.

33. She referred to the effects on the victim, and then considered the appellant's personal circumstances before going on to state:

> *"The aggravating factors are the serious nature of the charge; I think this is a very, very, very serious allegation of indecent assault. It occurred over a period of time, from the 1st of December 1980 to the 31st of December '85. The effect it had on the injured party and I've outlined that to some degree already. The breach of trust between the defendant and the injured party; he was an older brother and he was considerably older than him. It occurred in what should have been the safety of his dwelling, in his own home, in his own bedroom, and the Court is taking that into account as an aggravating factor. The Court is taking into account the disparity in age between the defendant and the injured party. The Court is taking into account the injuries inflicted on the injured party as a consequence of this abuse, and the Court, in some measure, has outlined that. Also, the Court is taking into account that these assaults occurred once or twice a week. The Court is taking into account that this abuse started when the injured party was a vulnerable individual, having just lost his brother to a road traffic accident. The Court is taking into account, and well into account, the adverse sequelae that the injured party and the Court has said what he endured during his teenage years, medically,*

what he has endured since the age of 16 when he left the family home, what he has endured right through his life; the effect it had on his relationships, the consequences of this abuse. The Court has been advised that Judge Nolan delivered a judgment and gave a sentence of nine years' imprisonment, and the Court has been advised that the maximum sentence for this case is 10 years' imprisonment. The mitigating factors are his ill health.

The Court considers that this is an appropriate case to impose a consecutive sentence. The Court has been handed in two recent judgments of the Court of Appeal, and the defence make a point that a severe sentence was handed down in the case given by Judge Nolan and the Court is asked to take that into account, that maybe a more appropriate sentence would be less if this sentence is to be consecutive, that I have to take that into account, and I will take it into account. The Court has to regard the principles of totality and proportionality, and the Court will take those principles into account in sentencing. The Court, in marking the seriousness of the offence, taking into account the personal circumstances of the accused, will impose a sentence of nine years' imprisonment consecutive to the sentence imposed by Judge Nolan in the case involving his sister, with four years suspended …"

Re Bill No 1104/2015

34. The sentencing judge commenced her consideration of the offences on this indictment by noting the different penalty ranges for the offences committed before and after the amendments effected by s.37 of the Act of 2001, noting that the maximum potential penalty was 5 years in respect of counts 3 to 12 inclusive, and fourteen years in respect of counts 13 to 22 inclusive.

35. She then noted the date of birth of the injured party, the relationship or, more accurately, the connection between the appellant and CM, namely that the appellant was CM's mother's partner, and their living arrangements at the time. She went on to describe the nature of the offending conduct before noting the appellant's previous convictions, including those on Bill No 259/2014 for which Judge Nolan had imposed nine years, which sentence had been upheld.

36. She then continued:

"The aggravating factors are the serious nature of the charge; it occurred over a period of time, the disparity of age between the injured party and the defendant which was a much greater disparity of age than in the previous case, the fear which the injured party, a young boy, was put into because of the actions of Mr Cooke, the breach of trust when he was in his home as a partner of his mother, which was a grave breach of trust. This abuse occurred in a place of safety, how own house and his own bedroom. The Court is taking into account the effect that this had on the injured party and continues to have on the injured party. The mitigating factors are his plea of guilty, his apology and his ill health. The Court can take into account as a mitigating factor his work ethic and his good employment record, and as in the last case, which I haven't mentioned, the Court is taking that into account, and well into account.

The Court, in marking the seriousness of the offence will impose, between 2 and 12, a prison sentence - bearing in mind that the maximum is five years - three years' imprisonment. And the Court, in marking the seriousness of the offence and taking into account the principles of totality and proportionality, in particular of totality in deeming a consecutive sentence and bearing also in mind the judgments here of KC and the other judgment which was handed sorry JC, which was handed in to the Court, and the judgment of ML. I gave the wrong bill No. as regards one of those; the bill number relating to this matter is 25/15. So the Court, in considering the matter and considering all matters as regards the totality principle, and taking into account all matters will impose a consecutive sentence, bearing in mind that this sentence is 14 years of eight years eight years consecutive to three years, with two years suspended …"

The Grounds of Appeal

37. In what counsel for the appellant characterises as her client's "central submissions", the following complaints are made:

(i). In respect of DUDP 0068/15, (indecent assault of DC), the sentencing judge applied mitigation to the maximum sentence as opposed to the proportionate presumptive headline sentence. Thereafter, insufficient regard was given to the personal and family circumstances of the appellant. The sentence failed to adequately reflect the totality principle, in circumstances where the appellant was already serving a long sentence.

(ii). In respect of DUDP 1104/2015 (sexual abuse of CM) insufficient credit was given by the sentencing judge for the guilty plea entered by the appellant. The sentencing judge erred in the manner in which she constructed the sentence and failed to give any adequate explanation for the imposition of consecutive sentences. The sentence failed to reflect the totality principle, in circumstances where the appellant had already been serving a sentence since January 2015.

The appellant's submissions

Bill No 68/2015

The aggregate sentence of eighteen years with four years suspended which the appellant received for the abuse of MS and DC.

37. Counsel for the appellant relies on the well-known statement of principle by Denham J (as she then was) in *The People (Director of Public Prosecutions) v M* [1994] 3 IR 306. Denham J stated that a sentencing court should first decide on the proportionate sentence for the crime, and then mitigate based on the personal circumstances of the criminal. At this initial stage, Denham J believed that the court should concentrate on the gravity of the offence and choose a commensurate level of punishment, bearing in mind that the maximum sentence should be reserved for the worst reasonably imaginable manifestation of the offence. Only after this stage has been completed, should the court should give credit for mitigating factors such as a guilty plea or relevant aspects of the accused's personal circumstances.

