**THE COURT OF APPEAL**

**Sheehan J.**
**Mahon J.**
**Edwards J.**

**Record No: 201/14**

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

**Respondent**

**v**

**M. C.**

**Appellant**

**Judgment of the Court delivered on 18th December 2015 by Mr. Justice Edwards**

**Introduction:**
1. In this case the appellant appeals against two sentences of five years imprisonment, imposed upon him at Dublin Circuit Criminal Court on the 30th of January 2014 to date from that date, in respect of offences of assault causing harm, contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 (being count 3 on the indictment) and sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990 as amended (being count 4 on the indictment), respectively, both sentences to run concurrently.

2. The appellant had pleaded guilty to the said offences. He had also pleaded guilty to counts of harassment (count 6 on the indictment) and false imprisonment (count 8 on the indictment) and these were taken into consideration.

**The facts of the case**
3. The facts of the case were extensively described in evidence given at the sentence hearing by Garda Trevor Phelan. In succinct précis all four charges arose out of a succession of incidents that occurred during a personal relationship that existed between the appellant and the injured party from approximately December 2011 until early 2013. The appellant had been the injured party's personal fitness trainer at a gym that the injured party regularly attended, and it was in that context that a personal relationship between them developed. That relationship was sometimes romantic and intimate but was at other times stormy and fraught. During the latter times the appellant engaged in intimidating and controlling behaviour vis a vis his partner, characterised by his resorting from time to time to domestic violence, which on one occasion was accompanied by false imprisonment; and on another occasion by sexual assault; and, after the injured party had made clear that she wished to end the relationship, by harassing her by means of telephone calls, text messages and other forms of unwanted communication.

4. The main assault, which was the subject of the s.3 charge, occurred on the 12th of August 2012 and occurred in the context of the injured party being subjected to a prolonged ordeal, which included her being also falsely imprisoned, an aspect of the matter which was separately charged and the subject matter of one of the charges taken into account.

5. On the occasion in question, the appellant, in the course of an escalating argument with the injured party at the injured party's home where he was staying, sought to obstruct the injured party from leaving the house by grabbing hold of her car keys which she had just removed from her handbag, ripping them from her hands. He then pulled her handbag away from her and took out a glass perfume bottle from the bag which he smashed off the kitchen table. The appellant then pushed the injured party from a standing position backwards into a seat that was behind her. She tried to get up and he leaned over and pushed the chair backwards onto its two back legs. The injured party was scared that he would drop the chair backwards and that she would hit her head, so she tried to escape the chair. As she attempted to do so the appellant was shouting and hurling abuse and pointing his finger at her. With his index finger only an inch from her eyes he complained that she never listened to him and that he was only trying to love her, and he then queried why she would not let him.

6. At this point the appellant grabbed both sides of the injured party's hair gripping tightly with both of his hands. He pulled her head forward by the hair and then pushed her head backwards hard and fast and rammed her head off a cream gloss dresser. The injured party felt an immediate pain and got a headache instantly. She reached for the back of her head to see if it was bleeding, and the appellant stepped away and the chair then tilted forwards again resting back onto its four legs and she covered her face with her hands.

7. At this stage the injured party could not stop crying and the appellant then began shouting at her again. She attempted to get up from the chair and he pushed her back into it by grabbing both of her arms and applying pressure to them. He again tilted her chair backwards so that it was balancing on two legs and so that the back of the chair was touching a glass sliding door. The injured party banged her head off the glass trying to break free of him. However, the appellant was holding her wrists very tightly and she claims to have been in excruciating pain as he held her wrists.

8. The injured party then pushed her hands up to either side of her ears and she pleaded with him to stop because she was in a lot of pain. However the appellant would not stop and he kept holding her wrists at her ears so she that she was unable to get free. Eventually the injured party managed to push him off and she stood up and moved past him and went towards the front door.

