THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 19CJA/16

BETWEEN

THE PEOPLE (DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

S. T

APPELLANT

AND

Record No: CA 20/16

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN

THE PEOPLE (DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

AND

S. T.

RESPONDENT

JUDGMENT of the Court delivered by Mr Justice Edwards on the 30th day of January, 2017

Introduction

1. For the purposes of this single judgment dealing with both of the above entitled matters the court will, for the avoidance of confusion, refer to Mr S. T. as "the defendant", and to the Director of Public Prosecutions as "the prosecutor".

2. In this case the defendant was tried upon indictment with seventy two counts of indecent assault as set out in Bill Number LK/109/2012, involving thirteen complainants, and was convicted by the jury on thirty of those counts involving six complainants, being counts no's 1, 2, 3, 4, 20, 21, 22, 23, 24, 25, 32, 33, 34, 35, 36, 37, 56, 57, 58, 59, 60, 64, 65, 66, 67, 68, 69, 70, 71, & 72, respectively.

3. The defendant was sentenced to 14 months imprisonment on count no 25 to date from the 25/11/2015. He was further sentenced to 12 months imprisonment on counts no's 1, 2, 3, 4, 20, 21, 22, 23, & 24 to be served concurrently *inter se* and also concurrent to the sentence on count no 25. He was further sentenced to 12 months imprisonment on counts no's 32, 33, 34, 35, 36, 37, 56, 57, 58, 59, & 60 to be served concurrently inter se but consecutive to the sentence on count no 25. He was further sentenced to 14 months imprisonment on count no 64 consecutive to the sentence on count no 25. He was further sentenced to 12 months imprisonment on counts no's 65, 66, 67, 68, 69, 70, 71, & 72 to be served concurrently inter se but consecutive to the sentence on count no 64. The final 20 months of the aggregate sentence of 40 months was suspended subject to conditions.

4. The defendant now appeals against his conviction. There is a cross appeal by the prosecutor seeking a review of the sentences imposed on the grounds that they were unduly lenient.

THE APPEAL AGAINST CONVICTION

Procedural History of the Case

5. On the 11th of February 2010 the defendant was separately charged with the offences which now form the subject matter of Bill Number LK93/2010. These involved four complainants, other than the thirteen complaints involved under Bill Number LK109/102.

6. On the 21st of June 2012 the applicant was charged with the offences which are now the subject matter of Bill Number LK109/2012.

7. All offences set out in both Bill Numbers allege that the defendant indecently assaulted a number of pupils of The Christian Brothers National School, Sexton Street, Limerick, (CBS Sexton St) where the defendant was at that time a Christian Brother in a teaching role. The complaints span the school years 1978/1979, 1979/1980 and 1980/81.

8. With some few exceptions the offences on both Bills were alleged to have been committed on the premises of CBS Sexton Street. A relatively small number of offences were alleged to have been committed by him at a swimming pool known as St. Enda's in Southhill, Limerick. All seventeen complainants were at the relevant time pupils of the CBS, Sexton Street. Fourteen complainants alleged that they were sexually abused by the defendant when they were in fifth class. These complaints spanned two school years those being 1978/1979 and 1979/1980. Three of the complainants alleged that the defendant sexually abused them when they were in sixth class, which was in the school year 1980/81.

9. With some exceptions, the complainants alleged that the defendant on regular occasions during the school year sexually assaulted them by putting his hand in their trousers while in class and fondling their genitalia. Some of the complainants alleged they were also assaulted while in a state of undress at the swimming pool at St. Enda's.

10. For convenience the complainants who are the subject matter of Bill Number LK93/2010 will be designated as complainants "A", "B", "C" and "D". The indictment is concerned with the school year 1978/1979. It is apparent from the book of evidence that "A" made a complaint to the gardaí in 2005. During the course of investigating that complaint the gardaí approached "B", "C" and "D", respectively who then made complaints of a similar nature to the Gardaí. The defendant was charged in 2010 to these complaints and thereafter returned for trial to Limerick Circuit Court. Thereafter the matter was adjourned from time to time for the following reasons:

(i) In order for disclosure to be made;

(ii) In order to deal with a "development in the case" which subsequently turned out to be the discovery of roll books and a follow up garda investigation which came to fruition in Bill Number LK/109/2012;

(iii) Pending the Supreme Court decision in *The People (Director of Public Prosecutions) v. Devins and O'Malley* [2012] 4 I.R. 491.

