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THE COURT OF APPEAL

Record No: 80/2019

Edwards J.

Kennedy J.

Ní Raifeartaigh J.

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

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Applicant

V

A. M.

Respondent

JUDGMENT of the Court delivered on the 29th day of November, 2021 by Mr Justice Edwards.

Introduction

1. The respondent herein was charged on indictment and had been returned to face trial before the Dublin Circuit Criminal Court in respect of twenty seven counts, comprising two counts of sexual assault of a child contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990 (counts 1 and 2, respectively); four counts of possessing child pornography contrary to section 6(1) of the Child Trafficking and Pornography Act 1998 (“the Act of 1998) (counts 3, 4, 5 and 6, respectively); twelve counts of producing child pornography contrary to section 5(1)(a) of the Act of 1998 (counts 7 to 18, inclusive); eight counts of distribution of child pornography contrary to section 5(1)(e) of the Act of 1998 (counts 19 to 26, inclusive); and one count of sexual exploitation of a child contrary to section 3(2)(a) of the Act of 1998 (as amended by s.6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 and as substituted by s.3 of the Criminal Law (Human Trafficking) Act, 2008) (count no 27).

2. The respondent pleaded guilty before the Dublin Circuit Criminal Court on the 20th of July, 2018 to the two counts of sexual assault of a child (Counts 1 and 2); to one count of producing child pornography (Count 7); and one count of distributing child pornography (Count 19). He was remanded in custody for sentencing on the 5th of November 2018.

3. On the 5th of November 2018 the respondent further pleaded guilty to one count of possessing child pornography (Count 4); and to the single count of sexual exploitation of a child (Count 27).

4. The pleas to Counts 4, 7 and 19, respectively, were pleas to sample counts in circumstances where the indictment had charged further instances of such offending behaviour and the pleas were entered and accepted on the understanding that sentencing would be conducted on a “full facts” basis and that the other counts not specifically pleaded to would be taken into consideration.

5. Sentencing was adjourned numerous times to allow for the procurement of relevant reports and other information. However, on the 12th of April 2019, the sentencing judge imposed the following sentences on the respondent:

Counts 1&2 (sexual assault): 4 years imprisonment

Count 4 (possession of child pornography): 3 years imprisonment

Count 7 (production of child pornography): 4 years imprisonment

Count 19 (distribution of child pornography): 4 years imprisonment

Count 27 (sexual exploitation of a child): 5 years imprisonment

6. All sentences were to run concurrently, and were backdated to the 8th of May 2018, to reflect time spent in custody. Also imposed was a 5-year period of post-release supervision pursuant to section 29(1) of the Sex Offenders Act 2001, during which the respondent will be under the supervision of the Probation Service and required to comply with the following conditions:

a. he is to attend a sexual offenders’ treatment programme;

b. he is to engage with Psychology Services as directed by the Probation Service;

c. he is not to use or access any computer device that is internet enabled without prior approval of the Gardaí or Probation Service;

d. he is not to own or possess a mobile phone with photographic functions without prior approval of the Gardaí or Probation Service;

e. he is to make his electronic equipment available to be checked by the statutory agencies working with him in the community;

f. he is to comply in all other respects with all directions of the Probation Service.

7. The Director of Public Prosecutions (“the DPP”) now seeks a review of the sentences imposed on the grounds of undue leniency.

Evidence before the Sentencing Judge

8. There were two identified victims in this case, whom we shall designate as “X” and “Y” respectively for the purposes of this judgment.

9. The offences were recorded to have been committed at six locations (grouping all unknown locations as one location), which are as follows:

• eight of the offences were committed at the home of the victim X;

• eight of the offences were committed at the respondent’s mother’s home;

• seven of the offences were committed at an unknown location or locations;

• two of the offences were committed at the home of the respondent;

• one of the offences was committed at the respondent’s place of work, and;

• one of the offences was committed at a Dublin hotel.

10. The court heard from Detective Garda James Neary, previously attached to the Paedophile Investigation Unit of the National Bureau of Criminal Investigation. Detective Garda Neary gave evidence that, in October 2013, he was aware of an international operation named “Operation Rescue”, which concerned an online forum on which users discussed the sexual abuse of children, mainly young boys. As part of that operation, the gardaí received a g-mail address from Europol. This g-mail address was associated with an intelligence file containing several postings made by the owner of that g-mail address. On foot of those postings, the gardaí had grounds to believe that the person using that g-mail address was in possession of and distributing child pornography.

11. The gardaí made a successful mutual legal assistance request to the relevant criminal law enforcement authorities in the United States of America asking that the contents of the g-mail address be obtained from the Google Corporation. This was done, and it allowed for the identification of the g-mail user as the respondent.

12. Search warrants were subsequently obtained to search the respondent’s home and place of work. In the course of a search of the respondent’s bedroom at his home gardaí seized a computer, computer media including a number of hard drives, and certain documents. In addition, a HTC Desire mobile phone was seized. An external computer hard drive was found in the respondent’s locker at his workplace and that was also seized. The items and material seized were subsequently examined forensically and digital content found thereon comprised a large number of images, videos, text files and documents, constituting child pornography as defined by s.2 of the Act of 1998.

13. Amongst the images found were images of two specific children, whom Gardai were able to identify, namely X and Y, respectively.