9. The injured party opened the front door and went outside and walked quickly towards her next door neighbour. She contends that she was so scared she could not speak or cry out for help. When she got to her neighbour's door and was about to press the bell the appellant approached her from behind, put both his arms around her at elbow level, and lifted her off the ground. Then he turned her around and walked a few steps back towards the injured party's front door, with the injured party's legs and feet still off the ground. At this point she was facing her own front door. She then managed to place her feet on the ground, and she pushed her lower body towards the accused and tried to push herself away from the house.

10. The appellant was too strong for her and he kept moving her forwards towards the front door. When they got to the front door she put both her hands on the door frame and he was standing inside the hall pulling her back into the hall. The injured party managed to hang on to the door frame for about 30 seconds and then he pulled her inside into the hall When they were both in the hallway the injured party was facing the appellant and she could see he was in a rage. She tried to get past him and to get back on

to the street but he held her back with one outstretched hand as he slammed the hall door shut and he then shouted, "What the fuck do you think you're doing trying to raise the alarm"? He added that he was in enough trouble as it was.

11. The appellant then pushed the injured party hard with both hands and he caught her off balance. The push was so hard that she fell backwards onto the stairs. He then shouted at her, "Is this how you repay me for me introducing you to my family and friends and my daughter?" The injured party told him that his behaviour was scaring her and he leaned over her, aggressively shouting something else about his daughter. At this point he grabbed both of the injured party's shoulders and squeezed both of her upper arms very tightly to the point that she was in severe pain, and then started whacking her back off the rung of the stairs. He did that five or six times while still screaming in her face.

12. The appellant then called the injured party ungrateful for ending the relationship and he made a fist with his right hand and he pulled his right hand back as if he was going to strike her, and she pleaded with him to stop and she put her hands up to her face and held on to the banister. He then punched her in the left arm and she then felt a terrible pain in the back of that arm.

13. The injured party then pulled her legs up into a foetal position and then pushed her legs out while still holding on to the banister, striking the appellant in doing so as a result of which he stumbled backwards but he did not fall. At that point the injured party ran into the living room as the appellant was still blocking her path to the front door. As she did so he grabbed her again by both of her upper arms from behind, and he shoved her into a pink sofa that was in the living room. The injured party found herself completely flat on her back on the sofa and she was facing the ceiling with her legs slightly curled up. The appellant then sought to pin her down and he climbed on top of her. His torso was covering her torso and she could feel him applying pressure to her ankle and her foot. She thought one of his legs was on the floor while the other one and his body were on top of her, and she said he was holding both her arms over her ears and again her wrists were hurting her.

14. The injured party felt tingles in her arms and she thought the blood supply was going from her arms because he was holding them in that position for so long. She was all the while trying to break free and he was shouting at her to calm down and to stop resisting him and to stop fighting him. The appellant then attempted to forcibly kiss her. She turned her head away and he used one hand to move her head back towards him so that she could receive the kiss. He then pressed his lips against her with considerable force and such that she couldn't breathe. She thought she was going to suffocate. The appellant then opened his mouth briefly and bit the injured party on the side of her lip. The appellant then stopped and she immediately moved her head to the side.

15. The injured party did not immediately say anything at this point because she did not want to enrage the appellant any more. Then she told him, "You bit me on the lip and I couldn't breathe". He then again tried to kiss her forcibly and pressed his lips firmly against hers. The second kiss lasted between five and 10 seconds and he then made a closed fist with his right hand and put his fist up to her lips and said "Do not resist and fight me; I won't hurt you"

16. The appellant then told the injured party that she needed to calm down. The injured party says she was completely terrified and she let her body go limp as she felt that by defending herself she was only making him more angry. The appellant then became noticeably calmer within minutes, and he stopped speaking to the injured party aggressively. However, as she would not make eye contact with him as he continued to speak he cupped his hands on her face and made her face him as he spoke.