38. The appellant submits that the sentencing judge did not follow Denham J's recommended procedure. It is complained that the sentencing judge erred in not locating where the case fell on the spectrum of severity. As this was not done, it was not possible to assess how much credit was given to the mitigating factors. Counsel for the appellant submits that it may be inferred from the final figure that insufficient regard was given to his personal and familial circumstances. Despite the indication given by the Court that it

would factor into its decision the medical condition of the appellant, the appellant believes that inadequate weight was given to this factor.

39. It was submitted that custodial sentences should be measured not just by length, but also by their intensity for the particular accused. The court had heard that the appellant had the support of his wife and young child. Whilst counsel for the appellant accepts there is a risk that this relationship could be undermined, given the nature of the offences, it was submitted that the length of the overall sentence carries with it the extra punishment of preventing any possibility of the appellant forming a meaningful bond with his family for some time.

40. Counsel for the appellant places reliance on the Court of Appeal's comment in relation to the sentence imposed for the offences against MS that it *"could fairly be described as severe and must be regarded as falling at the upper end of the available range"*. While accepting that the imposition of consecutive sentences was an option available to the sentencing judge, the appellant submits that in doing so the court failed to adequately take into account the principles of totality and proportionality, particularly in circumstances where the sentence on Bill No 259/2014 was acknowledged as being severe. The appellant submits that the sentencing judge did not review the overall sentence and thus it does not reflect the totality of the offending.

41. We were referred to *The People (Director of Public Prosecutions) v. Casey and Casey* [2018] IECA 121, in which Birmingham J (as he then was) stated:

> *"The totality principle is potentially engaged whenever a court is seeking to reflect the overall gravity of two or more offences for which an accused faces sentencing, either by means of overlapping sentences, or wholly consecutive sentences. It permits a court to adjust the final sentence, and some or all of its individual components, as required to reach an overall figure that is proportionate both to the gravity of the offending, but also to the circumstances of the individual offender… .*
>
> *It is most frequently seen to operate where a court approaches sentencing on the basis of first determining in the normal way the appropriate post mitigation sentence for each individual offence, and whether and to what extent those sentences should be consecutive or concurrent inter se, without reference to any consideration of what cumulative figure it may result in. the court is then required to step back and give consideration to the resultant cumulative figure and if necessary adjust it downwards, with appropriate pro-rata adjustments to the individual component sentences, so as to avoid the imposition of a "crushing" sentence on the offender."*

42. Counsel for the appellant has referred us to the same comparators to which the sentencing judge was referred in order to demonstrate that, in some cases in which multiple victims were subjected to regular sexual abuse, significantly shorter sentences were imposed than those imposed in the present case. In *The People (Director of Public Prosecutions) v JC (No.2)*, for example, a sentence of 10 years' imprisonment with 2 years suspended was upheld for a father who was convicted by a jury of numerous counts of sexual and indecent assaults against six different victims, two of whom he was the actual father of, and four of whom he was a father figure to. Whilst the offending conduct was less egregious than in the case involving DC, consisting solely of masturbation, the breach of trust was very great. The accused in that case had similar personal circumstances to the appellant here, being of a similar age and with a similar work history, with the main difference being that he had no previous convictions, whilst the appellant here has a previous relevant conviction and numerous other minor convictions.

43. We were also referred to *DPP v ML* [2015] IECA 144 involving an accused who was the partner of the mother of six injured parties, whom he had sexually assaulted over the course of ten years. Some of the counts related to oral rape. It was submitted that the accused in that case, who was convicted by a jury, had similar personal circumstances to the appellant here, although he did not have any previous convictions. Quashing the first instance sentence of 7 years with 2 years suspended as unduly lenient, the Court of Appeal raised it to 9 years.

44. Counsel for the appellant submits that even if the Court of Appeal allowed for some reduction for the disappointment factor when it raised the sentence in *ML*, that case involving as it did serious abuse against multiple victims, resulted in a significantly lower sentence than the total of 18 years with 4 years suspended which the appellant received for the abuse of MS and DC.

45. We were also referred to *The People (Director of Public Prosecutions) v O'Regan* [2008] IECA 120. In that case, which involved an undue leniency review, the respondent had entered late pleas of guilty (after a jury had been empanelled) to eighteen counts of indecent assault and three counts of rape, involving six young people (cousins and nieces) within his family circle. The Central Criminal Court had sentenced him to sentences of ten years' imprisonment in respect of each of the rape counts, with five years suspended in each case, and also to sentences of eighteen months in respect of each of the indecent assaults. All sentences were to run concurrently. The Court of Criminal Appeal had refused the DPP's application to set aside these sentences on the grounds of undue leniency. Giving judgment, *ex tempore*, for the court, Kearns J said, *inter alia*:

> *"It must be said at the outset that these were crimes of the utmost seriousness involving a gigantic breach of trust and involving in the main very young girls who were aged between nine and twelve years of age when this process was underway and it continued over a period of nine years from 1969 to early 1978."*

46. Notwithstanding this, the Court of Criminal Appeal concluded:

> *It is a highly unusual case and the Court is not going to interfere with the sentence which was imposed by the sentencing court because the Court is not satisfied that it could safely conclude, although it might have imposed a more severe sentence, that there was a substantial departure by the sentencing judge from what he was entitled to regard as appropriate for a variety of reasons.*
>
> *Firstly, the Court does take the view that the learned trial judge was correct in taking the view that the antiquity of these offences was something to be factored into account given that the range of penalties which the offences might have attracted had they been dealt with back in the late 1970's or early 1980's might have been significantly, or at least to some extent, less. Mr. Hartnett, senior counsel for the respondent, has directed the Court to the views of the former Chief Justice in The People (Director of Public Prosecutions) v. JT (Unreported, CCA on 6th November, 1996) which provides ample authority for this general proposition.*

47. The appellant in the present case places considerable reliance on this "*first*" point, and maintains that the same consideration should apply here.

