



THE COURT OF APPEAL

Record No. 219/2016

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

F.E.

APPELLANT

JUDGMENT of the Court delivered on the 26th of February 2018 by Mr. Justice Edwards

Introduction

1. This is the appellant's appeal against the severity of the sentences imposed upon him by the Central Criminal Court in respect of a number of offences in respect of which convictions were recorded against him; some following pleas of guilty by him, and others following his conviction of those offences by a jury on the 30th June 2016.

2. The appellant faced a multi-count indictment and was acquitted on some counts. However, in advance of his trial he had pleaded guilty to two counts, one (Count No 8) being an attempt to cause serious harm contrary to common law and the other (Count No 10) being an assault causing harm contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997. In relation to these he was sentenced on the 25th July 2016 to terms of imprisonment for seven years and six months, and three years and six months, respectively.

3. In respect of the remaining counts of which he was convicted by the jury the position is as follows:-

- Count No. 2: Rape contrary to s. 48 of the Offences Against The Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. The appellant was found guilty by unanimous verdict. He was sentenced to imprisonment for twelve years with the final two years suspended on conditions.
- Count No. 3: Threat to cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found guilty by unanimous verdict and was sentenced to imprisonment for five years.
- Count No. 4: Threat to kill contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found guilty by unanimous verdict and was sentenced to imprisonment for three years.
- Count No. 6: Threat to kill or cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found guilty by unanimous verdict and was sentenced to imprisonment for five years.
- Count No. 7: Threat to kill or cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The jury disagreed in respect of this count.

4. The offences alleged against the appellant were said to have occurred between the 2nd May 2014 and the 7th August 2014, a period of just over four months. The offences in respect of which the appellant was found guilty by the jury occurred between the 25th May 2014 and the 9th June 2014, a period of under three weeks. The most serious of the offences, rape, was committed on the 25th May 2015 as was a threat to kill or cause serious harm. The remaining offences of threatening to kill or cause serious harm in respect of which the appellant was found guilty were committed on the 26th May 2014 and the 9th June 2014.

Relevant facts.

5. The appellant is of Egyptian origin. In 2005 he and the injured party, Ms A, married having met several years earlier. In 2010 they had a child [C] together. In the period leading up to the offences the subject of this appeal the marriage had begun to break down. The appellant had been made redundant while Ms A had gained greater responsibility at work, resulting in her being away from home for longer periods. Because the injured party was breast feeding their child the pair no longer shared a bedroom.

6. In the weeks leading up the incident the appellant's marriage was under serious strain. On the 2nd of May 2014 the appellant and the injured party had a major argument resulting in the Ms A leaving the matrimonial home to live at her parents' house. The pair subsequently agreed to reconcile their differences and she moved back home. A few days later Ms A arrived home to the smell of petrol fumes and realised that the appellant had poured petrol on the soft furnishings in the house.

7. On the 25th of May 2014 the complainant arrived home with their child, who was asleep. She put the child on the sofa. The pair began discussing their marriage. Ms A told the appellant she still wanted to end the marriage. This prompted a violent reaction from the appellant who picked up a knife and told her "I could cut your face open" and "you're not leaving". She told the appellant he was being "crazy", in the words of investigating Garda Ian Brunton. The appellant then said "right, upstairs" which the complainant took to be an order to have sex. She put her son to bed, went into the spare room where they would usually have sex and lay on the bed. The appellant put his penis in her vagina. During this sexual intercourse, which was non-consensual, the appellant ordered the injured party to open her eyes. She told Gardaí that throughout that time she was shaking and had to lean against the wall as she took her clothes off. He called her a "cold, frigid bitch". After the rape the injured party told the appellant "we'll talk", causing him once again to become angry. He calmed down when she told him that she would give the marriage another chance.

8. He allowed her to go to another bedroom and a short time afterwards brought her her mobile phone. He had earlier seen her looking at it and told her "the guards will never get here on time". Afterwards she stayed in the room wondering how she would escape. The

appellant entered her room several times and at one point said he knew she wasn't asleep and "you'd better have meant what you said". The next morning she got up at 6.30 a.m. and had a shower. The appellant refused to let her bring their child to the creche and insisted that he bring the child. She said this was extremely difficult for her.

9. After the appellant left for the creche she contacted Gardaí and, without giving them specific details, told them she had been the subject of serious domestic violence. Gardaí advised her to gain a barring order from the District Court. On the 26th of May 2014 the injured party was granted an interim barring order by the Dublin District Court.

10. She went to live with her son at her parents' home. There the appellant contacted her via her parents' landline and screamed "you're dead. I'm not going to let you live with our child." On the 3rd of June 2014 the complainant obtained a full barring order with the appellant in court. She changed the locks at her home on the 8th of June and on that date the pair had another argument over the phone. The following day the appellant arrived at her place of work. As she attempted to enter the gates in her car the appellant was seen trying to get into her car. The same day Ms A had received phone calls from the appellant letting her know where she was. He later confirmed that he had been tracking her on her mobile phone. He also followed her to their child's creche and as she was attempting to leave the car park, rammed into her. On this occasion he told her "next time, I'll have a hammer".