Offending involving the victim “X”

14. After Gardai had searched the respondent’s workplace, a female co-worker of the respondent, whom we shall call “A”, made a statement to them. She described knowing the respondent as a co-worker for some time but stated that until she had become pregnant and had given birth to a baby boy he had shown no interest in her. A’s baby boy was the previously mentioned X. However, once A had had her baby and had returned from maternity leave the respondent had sought to befriend her. He would organise trips to the cinema and to fairs or other events, and would accompany A and X on these trips, and exhibited manifest disappointment if on any such occasion X was not brought along. The evidence was that the respondent would call to A’s family home to collect A and X, and would occasionally be left on his own for brief periods in the sitting room with X, while A attended to some task elsewhere in the house.

15. The evidence was that after some time A developed an uneasy feeling about the respondent, particularly whenever he would ask her to go over to his house to stay the night and would press her to bring the child. She stated that he had been quite pushy on these occasions, but she always made up an excuse not to go and never in fact went. A said she also felt uneasy when the respondent would bring toys or presents for X.

16. A had sought to distance herself from the respondent but he had persisted in calling her on the phone and in sending her many messages. He called to her house subsequently when her mother was present. Her mother had ignored him. After it had become known that the respondent had been arrested in connection with some of the offences on the indictment, A texted the respondent saying that she did not want to see him anymore and telling him not to call her again.

17. During the course of the investigation, gardaí became suspicious that certain indecent images of one particular child found during the forensic analysis of the computer equipment and media seized during the search of the respondent’s home could possibly be images of X. Although the images were cropped it was possible to recognise features of A’s livingroom and of X’s clothing. The images in question were shown to A who confirmed that they were images of X.

18. X was 11 years old when A made her statement.

19. Following his arrest, the respondent was interviewed and made admissions after a substantial amount of evidence had been put to the him during the interviewing process regarding images and videos which had been found. His admissions were for the most part confined to taking responsibility for the material with which he was being confronted, and he did not volunteer much beyond that. However, it is accepted by the applicant that the respondent had volunteered an admission in the course of being interviewed to abusing Y at a named hotel premises, at a time when the Gardai were unaware that Y had also been a victim, and that his co-operation in that regard had materially assisted the investigation. He also admitted, inter alia, to being the administrator of a website, designed to facilitate the sharing of child pornographic material. He was further co-operative to the extent of giving consent to gardai to access his email accounts. However, notwithstanding him providing such consent Gardai found upon subsequent forensic examination of his computers and peripherals that relevant evidence was effectively hidden and disguised within seemingly innocuous files, e.g., there were files that appeared in format, name and appearance to be ostensibly Word documents, or a Lotus Notes documents, but which in fact was not files of the type suggested, but rather were files which contained illicit videos or images or text. Moreover, access to the files in question was encrypted by means of Dekart Encryption Software to which the respondent did not provide a decryption key or password. Fortuitously, investigators eventually found a password that worked to allow them to access these files within an unencrypted mail amongst those stored on the respondent’s computer drives.

20. Counts 1, 2, 7 to 12 and 27, respectively, relate to admitted offending involving X, all of which had occurred at his home, except for that comprising Count 1, which occurred at a Dublin hotel. The admitted offending involved:

a. Count 1 - 25th June 2011 - sexual assault of X;

b. Count 2 – 27th July 2011 - sexual assault of X;

c. Count 7 – 30th April 2011 – producing child pornography involving X;

d. Count 8 – 15th May 2011 – producing child pornography involving X;

e. Count 9 – 10th July 2011– producing child pornography involving X;

f. Count 10 – 27th July 2011 – producing child pornography involving X ;

g. Count 11 – 10th November 2013– producing child pornography involving X ;

h. Count 12 – 1st December 2013– producing child pornography involving X ;

i. Count 27 – 30th April 2011-1st December 2013 – sexual exploitation of X;

Count 1

21. The respondent volunteered at interview that he had sexually assaulted X in the toilets of a named hotel on the 25th of June 2011, on which occasion they had been attending X’s grandmother’s birthday party. He later told his probation officer that he had touched the child’s penis and spoke to him about masturbation. The gardaí had not previously been aware of this offence. We are given to understand that X was 8 years and some months old at the time, calculated by reference to a date of birth provided by A in a victim impact report submitted to the court.

Counts 2 & 10

22. The respondent further admitted to sexually assaulting X in A’s living room on the 27th of July 2011 when A was out of the room, again by touching the child’s genital area and videoing that touching using his mobile phone. Again, by reference to X’s date of birth, it would appear that X was approximately 8½ at the time of this offending by the respondent.

23. Two videos had been found on the respondent’s computer, stored in a folder with X’s name on it. These videos showed an adult perpetrator touching the genital area of X. When these videos and the statement from A were put to him, the respondent identified himself as having been the perpetrator, and admitted to using his phone to produce the two videos.

Counts 7, 8, 9, 11 & 12

24. These counts all relate to the production of child pornography at X’s home on the dates listed above between 2011 and 2013. The pornography comprised 11 still images showing the child’s trousers or underwear pulled down to expose his genital area. The background to the images was recognisable to A, and to gardaí, as being A’s home.