48. In supplemental written submissions filed before the appeal hearing it was again submitted that the sentence was disproportionate because the sentencing judge failed to take into account, either adequately or at all, the fact that the offences involving MS and DC were historic, the fact that they overlapped and the fact that they related to a period when the appellant was a young person living with his younger siblings MS and DC. We were referred to O'Malley on *Sentencing Law and Practice*, 3rd ed, at p.146, where the esteemed author states:

> "A child for legal purposes is a person under the age of 18 years. However, it is also accepted that the chronological transition from childhood to adulthood does not entail any dramatic change in personality or capacity. Many young adults in their late teens and early twenties are still at a transitional stage of development, a reality the courts recognise when sentencing persons in this age group."

49. We were further reminded that while courts have a discretion to impose consecutive sentences where there are multiple victims, the authorities emphasise that consecutive sentences should be used sparingly and that in general the courts lean against consecutive sentencing. In support of this we were referred to the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v G.McC* [2003] 3 IR 609.

Bill No 1104/2015

The aggregate sentence of eleven years with two years suspended

in respect of the abuse of CM

50. It was submitted that the sentencing judge in reaching her decision stated that the *"mitigating factors are his plea of guilty, his apology and his ill health"*. It has been submitted on behalf of the appellant that the sentencing judge did not give the guilty plea sufficient weight, in circumstances where the appellant had not seen fit to plead guilty in respect of the offences alleged against him in respect of the other two injured parties. CM was spared the ordeal of a trial and the prosecution and the courts concerned were spared time and expense. It was further submitted that his guilty plea was indicative of remorse, and that remorse was further evident in the apology communicated to the victim on his behalf.

51. The appellant further submitted that his familial and health circumstances were not properly addressed by the sentencing judge in respect of CM.

52. Further, it was submitted that the sentencing judge did not give an adequate explanation as to why consecutive sentences were imposed, and failed to demonstrate proper application of the totality principle, in circumstances where the appellant had been imprisoned since January 2015.

The Respondent's Submissions

53. The respondent submits that this was an overall sentence which was carefully and meticulously crafted by the learned sentencing judge over a number of hearings. An examination of that chronological narrative reveals that the sentencing judge was mindful of her obligations in sentencing – particularly the obligations surrounding the imposition of sentences which did not bring her foul of the totality and proportionality principles. It is clear that she paid particular attention to her powers regarding the imposition of consecutive sentences – exemplified by her repeated requests to be addressed on this issue. She invited submissions on two occasions and received authorities from the defence prior to her determination.

54. From the outset, having been apprised of the sentence imposed by her colleague for the offences involving MS and the fact that it was a matter which was under appeal to this court, she suggested an adjournment of her sentence matters until after our determination in order to ensure that she did not rush into a sentence. Indeed, it was pointed out that when this court dismissed the appeal she called for not just counsel's agreed note but also the actual report of the judgment – expressing this to be relevant and clearly to apprise herself of the facts of that case and to measure their seriousness against the facts of the case involving DC which she herself had tried. She was equally anxious to know what the maximum sentence had been in relation to the matters involving MS.

55. The point was also made that the sentencing judge was equally reluctant to finalise matters without having the benefit of an update on the appellant's medical condition:

> *"I have to take into his account his medical condition because the hardship, if there is hardship given his medical condition, I have to take that into account in sentence as well, so I'll need a medical report……..I'm not going to finalise the matter today…..the medical report should address his incarceration and the effects it would have on him..if any…..for the proper final determination of the matter"*

56. She was also concerned about being addressed on the different penalties applicable to the sequence of offending regarding CM.

57. It was submitted that the sentencing judge had expressly acknowledged the plea of guilty and that she had adequately taken it into account. In acknowledging the plea, she had appropriately noted that the appellant had denied the complaints when interviewed in the course of the investigation.

58. The respondent has submitted that it is clear from the reticence expressed by the sentencing judge at different stages, that she was cautious, and exhibited concern to be fair to the appellant, in her approach to sentencing him.

59. With respect to the appellant's submission that the sentencing judge did not adopt the recommended best practice of nominating a headline sentence before discounting for mitigation, the respondent submits that there is clear authority to show that failing to identify a pre-mitigation headline sentence does not per se amount to an error in principle - *The People (Director of Public Prosecutions) v Flynn* [2015] IECA 290. Simply because there was no explicit identification or espousal of a headline sentence does not, a fortiori, indicate that the learned sentencing judge did not consider where the offending was properly located on the scale of gravity prior to taking into account mitigating circumstances. This was an experienced sentencing judge who had had the benefit of hearing the evidence given at trial and who had, from the start, adopted a cautious and restrained approach to the sentencing process.

60. Noting that the appellant has placed reliance on certain dicta of Birmingham P *in The People (Director of Public Prosecutions) v Casey & Casey*, where at paragraph 20, he sets out the manner in which the totality principle is engaged by a court which is faced with sentencing an accused for two or more offences, the respondent has submitted that Birmingham P makes it clear that the ultimate aim that the *overall* figure must be proportionate, *i.e*, proportionate in the distributive sense, both to the gravity of the offences and the personal circumstances of the offender. Birmingham P went on to consider the two approaches that a court can

take in reaching a lawfully proportionate sentence which complies with the totality principle.

61. The first, and most common, approach, is where the court determines: *"in the normal way the appropriate post mitigation sentence for each individual offence and whether and to what extent those sentences should be consecutive or concurrent inter se without reference to any consideration of what cumulative figure it may result in. The court is then required to step back and give consideration to the resultant cumulative figure and if necessary adjust it downwards, with appropriate pro-rata adjustments to the individual component sentences so as to avoid the imposition of a "crushing" sentence on the offender"*.