11. At the end of July efforts were made to facilitate visits between the appellant and his child. The handover did not go well, the appellant once again became aggressive and attempted to kiss the complainant. On the 6th of August the appellant spoke to the complainant on the phone insisting that he wanted to see his son and saying he was going to finish the matter that night. The appellant arrived at the complainant's home at 8 p.m. The complainant called the Gardaí, however, the appellant left before Gardaí arrived.

12. The complainant went to her parents' home. During the afternoon of the 7th of August, before the complainant had arrived the appellant called to her parents' home. The complainant's mother, Ms B, told the appellant that the separation was going ahead and he should talk to Ms A about it. He began "ranting and raving". At 4 p.m., by which time Ms A was back at her parents' house, the appellant called again. He was carrying a brown paper bag in which he claimed was a present for their child. In fact it was hammer. He produced the hammer. He tried to gain entry to the house, however, Ms A and her mother were successful in keeping him out. He did however succeed in striking both parties with the hammer, including striking blows to their heads. The appellant only left because of the interventions of neighbours. Neighbours afterwards described clearing up a large amount of blood and seeing the hammer was bloodstained. Both women were treated by paramedics as spinal patients as a precaution and were brought by spinal board to A & E. Ms A was left unconscious and suffered three deep lacerations to her head for which she received stitches. She was also initially told she had a skull fracture but fortunately she later learned that her skull was not in fact fractured.

13. The appellant was interviewed and initially denied all allegations except some elements of the assaults against Ms A and Ms B with a hammer on the 7th of August. However, he initially denied having used the hammer in the way alleged, despite several independent witnesses having been present. Garda Burnton indicated that he gave "a version of events that was partially truthful" and suggested that he used the other end of the hammer. In interview he also suggested that his relationship had broken up because of some form of black magic. He also referred to his depression, anger and frustration as reasons for having committed the assaults. He subsequently pleaded guilty to the counts in relation to these offences.

The appellant's personal circumstances

14. The appellant was 40 years of age at the date of the offences and 42 by the date of sentence. He was born and raised in Fawa in Egypt and was the youngest of 8 siblings. His father was an irrigation engineer and died of cancer in 1985. His mother died, also from cancer, in 1998. The appellant had been her primary carer during her illness.

15. He finished school at age 15 having completed examinations roughly equivalent to the Junior Certificate and thereafter completed a three-year diploma in Art and design in Fawa. At age 19 he undertook and completed a four-year diploma in Food and Beverage and Hotel Management, before enlisting in the Egyptian army at 23 years of age, as part of his national service.

16. In 1998 he came to Ireland where his older brother had settled and was working as a doctor, in order to complete further studies. He found himself unable to afford the particular courses he wished to attend and began working in the restaurant industry. He opened his first successful business, being a café in 1999 and set up a further restaurant which traded well until the end of 2007.

17. His restaurant business ran into difficulties with the economic downturn in 2008 and he sold it at this time. Thereafter he worked in the IT sector as a "middle-eastern sales representative". He worked in this position for four years and thereafter in a similar role with a different company in Belfast, before being made redundant in 2013. At about this time he made efforts to secure a franchising deal which endeavour required him to invest the bulk of his savings. He was ultimately unsuccessful in this enterprise and found himself out of work in 2014.

18. He met the complainant in or around 1999/2000 and they subsequently married in 2005. The relationship was good during this period and the couple lived together for several years prior to marrying. They eventually had their son [C] in 2010.

19. Following a year of maternity leave, the complainant returned to work and ultimately received a promotion. This resulted in greater time away from the family home and began to cause tensions within the relationship. The complainant continued to breast feed their son until he was approximately four and a half years of age which necessitated the couple sleeping in different beds, though they still maintained a sexual relationship. This resulted in numerous verbal arguments.

20. During the period in which the offences were committed and in the lead up to their commission the appellant was undergoing a significant depressive episode. The details of same are outlined in a psychiatric report prepared by a Consultant Forensic Psychiatrist, which was before the Trial Court on the date of sentence. In addition, during the Summer of 2014 he had been diagnosed as suffering from depression by a psychiatrist in Cork and had been prescribed anti-depressants.