Count 27

25. Count 27 on the indictment refers to the sexual exploitation of X by the respondent between the dates specified. The evidence underpinning the offences charged in counts 2, and 7 to 12 respectively, also underpins count 27. Sexual exploitation, in relation to a child, is defined in s.3 (5) of the Act of 1998 (as substituted by s. 10(b) of the Criminal Law (Sexual Offences) Act 2017) as: -

(a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,

(b) the prostitution of the child or the use of the child for the production of child pornography,

(c) the commission of an offence specified in the Schedule to the Sex Offenders Act 2001 against the child, causing another person to commit such an offence against the child, or inviting, inducing or coercing the child to commit such an offence against another person,

(d) inducing or coercing the child to engage or participate in any sexual, indecent or obscene act,

(e) inviting the child to engage or participate in any sexual, indecent or obscene act which, if done, would involve the commission of an offence against the child, or

(f) inviting, inducing or coercing the child to observe any sexual, indecent or obscene act, for the purpose of corrupting or depraving the child.

26. In addition to the offences which were specifically acknowledged by the respondent during interviews, Counts 3 & 4 related to other child pornographic images, videos and text files/documents found on devices owned by the respondent which were seized in the course of searches of his home and place of work. Count 3 covered child pornographic material found on devices seized at the respondent’s place of work, while Count 4 covered child pornographic material found on devices seized at his home. The total number of child pornographic images covered by both counts was 55,392; the total number of child pornographic videos was 6,020; the total number of text files qualifying as child pornography was 4,496 and the total number of documents qualifying as such was 191. Amongst the child pornographic images covered by Count 4 were some other images of X (and also images of Y, to be dealt with in the next section of this judgment).

Offending involving the victim “Y”

Counts 4 & 18

27. As mentioned already, the respondent was charged in Count 4 with possession of child pornography found on devices seized in the course of a search of his home conducted on the 9th of December 2013. Amongst numerous child pornographic images found were five images of a male child, i.e., the previously mentioned “Y”, whom gardai succeeded in identifying. Y was aged 5 and was going on 6 at the time. The respondent admitted at interview taking these images on the 1st of August 2004. They were taken from his (the respondent’s) bed in a bedroom in his (the respondent’s) mother’s house (giving rise to the further charge in Count 18 of production of child pornography). He admitted to straddling the child on the occasion in question by sitting on or above the child’s chest area so that as the child looked up he would have seen the back of the respondent’s head and his back. The child was naked from the waist down and there was a close up of the child’s genital and anus area. The respondent admitted to removing the child’s trousers and underwear and stated that he had done so for the excitement of the moment.

28. A significant aggravating factor in the commission of the count 4 offences against Y is the fact that the respondent has a previous conviction for sexually assaulting Y. We will be returning to this.

Other offending involving unidentified victims and categorisation of the images

Counts 3 and 4

29. Apart from the images of X and Y previously referred to, analysts discovered a large number of additional images, and video recordings, of unidentified children on computers and media seized during searches of the respondent’s home and place of work, which material also formed the basis of the charges preferred in Counts 3 & 4. Detective Garda Neary testified that there were 55,392 images in total that would be defined as child pornography. There were 6,020 videos that would be defined as child pornography. There were 4,496 text files that would also be defined as child pornography. And then there were 191 documents that would qualify as being child pornography.

30. A detailed report on the images and video material found (i.e., child pornography by visual representation) was prepared for the sentencing court by Detective Garda Mannix of An Garda Síochána’s Online Child Exploitation Unit, and was read into the record at the sentencing hearing by a colleague, i.e., Detective Sergeant Mike Smyth of the same unit. There was no objection to this procedure. It is convenient to deal with this report at this stage before returning to deal with further evidence that was given by Detective Garda Neary. In that report Detective Garda Mannix sought to categorise the material in three categories by reference to the definition of child pornography by visual representations in s.2 of the Act of 1998.

31. In that section child pornography is defined as comprising (inter alia):

(a) any visual representation —

(i) that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in real or simulated sexually explicit activity,

(ii) that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or

(iii) that shows, for a sexual purpose, the genital or anal region of a child or of a person depicted as being a child.

32. Accordingly, Detective Garda Mannix used three categories: a) Category 1, child sexually explicit images, involving a child under the age of 17 engaged in or witnessing sexual activity inclusive of oral, vaginal or anal intercourse and masturbation; b) Category 2, child exposure, involving a child under the age of 17 where the genital and/or anal region of the child is exposed; and c) Category 3, cartoon or animated images, videos or computer generated images of a child or children involved in sexual activity or where the focus of the image or video is a child’s genital or anal region.

33. It was explained that use of a previous five point categorisation, known as the COPINE Scale, which we are aware was developed in Ireland by staff of the COPINE Project (the acronym stands for Combating Paedophile Information Networks in Europe) run by the Department of Applied Psychology at University College Cork to categorise the severity of images of child sex abuse (by which we mean their moral depravity, the actual harm caused in creating them and their potential for causing further harm), has now been discontinued by An Garda Síochána in favour of this simpler three point categorisation anchored in the statutory definition.

34. Use by the gardai of a scale such as the COPINE scale, or their current three point scale (which seems logically based and entirely sensible), as a means of categorising severity of images for police purposes, including giving evidence at sentencing, is unobjectionable providing it is understood that police categorisations of severity using a scale, cannot bind a court’s view of the material. It is a police officer’s opinion, and no more than that, which strictly speaking ought not to be admitted at all unless the person offering the opinion has been shown to be a properly credentialled expert (based on qualifications and/or experience) in a recognised field of scientific or technical endeavour and speaking within the scope of his/her expertise. A court must make its own decision on the severity or depravity of the images or other material, with respect to harm done or potentially to be done, and with respect to the overall gravity of the offending conduct, based on evidence adduced at the sentencing hearing.