11. Bill Number LK93/2010 was mentioned on the 18th of May 2012 in Limerick Circuit Court on which date the 12th of June 2012 was fixed for the trial of the matter. The trial date was fixed on the assumption that disclosure would be made in advance of the trial. On the 7th of June 2012 an application was made by the prosecution to adjourn the trial as the prosecution were not ready to proceed as they wished to proceed with one trial in respect of matters then before the Circuit Court and District Court. There was no consent to this course of action and the trial of the matter was adjourned. On the 21st of June 2012, while Bill Number LK93/2010 was pending before Limerick Circuit Court, the defendant was charged with the offences which are the subject matter of Bill number LK109/2012.The complainants who are the subject matter of Bill Number LK109/2012 will for convenience be referred to as "E", "F", "G", "H", "I", "J", "K" "L", "M", "N", "O", "P", "Q" and "R". It was apparent from the book of evidence that all of these people made complaints alleging criminal activity to the gardaí having been approached by the gardaí in relation to the defendant. The defendant was served with a book of evidence in relation to these further matters on the 28th of November 2012 after the matter had been listed on a number of occasions before Limerick District Court. On this date his solicitor was also furnished with 3 lever arch files of disclosure material. Thereafter the matter was returned for trial to Limerick Circuit Court, an application to consolidate it with Bill Number LK93/2010 was refused and both Bill Numbers were fixed for trial. A chronology of events is set out hereunder.

Chronology

i) 1979-1981 Alleged Abuse (17 complainants)

ii) 2005 Complaint made by "A".

iii) 2006-2007 Gardaí contact classmates of "A" and then proceed to take statements of complaint from 3 other complainants ("B", "C", & "D")

The above complaints now form the subject matter of Bill Number LK/93/2010

iv) May 2006 Defendant questioned by Gardaí in respect of allegations made by "A".

v) May 2008 Defendant questioned by Gardaí in respect of allegations made by "B", "C" and "D" (Bill Number LK/93/2010)

vi) 11th February 2010 Defendant charged with offences the subject matter of Bill Number LK93/2010.

vii) 5th September 2010 Defendant served with Book of Evidence; Bill Number LK93/2010 and returned for trial to Limerick Circuit Court.

viii) Sept 2010-Mar 2011 Gardaí take statements of complaint from 13 complainants ("E" to "R" inclusive). The statements form the subject matter of Bill Number LK109/2012.

ix) 25th February 2011 Bill Number LK109/2012 in the Criminal list to fix dates in Limerick Circuit Court.

x) 4th May 2011 Defendant questioned by Gardaí in respect of allegations made by complainants.

xi) 18th May 2012 Trial date fixed in respect of Bill Number LK93/2010.

xii) 7th June 2012 Trial in respect of Bill Number LK93/2010 adjourned on the application of the prosecution.

xiii) 21st June 2012 Defendant charged with offences as set out in Bill Number LK/109/2012.

xiv) 2nd November 2012 Trial date fixed in respect of Bill Numbers LK93/2010 and LK109/2012 notwithstanding that a book of evidence had yet to be served in respect of Bill Number LK109/2012.

xv) 28th November 2012 Book of evidence served in relation to Bill Number LK109/2012 and defendant returned for trial. Disclosure received in relation to Bill Numbers LK93/2010 and LK109/2012 after numerous requests for same.

xvi) 25th January 2012 Circuit Court refuses to consolidate Bill Numbers LK109/2012 and LK93/2010 (following decision in Conlon –v-Kelly)

xvii) January 2012 to July 2015 Both Bill Numbers adjourned from time to time pending judicial review proceedings being determined.

xviii) 3rd November 2015 Bill Numbers LK93/2010 AND LK109/2012 listed for trial in limerick Circuit Court.