17. After a few minutes the appellant stopped talking and the injured party asked him could he get up, and he got off her immediately. She then saw her car keys which the appellant, having ripped them from her hands at the beginning of the altercation, had discarded near to where she now was. The injured party then got up from the sofa, retrieved her car keys and walked out of the front door. She then got into her car and was reversing out of the space in which it was parked when the appellant opened the driver's door of the vehicle and yanked the key from the ignition, breaking the key in the course of doing so. Then retaining the injured party's bunch of keys, including the broken half of the car key, the appellant went back into the house.

18. At this point the injured party observed that half of the car key was still in the ignition. It was sufficient for her to start the engine so she drove off but remained within the estate, parking some distance way. She waited for about 20 minutes and when she saw the appellant's car drive past her she moved her own car forwards. At this point the appellant spotted the injured party and, driving on the wrong side of the road at about 10 miles per hour, attempted to force the injured party's car to stop. However the injured party drove her car up on to the kerb and drove around the appellant's car. She then drove back to her house.

19. On arrival back at the house the injured party ran inside and closed the front door and locked it, thereby bringing her ordeal on that date to an end.

20. The sexual assault the subject matter of the count to which the appellant also pleaded guilty occurred on the night of the 13th of November 2012. The appellant and the injured party had become reconciled subsequent to, and notwithstanding, the incident recounted earlier in this judgment and were attending counselling together. The appellant was staying over in the injured party's house on this particular night. On that evening they had discussed their ongoing relationship and the injured party had told the appellant that she was unhappy in the relationship and that certain things had to change. The parties had gone to bed together, and had talked further while in bed for about 20 minutes. At the end of this conversation the injured party turned over on her left side to avoid further communication with the appellant. This seemingly incensed the appellant who pinched her on the buttocks and then attempted to pull her close towards him. She pushed his hand away and said that she didn't want to.

21. The appellant then put his hand onto her buttocks and she pushed his hand away for a second time. The appellant then sat up in the bed from a lying position, and pulled the injured party's two legs, which were closed in a curled-up foetal position, towards him and she looked up into his face and said, "No, please, not like this, I don't want this."

22. The appellant then put both of his hands on her and forcibly pulled her legs apart. He looked angry and she was frightened and she again said, "No, not like this, don't do this". When the injured party's legs were open about eight or ten inches wide the appellant then used his body weight to hold her legs apart. After saying "you like it rough" he then used the middle finger of his right hand to penetrate her vagina, while using his left hand to fondle her breast and attempting at the same time to forcibly kiss her. The appellant didn't speak but was very rough with the injured party while doing all of this and his finger was inside her for about a minute. The injured party then started crying and the appellant stopped everything at that point.

23. The injured party made a total of seventeen statements of complaint to An Garda Siochana in the course of her relationship with the appellant, commencing in August 2012. Ultimately the appellant accompanied the injured party to a Garda Station in December 2012 in relation to the complaints made by her. She was of the view they were attending at the Garda Station for him to take responsibility for the offences alleged against him; he was of the view that she was attending to withdraw her complaints. Ultimately the appellant was charged with the four offences to which he later pleaded guilty, and for which he was sentenced on the 30th of

January 2014.

24. The appellant was admitted to bail after he was charged, two conditions of which were that he should reside at a certain address, and that he should have no contact with the injured party. He breached both of these conditions and that led to his bail being revoked and him being remanded in custody for 12 weeks prior to the sentence hearing on the 30th of January 2014.

25. The sentencing court was told that the appellant was born in early 1970 and was therefore almost 44 years of age at the time. He had no previous convictions. In addition, it was accepted that the pleas were entered at an early stage. The court was further told that the appellant was very remorseful.

26. The sentencing judge received and read a victim impact statement from the injured party, who noted that the events the subject matter of the charges had had a huge effect on her and had caused her a lot of suffering.