The impact on the victims

21. Ms A read her own victim impact statement into the record stating:

All of the crimes, both individually and collectively have had a devastating and long lasting impact on me and [C], who is six now. I've tried my best in this victim impact statement to put into words the effect on me and [C] of the threats, rape and violent assault. Sharing a significant proportion of my life with [F.E.], living together and most importantly having a child together, makes the impact of these crimes so much more devastating and harder to come to terms with. From the time our relationship was breaking down, there was a slow build-up of threatening, controlling and abusive behaviour. From May 2014 the threat to cause me serious harm and to kill me combined with my every move

being tracked, made me absolutely terrified. Trying to keep life as normal as possible for [C], in the beginning not telling anyone what was going on, thinking I could find a way to solve the unsolvable, left me in a complete state of confusion and turmoil. The night of the 25th of May when I was raped and threatened with a knife will stay with me forever. From the moment I walked in the hall door and saw [F.E.], I knew I had got things terribly wrong. His complete insistence and entitlement to me and [C] no matter what. The complete terror I felt when he took out the knife. I knew that night there was nothing I could do to stop him. That is one of the hardest things to live with. The rape left me a complete sense of powerlessness, like everything of myself had been taken away from him. Being raped has affected every piece of me. It went to the core of myself. I felt so broken and for a long time angry with myself for what I saw as letting it happen. The terror [F.E.] continued to put me through during that never-ending night, the constant threats, instilled a level of fear that I never knew I could feel. It is always that night with [F.E.] standing over me saying "you better be telling me the truth", that comes back to me in my nightmares. There have been many nights over the past two years that I purposely tried not to sleep as it was far better than waking up drenched in sweat and terrified. My sleep pattern has never recovered since that night. Deciding to make the statement on the rape was so difficult because it meant admitting to myself what had happened. It took me five months to report it to the guards and I couldn't have done it on my own. Knowing that I was safe as he was in custody, the support of the Dublin Rape Crisis Centre and critically, because of the support by the investigating guards since the assault on the 7th of August, my trust and confidence in how it could be dealt with and in the criminal process, had grown. But yet I still found the word "rape" so hard to use in relation to me. The realisation in August that nothing was going to stop him, court orders, guards, didn't make any difference. The impact of the threats, hearing and then seeing the absolute determination of [F.E.] to kill me, will always stay with me. His cold determination and focus was so clear on the 7th of August when he kept hitting me with the hammer, even when other people came. I remember trying to pull him away from my mam and seeing blood all down her face. My memory of being repeatedly on the ground with people all around me still leaves me with a feeling of terror. The level of violence shown to me and my mam on that day completely changed my outlook on life. It broke a whole sense of security surrounding my life that I never knew was even there. I will never forget before I went unconscious, looking down at the door of the room where [C] was sleeping and thinking whatever happens now, don't come out, don't see this, because I believed in that moment I was going to die. I know if it wasn't for the actions of [a named man] that day that I may not be alive and all my family will be forever grateful to him. The psychological impact of that day cannot be erased. I can never comfort myself now when I feel afraid that a terrible thing will never happen. Nothing is impossible now. A critical impact on me has been a loss of trust and belief in myself. I lost trust in my own judgement and my ability to make decisions. I was constantly questioning my own instinct. It's very hard to describe what it's like not to trust your own gut instinct. I am constantly asking myself how could I not see this coming? Completely underestimating [F.E.]'s reaction to separating. How would anyone believe in me...? How and why didn't I prevent particularly the rape? And going through all the questions again in the course of the trial that I'd ask myself so much over the last two years. Despite the reassurances from very supportive friends, guards and other professionals, it's a long road to overcome and really believe in myself again. While everything in my head rationally knows that I've absolutely no responsibility for each and every one of these crimes, it's a very different thing to feel it and believe it and I'm one and a half years in counselling and I'm not there yet. It's still a very conscious effort and struggle. Hearing the verdict to the charge of rape really brought that home. The absolute relief I felt that I had been believed. Over the past two years I've struggled with staying in the moment, at home with [C] and in work. The smallest thing can bring of the events back. While I know I'm functioning well and being the best mam I can be and doing my job well, it continues to be a very conscious effort. There hasn't been one day where I haven't thought about what has happened, and that effort can be exhausting. There are days I wish so much that I could just turn it off for a while. The four bail hearings including the District and High Court and the very lengthy trial process intensified that constant reliving, particularly of the rape and the assault, as I felt I had to keep going back over the events, and it also increased my sense of fear, as I constantly worry what will happen to me and [C] on his release. Even now with [F.E.] having been found guilty, I still feel a deep level of fear of what will happen in the future. The impact on my relationship with my parents is significant as I went to their house on the 26th of May and on the 7th of August to be safe. I continue to feel very responsible for changing their lives utterly and bringing violence and fear to their home. I feel particularly for my mam who has not been the same since the assault. Yet she has always been a constant support to me and [C]. I know all my family have been damaged by these events. The immediate impact on [C] after the 6th and 7th of August was that he had nightmares. He wanted to be with me and know where I was all the time, and this meant letting him know if I was going into a different room in the house or upstairs. He wouldn't ever go to sleep for anyone but me. And slowly that anxiety that passed, but days before the trial he received a card from [F.E.] and he was very upset and asked if [F.E.] was going to hurt me and nana again. His anxiety and all the symptoms returned and I realised how deep-rooted the impact is on him and how it can be easily triggered. How does a child grow up and cope with knowing their father has harmed his mother so badly, to use a knife, a hammer and to rape her. [C] finds it very hard now to understand how his dad could hurt his mum and his gran. He's conflicted by his own feelings towards [F.E.]. [C] also now has an acute awareness of when I am anxious and worried. I don't know what the long term impact on [C] will be, but I worry so much about it and trying to adapt and negate it as much as possible will always be a constant feature of our lives. I will continue to use all the professional support around me to give [C] the most secure and happy environment in which to thrive, but I wish he wasn't faced with this. No child should have to come to terms with these horrendous circumstances. All of these events have changed me and for a while, I wanted to go back to be the person I was and find this closure that so many people have spoken to me about, but with support, I've stopped doing that now. What has happened is part of who I am now and has changed my perspective on life, particularly with regard to mine and [C]'s safety and security which will always be a future of our lives. But this experience and these events don't define me. The inner strength and courage and that I found which kept me alive during some of those horrendous events and sustained me up to and during this trial, gives me and [C] a strong foundation for living very positive and happy lives.