35. In most cases, narrative descriptions of what images or video or other media/documents may depict will suffice to enable the court to make the necessary assessment and it will not be necessary for a court engaged in sentencing to have the material exhibited before it. In suggesting that, we do note the observation of Rose L.J. of the Court of Appeal, Criminal Division, for England & Wales, in the important case of *R. v Oliver* [2003] 2 Cr App R (S) 15, who suggested that “*it will usually be desirable for sentencers to view for themselves the images involved, unless there is an agreed description of what those images depict*.” We don’t disagree with Rose L.J. However, it is our experience that cases involving controversy about what the images depict tend to be rare. Occasionally, e.g., where there is controversy about what the material depicts, it may be desirable that the material should be exhibited so as to enable the sentencing judge to view it for himself/herself. Expert assistance may also be required in assessing it as to whether it qualifies as child pornography at all where that is contested.

36. Expert assistance may sometimes also be required as to the harm (if any) caused in the creation of material said to constitute child pornography, and as to its potential for harming those who may be exposed to it, and in such a case expert testimony can be legitimately adduced. In many cases the harm and/or potential for future harm will be self-evident such that expert evidence is unlikely to be required, but there will be other cases in which a court would derive assistance from such evidence.

37. However, a court cannot base its judgment on the significance of, or the extent of, or degree of depravity associated with material said to comprise child pornography, and how it has been dealt with by the offender, on non-expert police opinion as to how egregious the police consider the material to be, particularly where that opinion is based on application of a scale, the science behind which has not been fully explained or demonstrated. The assessment of the significance, extent and depravity of such material, and of the harm done, or likely to be done by it, will always be a matter for the court based on admissible evidence. However, where there are a very large number of images, or documents, of interest, a police officer may quite legitimately seek to sort or categorise them, on a rational and explicable basis, for ease of presentation of evidence describing the material at issue. To do so is not to usurp the judicial function provided the sorting or categorisation is manifestly for presentational purposes only and that it does not represent an attempt to advocate in favour of how the court should ultimately view the qualitative significance of any particular image, or group or category of images.

38. In this case there was no evidence that Detective Garda Mannix had any expertise, training or experience in the classification or assessment of child pornographic images. The officer in question may have had such expertise, but no evidence was offered concerning it. The evidence was simply that Detective Garda Mannix was attached to An Garda Síochána’s Online Child Exploitation Unit, but what skills or expertise this garda might have had was unstated. Some evidence on the transcript was suggestive of the possibility that Detective Garda Mannix may in fact have had expertise in forensic computer analysis. The transcript, (05/11/2018, p13, lines 15 – 19), *per* the evidence of Detective Garda Neary, discloses that Detective Garda Mannix conducted a forensic examination of the computer media and hard drives seized from the respondent, and had located and recovered certain images and materials from them.

39. At any rate, Detective Garda Mannix then prepared a report providing extensive narrative descriptions of the materials encountered; and, there being a large number of them, sorted or categorised them by reference to the three-point scale currently used by the Gardai. It is clear to us that the purpose in doing so was not to seek to usurp the judge’s function and that it was done for presentational purposes only. Garda Mannix reported that:

“The vast majority of the images and videos found on the exhibits in this case are of children between 5 and 12 years old. On some exhibits I found videos involving babies aged zero months to six months and toddlers six months to one year old engaging in sexual activity. These videos are further detailed in the exhibit breakdown below:

Exhibit JN 1 contains 16 images, nine which are unique.”

40. Detective Garda Smith interrupted his reading of his colleague’s report at this point to explain that in a case of this sort the total number of images found will sometimes include duplicate or multiple copies of an image. Accordingly, it was customary for the purposes of forensic reporting to provide both a total number of images and the number of unique images. Single images for which there was no copy were logically to be treated and counted as unique images. However, where duplicates or multiple copies of the same image existed these would in each instance be treated and counted for reporting purposes as representing a single unique image.

41. Detective Garda Smith then continued:

“One of them was category one and 15 of them were category two. It also contained 120 video files of which 116 were unique, 199 [in her written submissions counsel for the applicant suggests, we think correctly, that the figure 199 represents a transcript typo and that it should read 119] of them videos were category one and one was category two.”

(commentary in square brackets by the Court)

42. Detective Garda Smith described the contents of two videos in which the same baby was violated and abused in a most depraved fashion. Suffice it to say that in one of the videos the abuse was penetrative of the baby in a number of ways, and otherwise involved conduct that would be regarded as degrading in the extreme of any human being, much less a baby. It was clear from the video that the baby was conscious while being so abused and greatly distressed.

43. The Detective Garda continued:

“The next exhibit was exhibit MS4. That contained 6,339 images. 5,311 which were unique, 2,362 were categorised as one, 3,616 as category two, 361 were category three. It also contained 309 videos, 286 of these were unique. Of the 309, 288 were category one and 21 were category two. There was 511 stories on that exhibit as well which are text stories that are child pornography as defined under the Act. So, text containing stories.”

44. Again, Detective Garda Smith described the content of some of the videos, and again they involved penetrative and highly degrading instances of sexual abuse of a number of very young female children by adult males and females. The witness continued:

“The next exhibit was exhibit MC19. This contained 13,347 images of which 10,981 were unique. 4,226 of these were category one. 7,296 were category two and 1,825 were category three. There was also 649 videos. 582 of them were unique. Of the 649, 593 of them were category one and 55 were category two. There was also 580 stories contained in that. So, text documents contained child pornography as defined.”