27. The sentencing judge also received and read a psychological report on the appellant which identified that he had a number of psychological issues that had contributed to his engaging in physically and sexually abusive behaviours. It recommended that he participate in a specialised group therapy programme for men who have sexually and/or violently offended in order to reduce his level of risk of re-engaging in similar behaviours in future relationships.

28. In addition a number of positive testimonials were handed in, and were read and considered by the sentencing judge.

**The sentencing judges remarks**
29. In the course of sentencing the appellant the sentencing judge said the following *(inter alia):*

> *"… in deciding what to do with Mr C I certainly have to take into account the mitigating factors. I have to take into account his plea of guilty, I have to take into account that he has no record of conviction, I have to take into account that he's lost his position of work, and I've also taken into account that up to the date when these events occurred he seems to have been a useful man and always in work. I also have to take into account the references handed in on his behalf, and I think it seems that he is a responsible father towards his child, and those factors have to be weighed in to the balance, and these could be termed mitigating factors; these certainly have to be taken into account. I have to take into account too, obviously, the seriousness of the crimes. These are serious crimes. Now, the question I have to - and I think the question that has to be addressed directly - does Mr C deserve an immediate custodial sentence for what he did and the crimes he has committed? I've listened to the evidence as it was presented and I've come to the conclusion that he undoubtedly does. I think what he did was too serious, and what he did -- and there was too many times involved and there was too many incidents of violence towards Ms. S. I have to, in sentencing Mr C, I have to take into account the context of the case as well, and I have to take into account obviously the report, and I have to take into account that basically if Mr C receives the right treatment or takes the right courses, he may not be a danger to anybody in the future, but that's a factor I must take into account. And in taking all these factors into account, I am going to sentence in the following way. I think, taking both of them -- I'm going to sentence on both count three and count four, I'm going to take the remaining counts into account. In relation to both counts I'm going to impose a five-year custodial sentence upon him. Those are to run concurrently. On the basis of the mitigating factors I'm going to suspend the last 18 months of that sentence on the following conditions: That during the course of his incarceration and for a period of 18 months following his release he be of good behaviour, and, two, that he enter into the bond in the sum of €100. I thought about imposing a period of probation upon him, but I think Mr C should at this stage have enough sense to know that if he's not to get himself into trouble again he has to take precautions in the matter. I'm going to take the remaining counts into account."*

**The Grounds of Appeal**
30. The appellant appeals against the severity of his sentences on following grounds:

> 1. The sentencing judge erred in principle in imposing the said sentences on the appellant in failing, when imposing sentence, to identify the appropriate starting point for the said sentences so as to reflect the nature and circumstances of the said offences as committed by the offender;
>
> 2. The sentencing judge failed adequately or at all to consider the appellant's previous good character;
>
> 3. The sentencing judge failed adequately or at all to consider the psychological report furnished for on behalf of the appellant;
>
> 4. The sentencing judge failed properly to consider the option of obtaining and considering a Probation and Welfare Service Report on the appellant in circumstances where the appellant was previously a person of good character with no previous criminal convictions.
>
> 5. The sentencing judge erred in law in imposing a custodial sentence without giving proper consideration as to whether the appellant was suitable for supervision within the community;
>
> 6. The sentencing judge erred in law in imposing a sentence which was in all the circumstances excessive.

31. However, at the oral hearing before this Court counsel for the appellant approached the case on the basis that his list of six grounds could really be distilled down into two primary complaints that had resulted, he contended, in excessively severe sentences being imposed. His first complaint was that the sentencing judge had, by failing to follow established best practice in terms of sentencing procedure, over-assessed the gravity of the case. His second main complaint was that the sentencing judge, by utilising the option of suspending a portion of the sentence rather than giving a straight discount, had failed to give adequate credit for mitigating circumstances.