22. Ms B said in a victim impact statement:

"The events have impacted on the whole family. We were just an ordinary family getting on with our lives and then these horrendous things that happened on the 7th of August impacted on all our lives and our family will never be the same again. I don't feel safe anymore, the fact that he assaulted me and [Ms A] in my home, I don't feel safe in my own home now. I constantly lock the doors of the house when I'm inside. I'm nervous answering the door when I am not expecting someone. After the assault, I was very afraid going out on my own. I went for counselling to cope with what has happened. I took [F.E.] into our home and I went out of my way to make him comfortable in our family and in my home. What he did to me, [Ms A] and the whole family, is absolutely devastating. To trust someone and for this to happen is unbelievable and very hard to get over. I really believed he could have killed [Ms A] on that day and that is very hard to come to terms with and try and put behind me. I will always remember him trying to close the front door and I was trying to keep it open. Knowing that he could have killed [Ms A] still leaves me terrified. I was always be grateful to [a named man] who saved us that day. To be hit on a head after having a bleed on the brain years

previously which [F.E.] knew of really scared and frightened me. Coming up to the trial I was very anxious and stressed. I still feel afraid at home and I feel I have to look over my shoulder when I'm out. I feel I will never feel safe again. The impact is not just on me, but knowing my family are afraid of what will happen when he comes out. This will always hang over us."

The sentencing judge's remarks.

23. Having described at some length the factual circumstances in which each of the offences was committed, the sentencing judge then continued:

He was arrested on that date and he was interviewed by members of An Garda Síochána. He accepted that he was present on the 7th of August 2014 and he put certain suggestions forward to include initially denying having the hammer. He then proceeded and denied this manner of abuse. He did however accept that he assaulted both women and he pleaded at an early stage to count 8 on the indictment being the assault on Ms A's mother but the plea to count 10 on the indictment must be considered and categorised as a late plea of guilty. Excuse me that is the other way around, he pleaded guilty. He accepted that he assaulted both women. He pleaded at an early stage to the attempted serious assault but the plea in relation to the assault causing harm in respect of the injured party's mother must be considered as being and accepted as being a late plea of guilty. In interview he acknowledged his behaviour was unacceptable and that is the background by way of a brief summary in relation to the nature of the convictions and the two counts to which the accused man has pleaded guilty.

I have considered the victim impact report given in evidence by the injured party and I have considered the very severe long lasting impact this offending behaviour has had on her. I've also considered the victim impact report as handed in in respect of Ms B.

The accused man has no previous convictions. He was not violent to the injured party prior to these events. He, I am told, was frustrated and upset with the turn that his life had taken. I am told that he has a brother who resides in this jurisdiction and the rest of his extended family live in his home country in Egypt. He has not seen his son since 2014 and continues to suffer the loss of the society of his son. I have considered the psychiatric report which was furnished on behalf of the accused man, his own statement to the Court expressing his regret for the harm he caused to his estranged wife on the 7th of August 2014. He expresses shame for his actions. Notably, however, he expresses no such feelings regarding his actions towards Ms B, the injured party's mother.

I have considered all matters urged in mitigation including the following; firstly, the plea of guilty, the early plea to count 8 on the indictment, the plea of guilty to count 10 on the indictment, being the charge of assault causing harm to Ms B. I have considered that he has no previous convictions, that he admitted to the assaults in interview when he was interviewed by members of An Garda Síochána on the 7th of August 2014, his remorse for assaulting the injured party on the 7th of August 2014. I am entitled to consider that this was genuine remorse given that he subsequently entered a plea of guilty to the count in relation to his wife when that count was added to the indictment at a late stage and the difficulties as recognised by the courts for a non national serving a sentence in this jurisdiction. I have also considered the victim report and it seems from that that he suffered a depressive episode one year prior to his offending conduct which appears to relate to the deterioration in the relationship.