The Grounds of Appeal

12. The defendant appeals against his conviction on three main grounds. These are:

(i) The trial judge erred in fact and in law in allowing the prosecutor to proceed with the trial of Bill of Indictment

LK109/2012 in circumstances where Bill of indictment LK93/2010 was also before the court, and was the first in time. By proceeding in this way, the prosecutor placed the accused in a position where he was unable to properly defend himself against the accusations made against him in Bill Number LK109/2012. The accused was, inter alia, unable to probe the basis on which an investigation was commenced that led to the formulation of Bill Number LK109/2012.

(ii) The trial judge erred in law and in fact in refusing to make an order severing Bill of indictment LK109/2012 in a manner that would have ensured a fair trial and due process for the accused. The learned trial Judge did order some severance but not such as to ensure due process for the accused.

(iii) The trial judge erred in law and in fact in failing to direct a not guilty verdict at the conclusion of the prosecution case.

13. The Court had received helpful written submissions from both sides in advance of the hearing. Counsel for the defendant was content to rely solely on his written submissions in respect of grounds (ii) and (iii); and at the hearing of the appeal concentrated on amplifying and developing in oral argument his earlier written submissions on ground (i).

Ground No (i)
14. The essence of the complaint being advanced in respect of ground (i) was that the defence was placed at a strategic disadvantange by the prosecution's decision to proceed with Bill Number LK 102/2012 ahead of Bill Number LK 93/2010 even though the latter was first in time.

15. The alleged disadvantage identified was that the defence had intended, if Bill Number LK 93/2010 had been allowed to proceed first, to probe in some depth the bona fides of what counsel characterised as "the foundation complaint", i.e., the complaint made by complainant "A", and further to suggest collusion and possible fabrication in relation to complaints "B" "C" and "D", which were only advanced as a result of those complainants having been approached by An Garda Siochána. It was suggested that the defence had confidence that they could secure an acquittal in respect of the counts on Bill Number LK 93/2010, and that it was then planned to deploy this success for the purpose of seeking to undermine the complainants covered by Bill Number LK 102/2012, again on the basis of alleged collusion and fabrication.

16. It was contended that by proceeding first with Bill Number LK 102/2012 the prosecution had visited unfairness on the accused to such an extent that he was deprived of a trial in due course of law.

17. Counsel for the prosecutor contends that it was entirely a matter for the prosecution as to which case they decided to proceed first in, and they elected to proceed with Bill Number LK 102/2012 in the first instance as it involved a larger number of complainants and it was perceived to be the stronger case.

18. The defendant does not dispute the genuineness of the reasons advanced by the prosecution for its decision, nor does he suggest any form of prosecutorial misconduct or sharp practice. He merely contends that as a matter of principle the first indictment in time should be proceeded with first, and that he ought not to have been disadvantaged in the manner complained of.