**Discussion**
32. Counsel for the appellant contended that the sentencing judge had not followed the recommended procedure of identifying where on the range of potential penalties the offending conduct lay in terms of its seriousness (with reference to moral culpability and harm done), taking into account aggravating factors but before taking into account mitigating factors. Rather, without any reference to the available ranges of penalties, the sentencing judge had assessed the sentences in both cases as meriting five years imprisonment. The problem with that was that five years imprisonment was the maximum available penalty for assault causing harm, and there was

simply no way that the circumstances of this case merited the maximum sentence as a starting point. In addition, while a potential sentence of up to ten years imprisonment was available for the sexual assault offence, the sentencing judge's basis for fixing on a headline sentence of five years imprisonment for this offence was entirely unexplained, either by reference to the available range or how he rated the offence in terms of its gravity. It was not sufficient to merely say that the offences were serious and to then decide on five years without offering any further analysis.

33. Counsel for the prosecution very fairly conceded that it was difficult to seek to stand over a starting point of the maximum sentence for the s. 3 assault in this case, notwithstanding the circumstances of it.

34. The Court agrees that the headline sentences determined upon by the sentencing judge were excessive in both instances, and that there was an error in principle in that regard. While the Court agrees that the judge's approach to sentencing did not reflect long established best practice, as most recently reiterated in its judgment in *The People (Director of Public Prosecutions) v Davin Flynn* [2015] IECA 290, it is not clear that the resulting sentence was necessarily directly attributable to the failure to follow best practice. However, the trial judges reasons for selecting the headline sentences that he did are not adequately explained.

35. As we pointed out in the *Flynn* case 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. This may or may not be one of those cases. However, the fact of the matter is that the trial judge's rationale for fixing on the headline sentences that he did, most particularly his selection of the maximum available sentence for the s.3 assault, is not obvious to this Court.

36. The essence of counsel for the appellant's second complaint is that his client was also entitled, by did not receive, an appropriate discount on the headline sentences on account of mitigating circumstances. These were, he contended, substantial and we accept that. The appellant's early plea of guilty, his previous good character, his remorse and his personal circumstances including, and in particular, his psychological issues, represented significant mitigating circumstances. The trial sought to reflect the available mitigation by suspending the last eighteen months of the five year headline sentences. It was argued that a suspended sentence is still a sentence and that by virtue of reflecting mitigation solely by suspending the last eighteen months of the appellant's sentences an inadequate allowance was made for mitigation. It was contended that the use of the option of partly suspending the headline sentences was inappropriate in this case and that a straight discount would have been more appropriate, and a straight discount of greater than eighteen months.

37. This Court does not agree that the sentencing judge erred in utilising a partly suspended sentence. A sentencing judge is entitled to avail of all of the potential sentencing options available to him, and it is a matter entirely for his discretion as to which is or are most appropriate. By utilising the option of partly suspending the headline sentence in this case the trial judge was able to give credit for mitigation while at the same time incentivising the appellant to take the necessary steps to address his underlying psychological issues so as to minimise his risk of re-offending. The sentencing judge clearly had this in mind because he stated specifically that *"I have to take into account obviously the report, and I have to take into account that basically if Mr C receives the right treatment or takes the right courses, he may not be a danger to anybody in the future, but that's a factor I must take into account."*

38. As to the complaint that the overall amount of discount afforded for mitigation was insufficient in the circumstances of this case, we do not find ourselves immediately persuaded in that regard. However, it is unnecessary to express a definitive view in circumstances where we have already found an error of principle in relation to the over assessment of the gravity of the case.

39. Having found the said error of principle this Court must now set aside the sentence of five years with the last eighteen months thereof suspended, and proceed to re-sentence the appellant. In accordance with established jurisprudence counsel on both sides were invited to place before the Court any additional materials that they might wish to have taken into account in the event of the Court having to proceed to a re-sentencing.