These are all very serious offences and I remark that the crime of rape is an attack upon the bodily and the psychological integrity of a woman. These offences occurred in the midst of a marriage breakdown which of course does not in any way excuse or justify the accused's conduct and he doesn't put it forward as such. It was terrifying for his wife over a period of time, leaving her in the impossible position of trying to ensure that their son had access to his mother, yet trying to protect herself from the accused man and his actions.

I consider the aggravating factors to be as follows. Firstly, as regard the offences on the 25th of May 2014, the threat of violence with a weapon, the breach of trust, the violation of the injured party in her own home while her son was asleep, the fear that he instilled in her and the severe effect on his victim. The functions of sentence are to punish the offender, to protect society and to offer the possibility of rehabilitation. The possibility of rehabilitation cannot be excluded even where an individual has pleaded not guilty as a person can be reformed after many years in custody and I must provide some light at the end of the tunnel for such rehabilitation.

I am obliged to identify the range of penalty available, to place the offence on the appropriate place on that range, to identify the mitigating factors and to reduce the sentence accordingly. You can stand up, Mr E, please. Regarding count 2 on the indictment, being the offence of rape, the range of penalty extends from that of a suspended sentence to one of life imprisonment. I measure the appropriate sentence to be a sentence of 14 years' imprisonment. Taking into consideration the mitigating factors which I have already identified I reduce that sentence to one of 12 years' imprisonment and to allow for the prospect of rehabilitation I will suspend the final two years of that sentence for a period of two years on the usual condition, that is that the accused man would keep the peace and be of good behaviour towards all the people of Ireland during his period of imprisonment and for the period of two years from the date of his release, the accused to enter into a bond in the sum of €300 before the governor or the assistant governor and on the condition that he have no contact with the injured party for that said period of time. Secondly, that he stay away from [a specified address].

As regards count 3 on the indictment, that is the count of a threat to cause serious harm on the 25th of May 2014, which included the picking up of a knife and threatened to cut her face off. In relation to that the aggravating features are clearly that a weapon was produced. The range of penalty available in respect of this particular count is a sentence which ranges from one of a suspended sentence to one of 10 years' imprisonment. I measure the appropriate sentence to be one of six years' imprisonment. Taking into account the mitigating factors which I have already identified I will reduce that sentence to one of five years' imprisonment.

Regarding then count 4 on the indictment, which again is a threat to kill, which occurred on the 26th of May 2014, which threat was made over the telephone to Ms A and overheard by her parents, I consider the aggravating features of that particular offence to include the nature of the threat made and the evidence regarding the aggressive tone used by the accused man. I have considered the circumstances of the threat and I have already identified the nature of it, it being made over the telephone, and subsequent to information received by the accused man of the barring order. I take those factors into account and I take into account in particular the element of emotional distress on the part of the

accused man. The range of sentence is from one of a suspended sentence to one of 10 years' imprisonment. I measure that matter as meriting a sentence of five years' imprisonment. Taking into consideration the mitigating factors, including the circumstances that I have just referred to, I will reduce that particular sentence to one of three years' imprisonment.

Regarding count 6 on the indictment, this is a threat to cause serious harm to [Ms A] which was made on the 9th of June 2014 at Leopardstown Shopping Centre where the injured party was told by the accused that the next time he would bring a hammer. This threat was made to her in the shopping centre in person and I note and I have considered the extract which Mr Dwyer read from the decision of R v. Hull and I have taken that into account. This is a very serious threat and given the evidence it is clear that it was not thought by the injured party to be an idle threat. I measure the appropriate sentence to be one of six years' imprisonment. Taking into consideration the mitigating factors I will reduce that sentence to one of five years' imprisonment.

That now brings me to the final two counts on the indictment to which the accused man has pleaded guilty, that is counts 8 and 10 on the indictment, being an attempt to cause serious harm contrary to common law to [Ms A] on the 7th of August 2014 and secondly the offence of assault causing harm to [Ms B] made on the same date and at the same location. These are in my mind truly horrific offences. The evidence I have heard disclosed a sustained, vicious and cowardly attack on [Ms A] and her mother using a hammer and causing them both multiple injuries which required medical attention. An aggravating feature is the fact that these offences were committed while her son was present in the house and in her mother's home. I also consider the nature of the attack to be an aggravating feature, the use of the weapon and the particular weapon used and it is indeed fortunate that he did not proceed to cause a fatality in the use of this weapon. I am also satisfied in relation to these offences that they are premeditated offences and I draw support for this view in that [Ms A] saw the particular bag in which the hammer was contained in his car the previous evening before this particular offence. The description of the accused indicating that he intended to retrieve a gift for his son from the car and instead brought back the hammer, his calm, cold demeanour as described in retrieving the weapon which he subsequently used, his refusal to stop the assault despite members of the public attempting to intervene, his violation of [Ms B]'s home and of course the effect on [Ms A] and on [Ms B]. I've already identified the factors which in my mind apply in mitigation which are applicable also to both of these offences. In addition, as regards count 8 on the indictment, I take into account that the accused man pleaded guilty to this count and that this count was added to the indictment at a late stage. In those circumstances I take this as being an early plea of guilty. I repeat the mitigating factors of an admission to the assault in respect of the injured party and her mother in interview. This particular offence, that is the offence which is set out on count 8 on the indictment, is a very grave offence indeed. The penalty available extends from one of a suspended sentence to one of life imprisonment and I measure this offence as meriting a sentence of 10 years' imprisonment. Taking into consideration of the mitigating factors I have identified I will reduce the sentence to one of seven and a half years' imprisonment.