45. Detective Garda Smith again provided illustrative narrative examples of the video material comprised in this exhibit, which included very young children being forced to participate in penetrative sexual acts, and in one instance in an act of bestiality. He continued:

“The next exhibit examined was exhibit MC16. This contained a total of 15,212 images of which 14,122 were unique. 5,170 of them were category one, 9,167 were category two and 875 were category three. There was also a total of 1,977 videos of which 1,757 were unique. Of the 1,977, 1,766 were category one, 206 were category two and 133 were category three. In total there was 1,142 text stories as well. This exhibit contained the following: …”.

46. Once again the description provided to the court was a graphic one involving penetrative and highly degrading instances of sexual abuse of a number of very young male and female children, indeed mostly babies, by adult males and females. The witness continued:

“The next exhibit he examined was exhibit MS5. Within that exhibit there was 2,315 images of which 2,256 were unique. Of them 631 were category one, 1,627 were category two and 57 were category three. There was 1,134 videos of which 1,042 were unique. Of the total videos 1,032 were category one and 102 were category two. In total on that exhibit there was 1,144 stories also.

Exhibit MC18A contained 18,157 images of which 14,704 were unique. Of the total images 6,315 were category one, 8,332 were category two and 3,010 were category three. There was also 1,818 videos of which 1,564 were unique. 1,612 are category one, 201 were category two and five were category three. In total on that exhibit there was also 1,144 stories.”

47. Again, the description provided by the witness of the video material included in this exhibit included penetrative and degrading sexual abuse of a toddler.

48. Returning to the evidence of Detective Garda Neary, he further testified that in relation to the HTC mobile phone that was seized, it contained an image showing an adult hand sexually assaulting a preteen male child's penis.

49. Detective Garda Neary then dealt with the charges relating to distribution of child pornography. The mode of distribution was the sending of e-mails to third parties on diverse dates with child pornographic images attached and utilising a specific e-mail address.

50. The first email was 11th of July 2006, 22:15 and had four images of child pornography attached to it. Two images were of pre-teenage boys engaging in anal sex with each other and two images of pre-teenage boys posing naked with visible erections.

51. On the 12th of July 2006 there were two further emails, one sent at 01.33 and one at 20:54. There were three child pornographic images attached to the first of these. One was an image of two pre-teenage boys, naked, playing a games console. Their legs were spread, and their genitals were visible. Another involved an image of two Asian preteen boys, one performing oral sex on the other. The third image involved a close up of a young boy's buttocks area with an adult hand spreading the child's buttocks, so you could see his anus.

There was one image attached to the email sent at 20:54 showing a pre-teenage boy lying on his back penetrating his own anus with his index finger.

52. Yet another e-mail sent on the 19th of July 2006 at 01:27 had five images attached, four of which would be classed as child pornography. One of the images was of a pre-teenage boy sitting back on a wooden fence, naked, with his legs spread, with the focus on his exposed genital and anus areas. There were three further images of three pre-teenage boys lying or bending over, naked, with their anuses or genital areas exposed.

53. An e-mail sent on the 20th of July 2006 at 20:15 had a further five images attached. One was a close-up image of the buttocks area of a pre-teenage boy, again with adult hands spreading the child's buttocks to expose his anus. Another image was of a pre-teenage boy lying on his back penetrating his anus with his own index finger. There was also a black and white image of a boy lying naked on his stomach on a beach with his anus and testicles visible. Yet another image involved a close up of a pre-teenage boy lying on his stomach with his testicles visible. The fifth image was again of a pre-teenage boy lying on his back, legs spread in the air, anus and genital areas exposed. Detective Garda Neary told the sentencing court that written at the top right-hand corner of that image were the words, "*The best erection site over the net, boyerection.com*."

54. On the 21st of July 2006 there was a further email sent at 21:33 with six images attached. The evidence was that one of them would be classified as child pornography. It was a black and white image of two pre-teenage boys lying on a bed with their legs spread and their testicles exposed.

55. On the 7th of August 2007 an e-mail was sent at 19:03, to which two images were attached, one of which constituted child pornography. This was an image of two pre-teenage boys, one leaning backwards balancing with his hands against the front of a jeep. The second boy was holding the first boy's chest and both boys' genital areas were touching each other.

56. There was evidence of a further e-mail sent on the 13th of August 2006 at 17:46, with seven images attached, three of which constituted child pornography. There was a black and white image of a boy lying naked on his stomach on a beach, his anus and testicles visible; an image of a pre-teenage boy hunkered down, his legs spread, naked from the waist down, with his genital area exposed; and an image of a naked pre-teenage boy sitting on a floatation device in a swimming pool with a focus on his exposed genital area.

57. Finally, there was an e-mail sent on the 19th of August 2006 at 21:28 to which a single image was attached. This was an image of a pre-teenage boy naked, sitting on the ground, leaning back with his hands and legs spread in the air with his genital and anus area exposed.

58. The sentencing court heard further evidence concerning the text files and word documents comprising child pornography which were found during a forensic analysis of the seized computer and computer media. There were 1142 text files and word documents containing stories constituting child pornography. Eight of them had the respondent listed as the author. One of the documents was a 170-page document in pdf format comprising a guide on how to approach children, befriend them, and ultimately to sexually exploit a child. It was called “*How to Practice Child Love: A Guide to Meeting, Befriending, and Sexually Exploiting a Child*”. Copies of this document were found on more than one of the computer drives examined.