62. The respondent has submitted that on no reading could the overall sentence in the instant case be considered a crushing one, having regard both to the manner in which it was constructed and imposed by the sentencing judge, and to the very serious offending engaged in by the appellant. The appellant was in very great breach of trust in relation to all three victims. The offending behaviour continued for years in relation to all three. He had vigorously fought the allegations in relation to two of his victims. The victims had been very adversely affected by his behaviour. It was submitted that the avoidance of a crushing sentence on the appellant was clearly what was in the judge's mind when, at the end of the sentence process, she was very emphatic as to what the ultimate overall sentence would be. It was obvious from the structure of the penalties on the different counts that she had in reality *"stepped back"* and made a downwards adjustment (by suspending almost half of the sentence in relation to DC).

63. While it was true that Birmingham P in *Casey & Casey* had gone on to acknowledge that a court *can* adopt a different approach – one which also brings the totality principle into play – in which the court determines in the first instance a global pre mitigation sentence reflective of the overall gravity of the offending conduct and then goes on to consider what actual sentences it should impose in respect of individual offences (as well as whether they should be concurrent or consecutive), this approach still demands any such global pre-mitigation figure should be proportionate to the gravity of the totality of the offending conduct .

64. It was submitted that this is consistent with, and reflects, that a fundamental consideration, for any sentencing judge who is sentencing for multiple offences, is the determination of an appropriate and proportionate pre-mitigation sentence which takes account of the gravity of the offending conduct in its totality. The respondent says that it is against that principle that the pre-mitigation sentence in this case must be judged and if, upon scrutiny of the facts of the case, that principle is not offended then there has been no legal error in the assessment of gravity and the totality principle has been observed. The respondent submits that the appellant has not established any error in principle on the part of the sentencing judge in that, or indeed in any other, respect.

65. The respondent has also sought to refute the suggestions by the appellant that insufficient credit or regard was given to his personal and family circumstances. On the contrary, the respondent says, an examination of the transcripts reveals that the sentencing judge was fully cognisant of his personal circumstances and, critically, was very concerned to be informed in particular as to his state of health and how incarceration might adversely impact on that. It was urged that in this regard the only mitigation presented with respect to the offences involving DC and MS was that he was a family man with a good work record. Remorse, save for the apology which was specifically directed *only* to CM, could not be said to have been a feature of the mitigation presented in respect of the offences on Bills No's 68/2015 and 249/2014– especially against a background where the appellant had fought both trials and had pursued appeals against conviction.

66. Whilst the appellant claims that the sentencing judge gave no adequate explanation for her imposition of consecutive sentences, the respondent refutes this, arguing that it was manifestly obvious from her overall sentencing remarks that the rationale for her decision was what she characterised as *"the very very very serious nature of the offending"*. The sentencing judge on the 27th of October 2016 did in fact state that authority exists which allows the court to impose consecutive sentences when the offending is of such a serious nature, which was conceded by counsel for the appellant. The respondent thus questions why the appellant now claims that the rationale of the sentencing judge was unclear.

67. The respondent submits that it is trite law that a sentencing judge has considerable discretion as regards to sentence structure for cases involving multiple offences. Professor O'Malley, in speaking of *R v Mohammed Sheikh* [2011] EWCA Crim. 3172, writes:

> *"Insofar as there is any guiding common-law principle, it is that concurrent [sentences] should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from separate and unrelated incidents. But this, it should be stressed, it is no more than a broad guiding principle. A court's fundamental duty is to impose a sentence that fairly reflects the totality of the offending conduct whilst making due allowance for personal mitigation and other relevant factors".*

68. The respondent notes that the present case does not concern "one transaction" offending, and there was no evidence of double counting by the sentencing judge. What is relevant, the respondent suggests, is the fact of the serial sexual abuse of numerous victims. Professor O'Malley further states:

> *"Where there are several victims…courts are now inclined to impose a set of concurrent sentences in respect of the offences against each victim but to order those sets of sentences to run consecutively to each other. Otherwise an individual victim may feel that harm inflicted on him or her has gone unpunished. However, this is just a general principle that has developed through recent practice. It was acknowledged by the Court of Criminal Appeal in DPP v Z as one of the situations in which consecutive sentences may be appropriate".*

69. It was submitted by the respondent that the sentencing judge's construction of the consecutive sentences for the CM offences accurately reflected the frequency of the offences over a lengthy period, as well as other considerations which she marked as aggravating factors. It is also apparent from her remarks that she was mindful of the new maximum penalty available. The respondent believes that marking the CM offences as serious and involving a severe breach of trust abides by the dicta of Sheehan J in the *ML* case cited by the appellant. In that case in which the accused occupied the role of a father figure for his partner's child, Sheehan J referenced the UK case of *R v Turner* [2011] EWCA Crim 3201, in which it was held that *"[w]hen a woman invites a man into her home to live with her and he assumes the role of stepfather to her young child, that imports a high degree of trust and responsibility. In our judgment a sexual assault on that child manifests a breach of trust to a very high degree"*.

70. The respondent submits that this Court is likely to find the cases of *The People (Director of Public Prosecutions) v JC (No.2)* [2016] IECA 97 and *The People (Director of Public Prosecutions) v ML* [2015] IECA 144, to which the appellant refers, to be of little assistance because they are offered as direct comparators, rather than as indicative of a demonstrable trend. The respondent argued that cases of this nature turn very much on their own facts, and due to their fact-specificity such cases cannot be directly compared in any meaningful way. In any case, the offending in *JC (No 2)* was of a much less severe nature than in the present case. As such, it is submitted that no proper comparison can be gleaned from these cases.

Moreover, it cannot be contended that the two cases proffered indicate any meaningful trend in sentencing. It would require a survey with a much greater sample size to support any such assertion.