Finally, then as regards count 10 on the indictment, that is the assault on [Ms B], and this is another brutal and cowardly assault on a woman in her own home. The impact on [Ms B] is understandably severe and both women are to be commended for their measured statements in their respective impact reports. [Ms B] suffered injury as a result of this horrible assault on her utilizing a hammer and it defies all rational sense. This was not an early plea, nevertheless I must and will give credit for the fact that the accused man pleaded guilty to this particular count and it is the position in law, however, that the latter the plea, the less the mitigatory effect. The penalty in relation to this particular count being an offence contrary to section 3 of the Non Fatal Offences Against the Person Act 1997 extends from a sentence of a suspended sentence to one of five years' imprisonment. I measure this count as meriting a sentence of four years' imprisonment and taking into consideration the mitigating factors I reduce that sentence to one of three and a half years' imprison. All sentences concurrent and backdated to the date when the accused man went into custody. I also, in accordance with section 29 of the Sex Offenders Act 2001, impose a period of five years' post release supervision and on the following conditions; firstly, that the accused keep all supervision appointments with the probation officer, secondly that he had advise the probation officer of his address for receipt of letters regarding supervision appointments and advise the provision officer immediately of any change of such address. Thirdly, that he had reside at an address agreed with the probation officer and finally that he will attend for assessment and any treatment as directed and considered necessary by the probation officer".

The grounds of appeal

24. Although the appeal is nominally against all sentences, counsel for the appellant very fairly indicated that he cannot really legitimately complain in respect of the sentences imposed of five years imprisonment or less, and that his primary focus was in respect of the sentence of twelve years imprisonment, with the final two years thereof suspended, imposed on Count No 2 for the rape offence; and seven and a half years' imprisonment imposed on Count No 8 for the offence of attempting to cause serious harm.

25. Three main grounds of appeal are advanced in respect of each matter. First it is contended that the sentencing judge over-assessed the gravity of the offences in each instance. Secondly it is complained that insufficient allowance was afforded in each instance for the mitigating circumstances in the case. Thirdly, there was insufficient regard to the penal objective of rehabilitation.

Discussion and Decision

26. It seems convenient to deal separately with the grounds of appeal relating to the rape offence and attempt to cause serious harm, and we will deal with the rape offence in the first instance.

The Rape Offence

27. The first complaint is that the sentencing judge over-assessed the gravity of the offence. It is suggested that the headline sentence of fourteen years nominated by the trial judge was simply too high, and outside the norm having regard to the circumstances of this crime.

28. We were referred to the judgment of Charleton J in *The People (Director of Public Prosecutions) v D (W)* [2008] 1 I.R. 308. That judgment was delivered twenty years after the Supreme Court's judgment in *The People (Director of Public Prosecutions) v Tiernan* [1988] I.R. 250. In *Tiernan* the Supreme Court was invited to provide sentencing guidance in the case of rape offences, but declined to do so, with Finlay C.J., stating at pp. 254 – 255: "I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation of tariff of penalty in cases" This was justified in part by "the absence of any statistics or information before this Court in this appeal concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction."

It was also justified on the basis of the need to preserve wide judicial discretion in order to meet the requirement of proportionality in sentencing.

29. Notwithstanding the Supreme Court's earlier stated reservations, Charleton J, when still in the High Court and sitting at first instance as a judge of the Central Criminal Court, attempted in *People (DPP) v D(W)* to do what the Supreme Court had declined to do, but in the case of sexual assaults and aggravated sexual assaults and related offences. Although the sentence imposed in *D (W)* was appealed to the Court of Criminal Appeal, the judgment on the appeal was delivered ex tempore and that court neither endorsed nor criticised Charleton J's guidance. Despite this Charleton J's guidance was thereafter regularly cited to the Court of Criminal Appeal, and continues to be cited to the present Court of Appeal, in appeals concerning sexual assaults, aggravated sexual assaults and related offences. Unlike in the case of *Tiernan*, Charleton J in *D(W.)* did have the benefit of some statistics, as well as comparators with which to work, and also the Law Reform Commission's Consultation Paper on Sentencing.