19. This complaint was first raised at the trial, and the trial judge ruled as follows:

> *JUDGE: Good afternoon. Thank you both for your submissions in relation to the matter. Now, Mr O'Sullivan makes it clear and he has not been contradicted in any great way that it is a matter for the prosecution to decide which selection of the complaints made, if I can put it in that way, goes first, irrespective of which is first in time. And the state's application is that bill number LK109/12 advances in the first position and that 93/10 backs it up, if I can put it in that way. Mr Sexton is opposed to that. Mr Sexton does not want the second bill to proceed in the absence of the first already having been determined. The reasons that he gives for this are in the first instance; that the State has given the impression that it was always going to run bill 93/10 first and that is supported, to a certain extent, by way of correspondence. I suppose what Mr Sexton is suggesting is that there was a certain degree of reliance placed upon by the defence on this by them, but having advanced or suggested that position he has not shown, to this Court that any particular prejudice might arise to his client. I'm not sure that much turns on the question of the impression that was given by the State in relation to this matter, and I don't find that that is a particularly good ground for the application made.*
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> *Mr Sexton says that another reason why matters should be advanced in respect of the first bill before dealing with the second is that the foundational complaint flows from that first bill where there are four people who made complaints and for that reason it should be dealt with first. I can see a certain logic in time to that argument but again, no specific grounds of prejudice to his client have been advanced and the manner in which I have thought about this, in my room, is by asking myself the question in what way is the accused man's right to a fair trial and his right to advance a full defence in respect of the second bill in any way interfered with by it running ahead of the first? And having that as the primary issue which guides me, and not being aware of any detail really in relation to the complainants or how they came about other than assuming, as I should, that each complaint stands on its own merits and was made by an individual in respect of an incident or incidents, I again find that I cannot find any particular ground such as to cause prejudice to the accused man or such as to interfere with his right to a fair trial in the second bill. Mr Sexton says that that the accusations having being made first should be dealt with chronologically. Again, I see the logic of that matter and I suppose in an ideal world it would be the case that matters that arose in 1978 and '79 were dealt with in the first instance and followed through but once again, the passage of time between the two bills, there is no passage of time between the two bills, it's simply a case of all of the complaints being back to back, if I can put it in that way. So there's no significant time gap that arises between them. So whilst it is more attractive from a logistical point of view for the first bill to be dealt with first, I don't find that it is necessary in an absolute way and I do not find that it is unfair that the second bill be dealt with in advance of the first. I don't think that the State, by dealing with the second bill first, are going to cause the accused person, the accused person's ability to conduct a fulsome defence, I don't think they're going to be that they're going to interfere with that.*
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> *There are 13 complainants, I'm told, in the second book of evidence and each of those complainants must be an individual who, as I said earlier, made complaints in their own right. Howsoever they were elicited and when I say that I'm making reference to Mr Sexton's earlier suggestion that there seems to have been some sort of foundational complainant, but I know nothing of that, as I say, other than the foundational complainant may have been somebody who is relevant in respect of the first bill. I know nothing as to whether or not there is a foundational complainant in respect of the second bill or not, but even so, each complainant making a complaint as an individual in their own right*

would have done so howsoever they were elicited to do so. And the state is entitled to explore their complaints and to have some determination reached in relation to them. So, in all the circumstances, having considered the matter carefully, I just can't see how the accused man is at risk of getting an unfair trial and being unable to conduct a fulsome defence in respect of the second trial by virtue of the matters in bill, record number LK109/12 proceeding at this time.

MR SEXTON: May it please the Court.

20. We can find no error of principle in the trial judge's ruling. It has always been the case, for example, that when separate trials are granted, or when an indictment is severed, it is a matter for the discretion of the prosecutor as to which trial is proceeded with first. There is no reason in principle as to why the same discretion should not exist as between two separate Bills of Indictment, even where one is older than the other. The only possible qualification to that, it seems to us, would be that the older case should go first if to further delay its trial would create a real risk of prejudice to the defence in terms of the non-availability of evidence. The defence in this case have not sought to suggest any such prejudice.

21. The defence has no entitlement to expect that they would be strategically advantaged by the prosecution, merely that they would not be unfairly prejudiced by the prosecution. The decision by the prosecution may have put the defence in this case at a strategic disadvantage but it was not unfair. What occurred was just one of the hazards of everyday criminal procedure. We therefore are satisfied that the trial judge was correct in his ruling, and would dismiss this ground of appeal.

Ground No (ii)
22. The essential complaint here is that the trial judge was wrong to refuse to direct separate trials of the counts relating to different school years. It had been argued that the indictment should be severed in several different ways. First, it was argued that the offences allegedly committed at St Enda's swimming pool should be severed and tried on their own. The trial judge had acceded to that application. Secondly, it was further argued with respect to the remaining counts that offences alleged to have been committed in any one school year should be tried separately from those alleged to have been committed in any other school year. The trial judge refused this request for further severance.