71. It was submitted that it is evident that in structuring the sentences in relation to the DC and CM offences, the sentencing judge was mindful of the *MS* sentence and imposed a thoroughly considered sentence which complied with the guiding principles of totality and proportionality, accurately reflecting the very serious offences on vulnerable victims over whom he occupied a position of trust. The fact that a substantial part of the sentence was suspended shows that the sentencing judge ensured to give the appellant some hope.

72. The respondent submits that the court should dismiss the appeal.

Discussion and Decision

73. In circumstances where the aggregate eleven year sentence of imprisonment with two years suspended imposed in respect of the offences on Bill No 1104/2015 has in practical terms been subsumed by the longer aggregate sentence of eighteen years imprisonment with four years suspended arising because the individual sentence imposed on Bill No 68/2015 was made consecutive to that on Bill No 249/2014, it is appropriate to focus primarily on the eighteen year aggregate sentence, at least at the outset.

74. The sentence under appeal is that on Bill No 68/2015, and not the sentence on Bill No 249/2014. However, because recourse was had to consecutive sentencing, the totality principle is engaged and the sentencing court was, and indeed this Court is now, obliged to consider the proportionality of the aggregate or overall sentence.

75. Predictably, the core complaint in this appeal relates to the proportionality of the aggregate or overall sentence. It is suggested that, regardless of how it may have arisen, the overall sentence is simply too high and that it is manifestly disproportionate. If this Court concludes that that is the case, then it is not necessary for any more specific error to be established. In that event we would be obliged to quash the sentence imposed by the court below and to proceed to re-sentence the appellant. However, the appellant goes further and seeks to attribute the cause of the asserted disproportionality to several quite specific errors which his counsel argues were committed by the sentencing judge. These are:

☐ the alleged application of mitigation to the maximum sentence, rather than to any proportionate headline sentence;

☐ the alleged paying of insufficient regard to the personal and family circumstances of the appellant, resulting in too small a discount in mitigation;

☐ the alleged failure to adequately apply the totality principle in circumstances where the appellant was already serving a long sentence.

76. It is appropriate to deal with these complaints in the order in which they are listed. The complaint that the overall sentence was simply too high can be dealt with in conjunction with, and indeed as an aspect of, the third specific complaint relating to the alleged failure to adequately apply the totality principle.

77. To deal with the first point raised by the appellant, there is simply no evidence to suggest that the sentencing judge, who was very experienced, applied mitigation to the maximum sentence. To suggest that is to completely misread the sentencing judge's remarks. The sequence evident from her sentencing remarks is she listed in the first instance the various factors relevant to assessing the gravity of the offences. In circumstances where she was clearly intending to impose consecutive sentences (and she had raised clear flags about this in earlier hearings when she invited submissions on this topic), she then noted that nine years had been imposed by Judge Nolan for the offending conduct on Bill No 249/2014. Next, she notes that the maximum sentence for the offences in respect of which she was required to impose sentences was ten years' imprisonment. Having done so she then observes that "The mitigating factors are his ill-health". It cannot be inferred simply from the fact that the mitigating factors are mentioned immediately after her acknowledgment of awareness of the maximum potential penalty that she applied mitigation to the maximum penalty. We dismiss any such suggestion *in limine* as being completed unsupported by the transcript. Moreover, in so far as there is a related complaint (which is not actually raised in any ground of appeal, although it was the subject of submissions) that the sentencing judge failed to follow the semi-structured reasoning approach that this Court has frequently commended as best practice, the transcript once again does not bear this out. Although she does not specifically label it as her "headline sentence" the sentencing judge's pre-mitigation starting point is clearly identified in her remarks as being nine years from which she discounted by approximately 44% by suspending the last four years. It is clear from the sentencing remarks read in their totality that the discount of 44% was intended both to take account of mitigation (of which there was very little) and to effect an appropriate downwards adjustment to take account of the totality principle.

78. With regard to the second specific complaint, we also do not regard this as being well founded. We have already observed that there was very little mitigation available to the appellant. He did not plead guilty in respect of the offences on Bill No 68/2015 and therefore did not have available to him the substantial mitigation that such pleas would have entitled him to. Moreover, he exhibited no remorse whatever for abusing DC. While his counsel was instructed to offer an apology to CM in respect of the offences committed against him, pointedly no such apology was offered to DC. Further, the appellant was not of good character, having a previous relevant conviction on Bill No 249/2014. The only other matters of relevance in his personal circumstances are his subsisting relationship with his wife and four-year old daughter, his work record and his medical issues.

79. No doubt being separated from his wife and daughters will represent some hardship to the appellant. It will also we assume represent some hardship to his wife and daughters. It might be observed that it represents no small irony that the appellant should have sought at sentencing to rely on the hardship that inability to maintain a family relationship due to imprisonment would bring, although the Court does not gainsay his entitlement to seek to rely on this, in circumstances where he had wreaked wholesale destruction on various relationships in his wider family arising from his abuses of MS, DC, and CM the child of his then partner. To be fair about it, his counsel gave this factor what might be described as a light rub at first instance. However, it has been pressed again on this appeal. Although the sentencing judge did not label the appellant's family circumstances specifically as being a mitigating factor, it is clear to us from the transcript of her remarks that she was fully alive to his family circumstances. We have not included her specific reference to those circumstances in the extracts quoted earlier in this judgment. It is sufficient to note that his family circumstances were specifically acknowledged indicating the sentencing judge's awareness of them. Included in the extracts that we have quoted, however, is the trial judge's assertion in passing sentence that in doing so she was *"taking into account the personal circumstances of the accused."* The sentencing remarks have to be considered as a whole and we are in doubt but that the sentencing judge did take the appellant's family circumstances into account. However, in the overall context of this case their actual mitigating effect would have been very modest.