30. Charleton J divided the offences that he was considering into three categories, namely those warranting "ordinary punishments" of between three and eight years, those warranting "severe punishments" of between nine and fourteen years, and those warranting what he characterised as "condign punishments" of between fifteen years and life imprisonment. It requires to be stated that Charleton J's indicative ranges in *D (W)* were based upon final sentences after taking all mitigation into account, rather than headline sentences, which somewhat limits the utility of his indicative ranges in assessing gravity alone. In addition, even accepting the methodology employed, the *D (W)* guidance arguably requires some updating at this stage. While acknowledging these limitations we nevertheless acknowledge that the guidance offered in *D (W)* continues to be useful. That having been said, this Court may take the opportunity, at some point in the future, and in an appropriate case, to seek to revisit the issue of guidance in matters of rape, aggravated sexual assault and sexual assault.

31. In the present case counsel for the appellant's point is that the final sentence, *i.e.*, a term of imprisonment for twelve years, with the final two years thereof suspended, was towards the upper end of Charleton J's range for cases warranting "severe punishments". It was submitted that when the facts of this case, which it was accepted by counsel are serious, are judged against the comparators cited by Charleton J, and measured against the indicia that he suggests should be present for the inclusion of a case in the category of cases warranting "severe punishments", it is clear that this case does not properly belong where it was located by the sentencing judge.

32. In particular reliance was placed on para 40 of Charleton J's judgment where, having referred to cases involving multiple counts, a number of victims and abuse of a relationship of trust, as being examples of those warranting severe punishment, he stated that leaving such cases aside:

"...there are clearly cases where a sentence of ten years imprisonment can be appropriate for an individual instance of rape. However, a sentence of ten or eleven years' imprisonment appears to be unusual, even after a plea of not guilty to rape, unless there are circumstances of unusual violence or pre-meditation."

33. Counsel for the appellant says that there was no pre-meditation in respect of the rape, and that while every rape is violent (and we would add a gross violation of the bodily integrity of the injured party) there was no unusual violence in the sense of gratuitous violence beyond the violence inherent in the act of non-consensual sexual intercourse itself, nor exceptional degradation or humiliation of the injured party, such as would have justified a sentence of that order. Counsel for the respondent has submitted that the headline sentence of fourteen years was appropriate given the aggravating factors in this case, and in particular that it was committed in the wider context of threats and intimidation going on over a period of months. It had been committed proximate in time to an express threat to kill Ms A with a knife, made a little earlier on the same evening in the kitchen, and in any case it involved a serious breach of the trust that should exist between husband and wife in a marital relationship.

34. While we accept that the circumstances of the case were egregious, and that it was very serious crime, we also agree with the submission made by counsel for the appellant that, viewed in isolation, the sentence on the rape appears to be somewhat out of kilter with sentences imposed in comparable cases. We have therefore concluded that the sentencing judge was incorrect to have assessed the case as meriting in the first instance a headline sentence of fourteen years. Our conclusion is that while the gravity of the offence, (determined with reference to the appellant's culpability, and the harm done) certainly merited the imposition of a substantial custodial sentence, it did not merit a headline sentence of that severity. We therefore uphold the first ground of appeal.

35. We would remark at this point that the appellant is perhaps fortunate that the sentencing judge did not decide to make the sentences on Counts Nos. 8 and 10, respectively, concurrent *inter se* but consecutive to the sentence on Count No 7. If she had chosen to do so, and it was an option that was certainly open to her in the circumstances of the case, while she would have had to reduce the aggregate total considerably to take account of the totality principle, the final result would almost certainly have been a sentence of at least as long as the sentence on Count No 2 now appealed against, and it is far from certain that Court would have been disposed to interfere with such a sentence. However, the sentencing judge did not in fact opt for consecutive sentencing, and her decision in that regard has not been criticised at the hearing before us.

36. We have also considered the arguments in respect of the discount on the headline sentence afforded for mitigation in the case of the rape offence. The allowance afforded for mitigation, including making provision for the incentivisation of rehabilitation, was reflected by a straight discount of two years from a headline sentence of fourteen years' imprisonment, with the suspension of a further two years of the resultant sentence of twelve years' imprisonment. Accordingly, the straight discount represented just over 14% of the total headline sentence, and the suspended portion represented another 14% of it. There was therefore a total discount of 28% on the prison time actually required to be served by the appellant (assuming he keeps to the conditions upon which his sentence was part suspended).

37. While the appellant was not to be penalised for having exercised his right to contest the case, it remains a fact that he did not have available to him what would have been the most powerful mitigating factors had he elected to avail of them, namely a plea of guilty and expressions of genuine remorse. On the contrary, there has been no taking of responsibility by the appellant with respect to the rape and no expression whatever of remorse or of any willingness to accept the verdict of the jury, and this Court's dismissal of his appeal against his conviction.

38. It is true that he was a man with no previous convictions, that he was indeed otherwise of positive good character, and that there was psychiatric evidence before the sentencing court suggesting he was suffering from a significant depressive episode prior to the offence with which we are concerned. He also had a good employment record. At present, he has no access to his son. He may also find prison harder to endure in circumstances where he is a foreign national. All of this was taken into account by the sentencing judge. We consider that in discounting by an effective 28% from the headline sentence this was an adequate, and arguably even generous, discount for mitigation in the appellant's case. We find no error of principle in that regard.