23. The trial judge's ruling is to be found in the transcript of the 5th of November 2015 from pages 2 to 6 inclusive. He found (*inter alia*):

"I have reviewed briefly the book of evidence and the statements which are relevant and having looked at them and having taken an overview, and having taken into consideration the age of the complainants, the location where they were and the degree of control which was exercised over them and also the time period during which this occurred, a time period which I remember and other people will remember, I'm satisfied that there is evidence of system evidence and also something Mr O'Sullivan relied on greatly was the establishment of evidence of dominion and control, I'm satisfied that somewhat more is required than the establishment of dominion and control. I'm satisfied that the, as I said, the various matters which were relevant to the age of the children, the location and so on and so forth are all relevant and important factors for consideration in arriving at a decision in relation to this matter. In particular, the nature of the location where the incidents occurred and the modus operandi in a general way which was employed by the alleged accused, or by the accused, are important. In that respect, there's a common thread which runs through all the incidents at the school and when I say school, I'm satisfied that the school comprises of the general curtilage of the school which includes the physical education room where the CPR took place, the boiler room and the cloakroom and toilet.

Each circumstance of alleged assault in the school is not exactly identical, even though some of them are very, very similar, but what is identical, that each takes place in the school in the first instance, irrespective of the locus therein, and in an area where as a teacher who belonged to a religious organisation in 1979/1980, he is a man who would have had absolute authority and control over the location generally. They took place within school time or when children were detained after school. All of these children were pupils in the accused's class and they were in his charge. The modus operandi would have been that he put his hand down their trousers; down jerseys, either front or back; and allegedly rubbed the pupils' private parts or bottoms; leant over pupils; used his cassock to shield himself; used threats of violence and was intimidating. I would not expect there to be an absolutely identical series of complaints in respect of each child, given the tender years that the children were at that time, but it seems clear to me that the system that was employed was broadly similar in all instances. He was not in any way discreet about his behaviour. That is another factor which is common. And having considered all matters I am satisfied that all of the counts relating to any of the alleged incidents in the school or in the curtilage of the school are proper matters for the indictment. The fact that there are three consecutive years' worth of pupils, and by that I mean that there's an intake for '78/'79, '79/'80 and '80/'81, so you've got three different classes. The fact that there are three consecutive years of pupils who have given statements must also be highly probative in itself. It seems to me that the possibility of three classes colluding in some way, shape or form must be, at best, minimal and boys of that age would not have a tendency to fraternise with children in higher classes than they are in in primary school. It's entirely appropriate there is such a spread of complaints over that three year period on the indictment."

24. We are satisfied that the trial judge considered the severance application with great care and rigour. He had opened to him the main relevant authorities, and in particular the judgment of Barron J in *The People (Director of Public Prosecutions) v B.K.* [2002] I.R. 199 and manifestly applied it properly to the circumstances of the case. There was clear evidence of system, striking similarities, and of dominion sufficient to justify him in his decision. We also dismiss this ground of appeal.

Ground No (iii)
25. The final ground of appeal relates to the failure of the trial judge to grant a direction. In terms of the two aspects to the *Galbraith* test, the defendant does not rely upon insufficiency of evidence. Rather he relies on the second component of the *Galbraith* test.

26. It will be recalled that in *R v Galbraith* [1981] 1 WLR 1039 the seminal statement of principle was contained in the judgment of Lord Lane, who stated:

"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty,

upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

27. The alleged weakness or infirmity in the evidence relied upon by the defendant is based upon the possibility of collusion in circumstances where it was elicited that all of the complainants in the present case came forward only after they were approached by the gardaí, that the majority of the complainants are taking civil actions for damages against the defendant, and that the majority of those are using the same solicitor and have seen the same psychiatrist.

28. We do not consider that the claim of possible collusion has been raised at anything approaching the level at which the judge would have been justified in withdrawing this case from the jury. There was nothing concrete to imply impropriety on the part of the complainants. As we stated previously in *The People (Director of Public Prosecutions) v J.R.M.* [2015] IECA 65 (Unreported, Court of Appeal, 27th March, 2015) there is a misconception abroad that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. As we pointed out, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, **unless** the state of the evidence is so infirm that no jury, properly directed, could convict upon it. That was not the position here. We would also dismiss this ground of appeal.