40. That was done and in the appellant's case certain additional materials were placed before the Court. A booklet of documents was handed in containing the psychological report, and the testimonials, that were before the Circuit Court. In addition, the Court was furnished with a letter from the appellant asserting his determination to turn his life around upon his release, and a number of certificates of achievement earned by the appellant during his time in prison, including evidence that he has successfully completed an Anger Control Awareness Programme, a Fetac Level 4 Database Methods Course, a SAFETALK Suicide Alertness for Everyone Programme, and a 12 week Pre-Release Course. The Court was further told that he continues to get on well in prison and has not come to adverse notice in any way.

41. The Court has been further informed that the appellant has been in custody for 27 months at this point, which is the equivalent of a three year sentence with normal remission. The figure of 27 months includes the time he spent on remand awaiting trial after his bail was revoked.

42. The Court has carefully considered the seriousness of the offending behaviour in this case, both in terms both of moral culpability and harm done, and with reference to the available penalties. The theoretically available penalties for assault causing harm ranged from non-custodial options to a maximum of five years imprisonment. However, we agree with the trial judge that a wholly non-custodial disposition could not, realistically, be contemplated in the circumstances of this case.

43. While relatively minor physical injuries were caused to the injured party in the s.3 assault committed on the 12th of August 2012, the ordeal to which she was subjected was prolonged and frightening, such that she undoubtedly suffered significant mental distress and trauma. There was significant moral culpability on the appellant's part in seeking to control the injured party in the way that he did and to dominate her, not just psychologically and emotionally, but also very much physically, in circumstances where he was a strong and, by reason of his occupation, exceptionally fit male. The false imprisonment aspect to the overall ordeal was an aggravating factor, as was the prolonged duration of it.

44. Having carefully considered the evidence before the sentencing judge as revealed by the transcript we consider that the s.3 assault ought properly to be assessed as belonging in the medium to high range on the spectrum of available penalties, before any discount for mitigation. We therefore consider that a headline sentence of three years and six months imprisonment is appropriate for this offence.

45. The Court has performed a similar exercise with respect to the s.2 sexual assault committed on the 13th of November 2012. Again, the range of theoretically available penalties for sexual assault ranged from non-custodial options to a maximum of ten years imprisonment. Again, we agree with the trial judge that a wholly non-custodial disposition could not, realistically, be contemplated for

that offence in the circumstances of this case.

46. The sexual assault was a once off, and was of relatively brief duration. However it involved digital penetration and was accompanied by a moderate degree of violence, and physical domination. It did not however involve gross violence, and fortunately did not give rise to any significant physical injury. However, the injured party was unquestionably violated, and felt violated, and suffered great mental distress and emotional trauma as a result.

47. Having carefully considered the evidence before the sentencing judge as revealed by the transcript we consider that the s.2 sexual assault ought properly to be assessed as belonging in the low to medium range on the spectrum of available penalties, before any discount for mitigation. We therefore consider that a headline sentence of three years and six months imprisonment is also appropriate for his offence.

48. The appellant is entitled to a discount for mitigation based upon his early plea of guilty, his previous good character, his remorse and his personal circumstances including his psychological issues. To reflect the mitigating circumstances in his case, and with a view to incentivising his continuation along the path on which he has already begun to travel, the Court will impose sentences of three years and six months on the appellant for both the s.3 assault and the s.2 sexual assault, respectively, to run concurrently, but will also backdate both sentences by 27 months from the date of the appeal hearing (Tuesday 15th December 2015) to take account of the 27 months the appellant has already spent in prison; and will further suspend the unserved balance of both sentences for a period of two years following his release from prison upon the usual conditions that the appellant should enter into a bond to keep the peace and be of good behaviour, and to submit to supervision by the Probation Service, and to abide by their directions, during the said period of suspension.

49. While the offence of false imprisonment was separately charged (as count 8), as was an offence of harassment (as count 6), the sentencing judge, as he was entitled to do, took them into consideration in his sentencing for both the assault causing harm (count 3) and the sexual assault (count 4), and he did not impose separate or discrete sentences in respect of these matters. This Court considers that this was appropriate and we will follow the lead of the sentencing judge in that regard, and make a similar order.