39. Equally we find no error of principle with respect to the degree to which the trial judge sought to incentivise rehabilitation. Clearly, this appellant needs to take responsibility for his actions and to address his anger management issues. In circumstances where there were no specific proposals before the sentencing judge, but she was determined nonetheless to provide him with some incentive to reform, she treated him more than fairly in part suspending two years of the sentence.

The offence of attempting to cause serious harm.

40. We have considered the headline sentence of ten years' imprisonment determined upon by the sentencing judge in respect of this offence. The sentencing judge correctly noted the range to be from non-custodial options to imprisonment for life. She considered the circumstances of the offending conduct, i.e., the perpetration of a vicious and sustained assault on the person of the injured party with a hammer; the intrinsic moral culpability of the offender i.e., that the assault was intentional and indeed premeditated; the harm done to the injured party; and the aggravating circumstances in the particular case i.e. the nature of the weapon used, the bringing of the weapon to the scene, the subterfuge resorted to by the appellant in pretending that he was going to his car to retrieve a gift for his son when in fact he was going to arm himself with the hammer, his retrieval of the weapon, and his refusal to stop the assault when members of the public intervened.

41. We are satisfied that this case comes within the upper range of sentences contemplated in *The People (Director of Public Prosecutions) v Fitzgibbon* [2014] 2 I.L.R.M. 116, namely those attracting a headline sentence of between seven and a half years' and twelve and a half years' imprisonment. We find no error of principle concerning the selection of a headline sentence of ten years' imprisonment in the circumstances of this case.

42. In terms of mitigation, the circumstances of this offence were somewhat different from those of the rape offence. The appellant did plead guilty and indicated an intention to do so at an early opportunity, and made certain admissions in the course of being interviewed. In addition, he has expressed some remorse, though only for attempting to assault his now estranged wife (which is this offence, i.e. Count No 8) but not in respect of the related offence of actually assaulting his mother in law causing her harm (which is Count No 10). In addition, the other mitigating factors previously mentioned in the context of the rape offence were also again relevant.

43. The headline sentence of ten years was reduced by 25% to seven and a half years to reflect the mitigating circumstances in the case. We are satisfied that this was within the appropriate range within which the sentence judge might have acted. It is irrelevant whether another court might have been more generous in the allowance to be made for mitigation. The issue for us is whether the actual allowance afforded was within the range of what was acceptable. We are satisfied that it was and find no error of principle.

44. In relation to the complaint concerning rehabilitation, we are satisfied that there was no reality to this in circumstances where firstly there was no track record to date, e.g., participation in an anger management program, secondly, no proposal concerning what steps might be taken in that regard in the future, and, thirdly, where in any case the appellant was being sentenced concurrently to a longer sentence for another offence which had built into it a part suspended element to incentivise rehabilitation. Accordingly, there was no error of principle in respect of the alleged failure to take account of the penal objective of rehabilitation in sentencing the appellant for this offence.

Re-sentencing

45. In the light of our finding that there was an error of principle in sentencing the appellant for the rape offence, we will quash the sentence on Count No 2 imposed in the court below, and proceed to re-sentence the appellant for that offence.

46. In re-sentencing the appellant for that offence we have carefully considered the gravity of the offence with reference to the available range, taking into account the general circumstances of the offence, the appellant's culpability based on the intrinsic seriousness of the offence, the extent to which there were particular circumstances aggravating his culpability, and the harm done to the injured party. We assess the offence as meriting a headline sentence of imprisonment for twelve years, before discounting for mitigation.

47. We have already indicated that we take no issue with the extent to which the sentencing judge reflected mitigation. Even though to do so will, in circumstances where the headline sentence has been reduced by two years, mean that the percentage discount afforded is slightly more generous than in the court below, we will again discount by two years to reflect such mitigation as exists in the case, leaving a net sentence of imprisonment for ten years

48. There remains the need to consider whether we should follow the approach of the sentencing judge at first instance and further suspend some portion of the net sentence to incentivise rehabilitation. We note from the Prison Governor's report that we have received that the appellant is on enhanced privileges, and that he is well behaved in prison, working in the laundry and participating in education. After considerable reflection, we have decided to follow the lead of the judge at first instance, notwithstanding his present obdurate disposition. We will afford the appellant an incentive to rehabilitate primarily in the interests of his son, with whom we hope the appellant may in due course resume a relationship, something that may eventually be possible notwithstanding what has occurred provided the appellant takes the opportunities afforded to him while in prison and during the suspended period of his sentence to address his anger management issues, his mental health issues, and his attitude to women.

49. In the circumstances of the case we will suspend the last eighteen months of his sentence of imprisonment for ten years on the same conditions as attached to the suspended portion of the sentence imposed on him by the court below.

50. The new sentence we are imposing on Count No 2 will date from the 9th of August 2014 and will run concurrently with all of the other sentences imposed by the court below and which remain unchanged.