80. That he has had health issues is obviously of potential relevance, and it is of significance that the sentencing judge sought a medical report, and that her judgment specifically referenced his ill health as being mitigating. However, in circumstances where the evidence was that he has largely recovered from his stroke, the actual mitigating effect of this consideration would again have been modest.

81. As far as his good work record was concerned, it is true that the sentencing judge did not specifically refer to this, but again in the overall context of this case the mitigating effect of this would have been very modest indeed.

82. The fact that the offences occurred a long time ago does not provide mitigation per se or render them less culpable. Indeed, it ought to be observed that it could not logically do so. We allude to this because it was submitted in the plea in mitigation at first instance that *"there has to be proportionality in respect of the amount of time that Mr C serves in circumstances where those … offences were historic."* Just because the complaints are historic does not render the offending conduct any the less reprehensible. That is not to gainsay the nuanced point made by Kearns J in *The People (Director of Public Prosecutions) v O'Regan* arising where *ex-post facto* the commission of offences the maximum sentence provided for by statute has been revised upwards, or a new offence carrying a higher potential penalty is created that would have captured the offending conduct if it had been in force at the time. In this case the appellant benefits from the fact that s.4 of the Criminal Law (Rape) (Amendment) Act 1991 had not yet been enacted when he committed the offences against DC that involved anal penetration, with the result that he was charged with indecent assault which carried a much lower maximum sentence than the maximum sentence of life imprisonment which is available today for s.4 rape. However, he is certainly not entitled to claim that the fact that the offences happened a long time ago is, in addition, somehow a mitigating circumstance; or that in the assessment of the gravity of these offences that the court should regard them as anything other than at the highest level of indecent assault.

83. Because the discount of 44% is not broken down as between the reflection of mitigation and the adjustment for totality, we think that rather than expressing a view at this stage on the second specific complaint, it would be more appropriate to proceed to consider the third specific complaint, and then to express a view as to whether the discount of 44% which was intended to reflect both considerations was in fact adequate.

84. Ignoring for the moment the sentence of nine years' imprisonment imposed on Bill No 249/2014, and any issue of consecutive sentencing, the headline sentence of nine years nominated for the offending conduct on Bill No 68/2015 seems to us to have been entirely appropriate. The offending conduct, which included what would now be characterised as three instances of anal rape, involved the gravest kind of violation of a young boy. The circumstances were extremely aggravating. There was a significant breach of trust. There were multiple instances of the offending behaviour and the offending continued over a protracted period. The victim was very young and was significantly harmed, both physically and psychologically, and the psychological harm continues to this day. The offending was clearly to be located at the high end of the available range, where that range was between non-custodial penalties and imprisonment for up to ten years. We find no error in the nomination of a headline sentence of nine years.

85. It is clear from the transcripts that the sentencing judge was aware from an early stage that the appellant was already serving a sentence for the offences on Bill No 249/2014, and that there had been appeals to the Court of Appeal in that matter. She was assiduous to find out both the circumstances of the offending in which MS had been abused, and what this Court had said in upholding the sentence of nine years' imprisonment that had been imposed for those crimes. She expressed the view at an early stage that the offences in which DC had been abused were even more serious than those involving MS, and in our view she was correct in so concluding. The sentencing judge indicated from an early stage that in circumstances of her having to sentence the appellant for yet further, and more serious, offending involving another victim, she would have to give serious consideration to consecutive sentencing. Although she was urged not to have recourse to consecutive sentencing, it was accepted, and remains accepted, that to do so was within her discretion. The appellant does not seek to make the case that inappropriate recourse was had to consecutive sentencing.

86. The case actually being made is in fact very straight-forward. It is that when the sentencing judge aggregated the nine-year sentence on Bill No 249/2014 with the nine-year headline sentence she had nominated for the offences on Bill No 68/2015, giving a total of eighteen years; and then made a downwards adjustment by suspending the last four years of that eighteen year aggregate term, to reflect totality, she did not make a big enough downwards adjustment. The issue raised is complicated because the downward adjustment effected was not solely intended to reflect totality. It was also intended to reflect such mitigation as the appellant was entitled to for the prospect of being separated from his family, for his ill health and for his good work record. While the total discount afforded amounted to 44%+ (of the nine-year headline sentence) it follows that whatever portion of the discount was attributable to adjusting for totality had to be less than that. The appellant's case is that this Court must infer that there was not enough of an adjustment for totality.

87. We have given much consideration to the argument being made but are not persuaded by it. We consider that the actual discount to which the appellant would have been entitled to for the combination of hardship on account of separation from family, his ill health and his work record, would have been very modest indeed. While we are not prepared to speculate as to the exact weightings the sentencing judge, in deciding to suspend the last four years, might have attributed to the mitigating factors on the one hand versus an adjustment for totality on the other hand, we consider that it is likely that the greater part of her adjustment would have been to reflect totality. Indeed, it is not to be assumed that the sentencing judge had in mind any specific weightings at all. In circumstances where she was conscious of the need to discount to reflect both factors she would have been perfectly entitled to determine upon a single figure by instinctive synthesis.

88. Recognising that, and in the absence of any evidence of the application of specific weightings by the sentencing judge at first instance, the issue for this Court is whether the overall discount of 44%, intended as it was to reflect both a meaningful adjustment for totality, and the very modest mitigation available to the appellant, was within the sentencing judge's margin of appreciation, i.e., her legitimate range of discretion.

89. In our estimation the mitigation to which the appellant would have been entitled could not realistically have exceeded 10% of the pre-mitigation headline sentence. Indeed, that would be on the generous side. Importing that figure into the discount actually afforded would mean that a discount of 34% (at least) was applied towards adjusting for totality. Would that have been enough?