THE APPLICATION FOR A REVIEW OF SENTENCE

ON THE GROUNDS OF UNDUE LENIENCY

29. The detailed grounds upon which the prosecutor maintains that the sentences imposed were unduly lenient, and seeks a review on that account, are set out in the notice of application dated 14th January, 2016. The said notice states:

"The sentencing court erred in principle in imposing the said sentences on the [defendant]] in respect of the said offences in that the said sentences were unduly lenient having regard to the nature, circumstances and gravity of the said offences and, in particular, the sentencing court, when sentencing the [defendant], erred in principle in:

(i) failing to reflect in the said sentences the level of culpability of the [defendant] and, in particular, the repeated breaches of trust on the part of the [defendant] inherent in his offending;

(ii) affording excessive weight to mitigating factors in circumstances where the [defendant] had contested the charges proffered against him and where there was no evidence of remorse on the part of the [defendant];'

(iii) failing to make the series of sentences in respect of each of the six injured parties consecutive to each other so as to reflect on the totality of the sentences imposed the gravity of the said offences together with the fact that the same were committed over a period time against six children;

(iv) suspending part of the overall sentence imposed in circumstances where there was no reasonable basis for so doing;

(v) taking into account that the [defendant] had spent a period in custody in respect of an unrelated case."

30. Counsel for the prosecutor, while not abandoning complaints (a) – (d) above focused the main part of his submission on ground (e). The Court's attention was drawn with particularity to the following passage from the ruling of the sentencing judge. The sentencing judge had stated:

"However, I am cognisant of the most peculiar situation whereby Mr. T. has already been deprived of his liberty for nearly four and a half years, albeit in circumstances where he did not attempt to avail of bail himself. That is a matter which exercises the mind of the Court. He also did not apply for bail at the conclusion of these proceedings. Having considered the matter, I am satisfied that I cannot draw any inferences from these actions to suggest remorse or apology. But what I can do is infer from these actions that at a minimum, Mr. T. has acknowledged and accepted his situation and furthermore his reluctance to apply for bail in the previous set of circumstances, I am satisfied must have similarly been some form of acknowledgement or acceptance of the situation in which he found himself. This was not however followed up by any concrete acknowledgment of remorse or regret. I find this to be a most difficult matter. But in the context of this particular sentencing, I am satisfied that it would be wrong of me to allow it to influence me in relation to my determining the appropriate sentence in this case on these facts for these victims. But I do believe that it may be relevant to my later considerations as to whether or not part of the sentence should be suspended."

31. Counsel for the prosecutor acknowledges that the sentencing judge in his ruling carefully observed the methodology repeatedly recommended by this Court to be adopted in the sentencing of offenders. However, he submitted that the finding of the sentencing judge that the actions of the defendant in:

(i) going into custody; and

(ii) not applying for bail on a previous occasion

could be deemed to be relevant as mitigation amounted to an error in principle.

32. It was further submitted that the sentencing judge erred in principle in suspending a substantial portion of the aggregate sentence imposed, namely, 20 months. It was contended that in the context of this case this error in principle resulted in the imposition of an overall aggregate sentence that could be said to represent a substantial departure from the norm. The defendant had

been convicted of a number of offences which involved a substantial breach of trust on his part. Further, he did not have the benefit of the substantial mitigation that would have arisen from a plea of guilty as this would have spared the complainants from being obliged to give evidence.

33. The Court's attention was drawn to a decision of the Supreme Court in a case of *The People (Director of Public Prosecutions) v. Colbert* [2016] IESC 69 (unreported, Supreme Court, 28th November 2016). In *Colbert* the Court of Criminal Appeal, having dismissed the appeal of Mr. Colbert against his 4 year sentence for 10 counts of sexual violence committed against a young girl, certified under s. 29 of the Courts of Justice Act, 1924 the following as points of law of exceptional public importance that it would be desirable in the public interest should be taken as an appeal to the Supreme Court:-

> "(1) Whether in an appeal against severity of sentence to the Court of Criminal Appeal the court should, as a matter of law, take into account time spent in custody by the appellant for a conviction subsequently quashed, and
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> (2) whether in an appeal against severity of sentence to the Court of Criminal Appeal the court should, as a matter of law, take into account time spent in custody on remand by the appellant even where he was at the same time serving a sentence for a previous conviction subsequently quashed."