59. It was confirmed to the sentencing court that counts no’s 13, 14, 15, 16 and 17 all relate to the production of documentary child pornography. One text document was called, "*A's latest story.*" This was a text story describing sexual abuse of a child K whose identity is suspected but not confirmed. There was also an image associated with that story. The image was a close up of the face of a smiling child. Subsequently gardai established that the image of that child was not that of the child in the story.

Offending while on bail

60. The sentencing court heard that the respondent has one previous conviction, namely the conviction for sexually assaulting Y alluded to earlier in this judgment. The respondent had pleaded guilty to that offence on the 2nd of June 2006 and was sentenced on the 6th of November 2006 to nine months imprisonment, which was suspended for three years. The sentencing court in the present case was told that in relation to counts no’s 19 to 25 on the indictment, all of which charged the distribution of child pornography, those incidents occurred in the interval between the 2nd of June 2006, i.e., the date on which the respondent had pleaded guilty to sexually assaulting Y, and the 6th of November 2006. i.e., the date on which he was sentenced for that offence. Accordingly, he was on bail at the time that he committed the offences comprising counts no’s 19 to 25 on the present indictment.

The respondent’s attitude during the investigation

61. It was accepted by Detective Garda Neary that the respondent had been co-operative to an extent when interviewed in detention following arrest. He had initially offered denials but ultimately had been prepared to accept involvement and to admit to offending when presented with what Detective Garda Neary described as “*hard evidence that couldn’t be disputed*”. When images and videos were put to him containing strong circumstantial evidence tending to suggest his guilt, he made admissions in relation to having perpetrated the abuse shown, but in doing so did not go further than admitting to what was visible anyway in the images or video.

62. It was accepted that after the respondent was charged, he indicated an intention to plead guilty at an early stage. A member of the Garda investigation team, and a solicitor from the Chief Prosecution Solicitor’s Office, were so informed on the 21st of June 2018 at a District Court hearing when the respondent was served with the Book of Evidence. It was further indicated that no further disclosure would be sought, and no disclosure order was applied for.

The Philippines’ controversy

63. The sentencing court heard evidence that the respondent was in fact arrested twice in the course of the investigation, the second arrest being on a date in October 2014 following which a file was sent to the DPP. The respondent was released pending the DPP’s decision in the matter. The DPP in due course communicated a decision that charges should be preferred and that the respondent should be prosecuted on indictment. However, in the meantime the respondent had left the jurisdiction.

64. As the respondent was believed to have gone to the UK, a European arrest warrant (“EAW”) was applied for and obtained seeking the surrender of the respondent for prosecution in this jurisdiction. However, before that EAW could be executed, the respondent had travelled onwards to the Philippines. This presented a problem for the Irish prosecuting authorities as Ireland does not have an extradition treaty with the Philippines. Although the evidence as to how it occurred was vague, seemingly the Philippines’ authorities subsequently became aware both that the respondent was wanted in Ireland on serious charges, and that in connection with that his extradition, or more correctly his rendition, had been sought from the UK on foot of an EAW but that he had left the UK before there was any attempt to arrest him. The latter information may have come from Interpol. At any rate, we were informed at the appeal hearing that the Philippines’ authorities then initiated an investigation into the respondent’s immigration status, in the course of which he was found to be in possession of a fraudulently obtained passport which he had obtained from the Passport Office in Ireland having falsely represented to that office that he had lost his previous passport, whereas in fact Gardaí had taken possession of it following a search of his residence during their investigations. On learning this, the Philippines’ authorities immediately revoked the respondent’s visitor’s visa and arrested him on the 12th of May 2015 and placed him in detention to await deportation.

65. The position of the Philippines’ authorities was that he would remain in detention until he secured an airline ticket. The respondent claims that his conditions of detention were extremely poor, indeed poor to the extent of being squalid and dangerous. While being so detained the respondent then sought consular assistance from the Irish Consulate in Manila. He was provided with a small amount of money from time to time (€50 approx. per quarter) by the consulate, but it was made clear to him that no public funds would be used to repatriate him. Eventually, the respondent secured sufficient funds through private means to pay for an airline ticket but then found himself caught in a stalemate whereby the Philippines’ immigration authorities would not deport him without clearance from the Philippines’ National Bureau of Investigation (“the NBI”), and the NBI was not prepared to grant such clearance in circumstances where he continued to be the subject of an Interpol alert. This “*impasse*” was only cleared in 2018, and he was deported to Ireland on the 8th of May 2018. He was then arrested by Gardaí on his arrival in the State.

66. The relevance of what happened to the respondent in the Philippines is that defence counsel at his sentencing submitted that he should receive credit for the time spent in detention in the Philippines, on an analogous basis to that in which a person who is remanded to await extradition usually receives credit for such time on remand. This application was opposed by counsel for the applicant (DPP) on the basis that he had been detained arising from “*an immigration problem of his own making*”, and not as a result of any act on the part of the Irish authorities.

The Impact on the Victims

67. It is typically the case in prosecutions for child pornography offences that the child victims cannot be identified. That is true also in this case in respect of the great majority of the children represented in the images and documents found in the respondent’s possession. Unusually, however, it was possible to identify two of the child victims in this case. Because of their ages they did not give evidence as to the impact of the respondent’s crimes upon them, nor did they provide individual victim impact statements. However, X’s mother A did make a victim impact statement.