90. By any standards an eighteen-year pre-mitigation and pre-adjustment aggregate sentence would have to be regarded as very severe. Indeed, we would accept that unless adjusted it would have been severe to the point of being disproportionate, notwithstanding the egregious nature of the offending conduct in both cases. Allowing for a 10% discount for mitigation which computes at 10.8 months, and rounding it upwards to a year for ease of computation, would result in a post mitigation sentence of eight years on Bill No 68/2015 and bring the aggregate figure, unadjusted for totality, back to seventeen years. However, we consider that this would still have been a disproportionate sentence and that some further, and fairly significant, discounting, was required by

way of an appropriate adjustment.

91. In our estimation it would have been within the sentencing judge's legitimate range of discretion to have effected a further adjustment of 30% to 40% of the initial nine-year headline figure that she had determined upon.

92. As her combined adjustment for both totality and mitigation was of the order of 44%, albeit undifferentiated, we are not persuaded that the ultimate sentence of fourteen years to be actually served (assuming compliance with the conditions on foot of which final four years of the aggregate eighteen years was suspended) was disproportionate. We accept that fourteen years to be served represents a heavy penalty, but that having been said the offending conduct committed by the appellant in these cases was egregious. We find no error of principle with respect to the sentencing on Bill No 68/2015.

93. Before considering the sentences imposed on Bill No 1104/2015, we would add the following comments arising from some of the submissions made. We agree with the respondent that the two cases produced by the appellant as comparators (or three if the *O'Regan* case is included) are of little assistance. Direct comparisons are largely meaningless, as no two cases are sufficiently similar for that to represent a legitimate exercise. Moreover, while a representative series of comparators can legitimately be presented as indicating a trend in sentencing, to rely in that regard on just two or three cases will in many cases be insufficiently representative for that to be a meaningful exercise. There has to be a representative sample. If the offence(s) concerned was/were uncommon, and two or three cases was all that could be found following diligent research, such a small sample might be acceptable. However, that is not the case here. It is a regrettable fact that indecent/sexual assault and rape offences, particularly in a situation where the abuser has been a family member and/or in a position of trust, have been, and seemingly continue to be, very common and there are numerous judgments dealing with sentencing for this type of offending. In saying this we are not to be taken as discouraging the use of comparators. On the contrary, we unreservedly welcome the assistance that proper recourse to comparators may provide. The point we wish to make is that it is important that they are used correctly and that they are not relied upon inappropriately.

94. Moving now to the aggregate sentence of eleven years' imprisonment with the final two years suspended imposed for the offences on Bill No 1104/2015, there are three principal complaints here. The first involves the suggestion that insufficient credit was given for mitigation, and in particular the pleas of guilty in this matter. The second principal complaint involves the appellant questioning whether consecutive sentencing was really justified at all in this instance and, as an aspect of this, a subsidiary complaint is made that the sentencing judge failed to provide an adequate explanation for having regard to consecutive sentencing. The third principal complaint is again an alleged failure to have adequate regard to the totality principle.

95. For convenience, we will deal with these complaints in the following order. We will consider first of all whether recourse to consecutive sentencing was justified; secondly, with whether there was adequate discount for mitigation; and finally, with whether the totality principle was adequately applied.

96. It is understood that the appellant does not take issue with the individual headline sentences of three years and eight years, respectively, determined upon as being appropriate by the sentencing judge for the offending committed before the 27th of September 2001 on the one hand, and for the offending behaviour committed after that date on the other hand. In both instances, the headline sentences nominated were just above the half way point on the spectrum, tending to indicate that the sentencing judge assessed the gravity of each individual offence as being in the upper half of the mid-range, assuming an evenly divided scale into a low range, mid-range and high range. However, the case that he implicitly makes is that these sentences should all have been concurrent and that there was no justification for having recourse to consecutive sentencing.

97. It is not disputed that the sentencing judge had a discretion in that regard, but it is contended that such a discretion should only be exercised sparingly in favour of consecutive sentencing. Moreover, the appellant maintains, the discretion should not be arbitrarily exercised and therefore any judge deciding to have recourse to consecutive sentencing should have a rational and cogent reason for doing so. The appellant points out that the sentencing judge offers no reason for deciding to impose consecutive sentences in this instance.

98. We would offer the following commentary at this stage on the case being made. The desirability that a sentencing judge should have a rational and cogent reason for resorting to consecutive sentencing is not an end in itself. Moreover, it is not the law that a sentencing judge must give his or her reason for doing so in every case. A judge has a very wide discretion as to how he/she decides to structure a sentence to effect the punishment that he/she believes to be appropriate, and it is not the law that recourse can only be had to consecutive sentencing in limited and defined circumstances. The key consideration, however, in terms of whatever sentence is selected, and however it is structured, is that it should be proportionate in the distributive or ordinal sense both to the gravity of the offending conduct and to the circumstances of the offender. The reason that it is stated judicial policy that a judge's discretion to have recourse to consecutive sentencing should be exercised sparingly, is that it is much easier to end up with a sentence that is disproportionate where recourse is had to consecutive sentencing.

99. We accept that the appellant is correct in asserting that no reason is given for the recourse to consecutive sentencing on this bill of indictment. Although the failure to provide a reason is sub-optimal it does not mean per se that the sentencing judge's discretion was incorrectly exercised. At the end of the day, the key question is whether the punishment actually imposed was a proportionate one in the distributive sense. However, the absence of a reason or reasons does present a problem. The difficulty we now face, as an appellate Court asked to review the sentence on grounds *inter alia* that it is disproportionate, is encapsulated in the following quotation from our judgment in *The People (Director of Public Prosecutions) v Flynn* [2015] IECA 290: *"if this Court when asked to review a sentence cannot readily discern the trial judge's rationale for how he or she ended up where they did having regard to accepted principles of sentencing … it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question."*

100. It remains to be seen whether the judge's unspoken reasons in this case are capable of being inferred; or, if not, whether, notwithstanding the absence of reasons, this Court can be satisfied that the overall sentence of eleven years with two suspended was proportionate.