34. The Supreme Court found that the fact that Mr. Colbert had surrendered his bail at an earlier point enabled him to get the benefit of the fact that he had spent time in custody in circumstances where his first conviction was later set aside. Counsel for the prosecutor emphasises that that is not the position in the present case.

35. Counsel for the defendant had sought to argue that the sentences imposed, even if lenient, were not unduly lenient and that they were within the legitimate range of the sentencing judge's discretion.

36. This Court has carefully considered the full ruling of the sentencing judge in sentencing the defendant. As conceded by counsel for the prosecutor it is well reasoned and properly structured. The sentencing judge has clearly endeavoured to adhere to best practice as recommended by this Court. He had proper regard to the range of penalties open to him. He sought to assess the seriousness of the offending conduct with reference to culpability and harm done and to locate the offending conduct on the range of penalties. In doing so he took into account both aggravating and mitigating factors going to the issue of culpability. He determined upon an appropriate headline sentence and then discounted from that for mitigating factors.

37. If we ignore for a moment the sentencing judge's approach to the period of time spent in custody both in respect of the unrelated case, and on remand in this case in circumstances where it would have been open to him to apply for bail, it is clear that the mitigating factors identified by the sentencing judge were all proper and appropriate factors to be taken into account as mitigation.

38. Returning then to the issue of the time spent in custody in respect of the unrelated case, it is clear that it would not have been appropriate for the sentencing judge to give full allowance for this in the same way that he would be expected to give credit for time served on remand in respect of the offences for which the defendant was being sentenced. To the extent that he spent time on remand in this case in circumstances where it would have been open to him to apply for bail, it is less clear that he should not get credit for this. However, the point was not pressed nor was it fully argued.

39. Be all of that as it may, the sentencing judge was still required, in seeking to arrive at a proportionate sentence, to have regard to the personal circumstances of the defendant and in that regard was entitled to take into account any adversities or prejudices experienced by the defendant in the course of his life history. The appellant spent four and a half years incarcerated in respect of crimes that he was found not guilty of. While it is true that he could have applied for bail, and chose not to do so, it remains the position that he was incarcerated and deprived of his liberty for that considerable period of time. This was an adversity in the defendant's life and we consider that the sentencing judge was correct to take it into account to some extent as part of the personal circumstances of the defendant. Clearly the defendant could not have expected a full allowance for the time served in the circumstances. Even though it was, in effect, a voluntary surrender of his liberty in circumstances where there was a reasonable prospect, we understand, of achieving bail, we consider that he was nevertheless entitled to have some account taken of it as part of the general mitigation provided by adverse personal circumstances, and that the trial judge did not commit any error in making allowance for it in the way that he did.

40. The sentencing judge had already decided upon the sentences that he intended to impose excluding this factor from his consideration. He then went on to consider what additional allowance, if any, he would make for this factor. He concluded *"it would be manifestly unjust of me not to factor it in in some way in relation to the sentence which I am expecting Mr. T. to serve".* To reflect this prejudice to Mr. T.'s life, and further to enable Mr. T. to pursue the goals of rehabilitation and reintegration into society on release, he decided to suspend the last 20 months of the aggregate sentence upon conditions. We do not criticise him for doing so and consider that this was a matter within his legitimate range of discretion.

41. We should also state that we consider that the Colbert case is readily distinguishable on its facts and that it has not provided us with any material assistance on this issue.

42. There is no doubt that the sentences imposed on the defendant were lenient. However, we agree with counsel for the defendant that though they may have been lenient, and possibly very lenient, they were not unduly lenient in the sense of being significantly outside of the sentencing judge's margin of appreciation and outside of it to such a degree as to represent a clear departure from the norm. On the contrary, we are satisfied that the sentencing judge approached the sentencing exercise in this case with great consideration and care and we find no error of principle. We therefore refuse the application.