68. A confirmed that X had no recollection of the events involving his abuse by the respondent. Nevertheless, following the discovery that the respondent had child pornographic images of X in his possession, and the commencement of a TUSLA investigation, X was provided with regular counselling at Saint Claire’s unit in Temple Street hospital over a three-month period. A stated that X goes about his life normally. Nevertheless, it is a huge worry for her that X may recall the abusive events to which he was subjected later in his life. She worries what would happen if X were to encounter the respondent after he is released. A stated that she herself has been deeply affected by the trauma of her son being abused. She worries about the pictures that were taken of X and what may happen to them.

69. A reported that her trust in people has been affected because of the respondent’s betrayal. She now realizes that the interest he had shown in her and her son was grooming activity. She is distressed by the fact that she does not know exactly what the respondent did to her son. This, she says, hurts very deeply

The Probation Report

70. On the 5th November 2018, the sentencing judge directed the preparation of a Probation Service report and one dated the 25th of January 2019 was before the sentencing court on the 30th March 2019.

71. The Probation Report was based on 5 meetings with the respondent, correspondence with the Garda Criminal Records Unit, access to the Book of Evidence, contact with the Prosecuting Gardaí, liaison with the Midlands Prison and the application of the Probation Service’s Risk Assessment Measure.

72. The respondent self-reported to his Probation Officer that he himself had been sexually abused by an adult neighbour from the age of 8. He was required to engage in sexual activity, which he admits he found pleasurable, involving himself, the adult neighbour and the neighbour’s son (who was three years older than the respondent). The sexual activities involved masturbation, oral sex, anal penetration and viewing pornographic material.

73. Under various headings of the Report it states *(inter alia)*:

“OFFENCES AND ATTITUDE TO OFFENCES

…

According to Gardaí 65,000 images, videos etc. were found on his computer and hard drive. [AM] was on various websites like ‘boylover.net’ etc and was in possession of and distributing child pornography. He confirms that he had become engaged in various online Forums and was in the Dark Web where he was linked with like-minded people. [AM] informs me that he both wrote and received erotic stories of sexual activity involving children which were very graphic and explicit in content. He reports that he constantly viewed sexual images of children, would masturbate these images and move on to others as there was always a plentiful supply. States that while he had very little access to children be accessed these various sites daily from anything from a few minutes to several hours and experienced sexual excitement as a result.

[AM] states that he participated regularly in Forums with like-minded people. He informs me that he does not know why these were important to him nevertheless he states they were. He informs me that he enjoyed chatting to others who had similar interest to himself and through which he made links to more links, all leading to sexually explicit images of children. According to the gardaí [AM] had a very strong online persona and that he was viewed as a very serious player among others using their forums. In relation to these Forums [AM] states that they were perfectly legal and that he worked as a moderator on these forums to make sure that everyone using them followed the rules. He confirms that most of the images came from the Dark Web and from peer to peer software.

…

[AM] acknowledges that he has a definite sexual attraction to children and confirms that he engaged in grooming with both children he is convicted of sexually assaulting, one before this court and the other in 2006. …

[AM] reports that in his opinion the forums reinforced his preferred way of life and he received constant reassurance that he and others had it right and that both society and the media were wrong when it reported the harmful and long-lasting effects of abuse on children.

…

VICTIM ISSUES

[AM] only expressed concern in relation to the two child victims of the sexual assault perpetrated by him when prompted. Whilst he mentions that he hopes they have forgotten it or will view it as just some weird incident, as he states that he had no desire to cause then [sic] any real harm. He does not appear to view his own sexual experiences in childhood as abuse or that they in any way affected him negatively or caused him any lasting damage. In relation to the wider victim field he understands that the pictures, videos etc are permanently on the internet he states that if he had not been arrested he would still be engaged in this activity.

PREVIOUS OFFENDING BEHAVIOUR AND RISK OF RE-OFFENDING

…

The Risk Matrix 2000 Risk Assessment Measure was applied in this case. This is an actuarial risk assessment measure and predicts re-conviction rates using static unchangeable factors such as age, record of sexual offending and criminal sentencing appearances alongside a number of other areas including relationship history, convictions for having male victims, non-contact sexual offences and unrelated/stranger victims to provide a full indicator of risk of re-conviction. Application of this risk assessment places [AM] at high risk of re-offending. This is based on his convictions for sex offences against males, non-contact sex offences and relationship history in that he has never been in a marital type relationship.

…

Application of the Stable 2007 Risk Assessment Measure places [AM] at high risk in terms of sexual re-offending. As previously stated this is a dynamic risk assessment and is amenable to change. The areas in which [AM] scored high were Capacity for Relationship Stability, General Social Rejection, Lack of Concern for Others, Poor Problem Solving, Negative Emotionality, Sex Drive/Sex Pre-occupation, Sex as Coping and Deviant Sexual Preference’.

…

BACKGROUND

[AM] reports that he was born raised and educated in [a named location]. He informs me that his childhood was blighted from a very early age when his father was diagnosed with cancer. He tells me that his father subsequently died when he was 8 years old and his three siblings were aged between 6 years and 6 months. [AM] describes family life is very difficult from then onward and states that he believes they were left unsupported by the extended family. He reports that his mother was unable to cope and that it often fell on him to care for his siblings. As a result he states that his life did not improve until his siblings got older and shared the duties which had initially befallen on him.