101. A frequent justification for recourse to consecutive sentencing is where there is more than one victim. However, it was the same victim in terms of both groups of offences here, namely CM and so that can be ruled out as a possible justification.

102. Another frequently advanced justification is that consecutive sentencing is considered necessary to adequately reflect the extent and duration of the overall offending conduct. In this case the twenty-one counts for which the appellant faced sentencing were sample counts to reflect a two and a half year course of regular abuse of CM, occurring at a frequency of two to three times a week. The appellant had pleaded guilty on the understanding that sentencing would take place on a full facts basis, and the evidence at the sentence hearing, which was not objected to, was that the abuse of CM began when the injured party was 12 years old, and

that it occurred around two to three times per week from January 2000 until July 2003, when the appellant was 15. A relevant factor in this regard is that the maximum penalty for the offences that occurred prior to the 27th of September 2001 was five years, whereas the maximum penalty for the offences that occurred after that date was fourteen years. The sentencing judge was obliged to impose sentences on each individual offence with reference to the maximum penalty applicable to that offence. As she assessed all the offences as falling effectively in the upper mid-range on whatever the applicable spectrum was in each case, she ended up with thirteen individual sentences of three years and eight individual sentences of eight years. She might have made them concurrent and left it at that, but that would not necessarily have yielded a distributively proportionate result. Equally, she would have been perfectly entitled to then stand back and consider whether, having regard to the overall picture, some recourse to consecutive sentencing was required to fully reflect the protracted nature and overall extent of the offending conduct. Regrettably, it is not apparent from the sentencing judge's remarks if that was in fact her reasoning. However, this was a very experienced judge. Moreover, she had specifically asked to be addressed on consecutive sentencing and had been reminded that it was established judicial policy that the discretion to have recourse to consecutive sentencing should be sparingly used. It may be inferred in the circumstances that the sentencing judge's decision to have recourse to consecutive sentencing was most unlikely to have been arbitrary, and that it is far more likely that it was a reflective and carefully considered one. We are satisfied that that it is safe to conclude that the most likely reason for her recourse to consecutive sentencing was to ensure that the protracted nature and overall extent of the offending conduct was properly reflected in the overall outcome of the sentencing exercise and proportionately punished.

103. In the circumstances, we consider that the appellant has not established that the sentencing judge's recourse to consecutive sentencing was unjustified, and an inappropriate exercise of her discretion. We find no error of principle on that account.

104. The next issue we are required to consider is whether there was an adequate discount for mitigation. The discount afforded was a discount of two years, effected by means of the suspension of the final two years of the aggregate sentence. This computes to a discount of 22% for the mitigating factors, which were stated in the sentencing judge's remarks to be *"his plea of guilty, his apology and his ill-health"*. The sentencing judge also said she would take into account, and well into account, *"his work ethic and his good employment record"*.

105. The most significant item in that list was the plea of guilty. It was undoubtedly of value notwithstanding that it was not a particularly early plea, and notwithstanding that, as the sentencing judge noted, the appellant had previously denied the offending conduct when interviewed about it in the course of the Garda investigation. It did ultimately save court time and expense and, more importantly, was a belated acknowledgment of responsibility and it spared the victim from having to give evidence and submit to cross-examination at a contested trial.

106. The mitigating factors of the other factors would have been modest, as has already been observed earlier in this judgment. While the sentencing judge did not specifically refer to the hardship factor arising from the inevitable separation of the appellant from his wife and child, we are satisfied that she was fully alive to the appellant's family circumstances. And, again, the mitigating effect of that would in any case have been very modest.

107. The question is: was a discount of 22% adequate in the circumstances? While we concede that it was not generous, we consider that it was within the acceptable margin of appreciation in terms of the sentencing judge's scope for action. We therefore find no error of principle on that account.

108. The final issue that must be considered relates to the totality principle. In that regard we feel that it is important to emphasise that the totality principle exists to assist judges achieving a proportionate overall sentencing where recourse is being had to consecutive sentencing. It permits of a downward adjustment where that is required to achieve proportionality but it by no means implies that such an adjustment will necessarily be required in every case. If the aggregate of sentences made consecutive to each other is not manifestly disproportionate, then no adjustment is required. There is to the power to make a downwards adjustment if it is required, but no adjustment should be made if it is not required. We have inferred that the sentencing judge considered, and we agree, that an extra period beyond what concurrency would have provided for was required in the circumstances of this case to reflect the protracted nature and overall extent of the offending conduct. In this instance, because the lower of the sentences being aggregated was three years, the difference between what the outcome would have been if the sentences had been made concurrent and the actual unadjusted outcome is a difference of three years, i.e., nine years to be actually served in circumstances where concurrency would still have seen the appellant having to serve six years. The question is: did the simple aggregation of the three year sentences (which were to be concurrent inter se) with the eight year sentences (which were also to be concurrent *inter se*), with the final two years of the aggregate figure being suspended to take account of mitigation, result in an overall disproportionate sentence such as to have required some downward adjustment in application of the totality principle?

109. We think that this issue is finely balanced. The resultant overall sentence on Bill No 1104/2015 is probably at the outer limits of what was proportionate, but we are ultimately not persuaded that it falls on the wrong side of the notional line. In arriving at this view we have taken into account that, for practical purposes, the overall sentence on Bill No 1104/2015 will be subsumed in any event in the longer sentence imposed on Bill No 68/2015 which we have indicated we are satisfied to uphold, and with which it is to overlap and run concurrently from the 14th of October 2016. Accordingly, we do not consider that the complaint that there was a failure to have regard to the totality is made out, and we find no error of principle in that regard.

110. In the circumstances, we must dismiss the appeals against the severity of the sentences imposed for the offences on both Bills No's 68/2015 and 1104/2015, respectively.