[AM] reports very negative accounts of his time both in primary and secondary school. He describes himself as very bright with a keen interest in learning, however he reports that he felt hindered in this at every step due to the bullying he experienced from both teachers and fellow pupils. …

[AM] describes himself as a loner throughout his childhood and adolescence. … once his education was completed he retreated to his room where he remained for almost 4 years playing computer games, creating programs etc. until aged 22 when [he secured] a part-time job in a pet shop… He informs me that through his increased use of the internet and his awareness of his abilities around programming he completed a fast track course in Information Technology and quickly secured employment in a large … company where he remained until the offences before court today came to light. …

…

In relation to his previous conviction before Court [AM] attended the Granada Institute for counselling in 2006/2007 in relation to his offending behaviour. He describes the group programme he attended as more generic in nature and dealing more with his deficits in the area of social skills rather than his sexual offending. He acknowledges that he continued his sexual activities on the internet during this time and went on to sexually assault another child in the following years.

….

CURRENT SITUATION

[AM] has been on remand [in a named prison] since his return to Ireland and his appearances before Court. He is currently an enhanced status prisoner within the prison regime and works in the laundry. He reports that he also attends school and has developed an interest in woodwork. …

…

[AM] reports that he has thought about his future career prospects and initially mentioned that he has taken to woodwork he might pursue this interest as a possibility for future work. However he acknowledges that he has no experience in this area and never previously demonstrated any interest in woodwork. He appears somewhat naïve in his expectations and was visibly upset when he realised that he may not be able to work in the Information Technology area in the future or that there may be restrictions in relation to his internet use as result of the nature of the offences before the Court today.

[AM] states that his sexual preference is pre-teen males and he tells me that he accepts that he is a paedophile. During his interview with prosecuting Gardai and also in interview with the Probation Service he confirmed this assertion. He informs me that he is keen to attend treatment programmes to address his sexual offending and has familiarised himself with the treatment programmes available pre and post release. He appears to be fully aware of the seriousness of his situation vis-à-vis this court and states that he is expecting to spend a lengthy period in custody.

SUMMARY/PROPOSAL

He appears to have rationalised his behaviour to the extent that he believed his various activities were normal and disbelief was reinforced by both like-minded individuals and by his selective process of elimination of information which stated otherwise. In relation to victim issues [AM] has not expressed any real empathy in relation to the effect his abuse has had on the victims involved. He states that he was not adversely affected by the abuse he experienced in childhood and in fact speaks of it in positive terms and believes that this has been reinforced by his online activities. This demonstrates the extent of his distorted and skewed inking processes which allowed him to perpetrate the offences before the court today.

…

[AM] is deemed to be at high risk in terms of sexual offending over the next twelve months. This risk assessment gives very clear areas to target in both sex offender treatment programmes and in supervision. [AM] has stated that he would be keen to participate in such programmes to address these areas which include Sex Drive/Sex Preoccupation, Poor Problem-Solving, Deviant Sexual Preferences, General Social Rejection etc.”

74. The Recommendations set out at the conclusion of the Probation Report were imposed by the learned sentencing judge in her final order.

The Sentencing Judge’s Remarks

75. Sentences were passed on the 12th of April 2019, the sentencing judge having taken approximately two weeks following the plea in mitigation to reflect on the evidence that she had heard and to consider what sentences she would impose. The sentencing judge commenced by reviewing in detail the circumstances in which the offences were committed, and the nature of the material in question. She noted the circumstances of the respondent’s arrests in this jurisdiction, and his co-operation during interviews. She further took note of the circumstances in which he came to be imprisoned in the Philippines, determining that his detention there arose from an immigration problem of his own making. She further took note of the contents of the Probation Report.

76. The sentencing judge then continued:

“Mr [M] is a 42 year old man. He is manifestly an intelligent person who is an expert in information technology and who progressed rapidly through the ranks in [his employment], eventually gaining a position in software development. Mr Shelley has submitted that the conditions of his incarceration in the Philippines were extremely difficult and that none of his basic needs were met. However, in his interaction with the Probation Service, Mr [M] maintained that he formed a relationship in prison and it was the best thing to have happened to him. He is currently detained in the Midlands Prison where he is an enhanced prisoner and is attending school and engaging well with staff and prisoners. The accused has expressed a willingness to undergo treatment programmes prior to and following his release and has independently researched the available options. There is some basis for believing he has finally come to an understanding of the grave harm caused by his actions.

Following the search of his home, the accused wrote a letter exonerating his landlord of all responsibility for the material found on his property and also apologising to neighbours and the community for the distresses he had caused to him. He has also since written a letter to the Court, the final paragraph of which are addressed to [X] and his mother, in which he apologises for his actions and the emotional pain he has inflicted.

The accused has pleaded guilty to selected offences on the basis of full facts, and the headline sentence in respect of the selected offences must reflect the overall culpability of the accused with reference to the multiplicity of offences involved and by reference to the extended period of time over which he has offended and the harm caused by his offending. In respect of all offences, a further aggravating factor is the accused's previous conviction for a sexual assault in 2006 for which he received a suspended sentence.

With the benefit of hindsight and the further evidence which has since come to light, the imposition of a suspended sentence did not in any way adequately reflect the accused's true culpability and the suspended sentence was neither an effective punishment nor a deterrent.

The offences of sexual assault and production of pornography and child exploitation which relate to [X] import common aggravating factors; namely, a breach of trust, premeditation and grooming, in addition to the youth of [X], the fact that the abuse was recorded and the harm which was caused to [X], the potential for future harm and the distress caused to his mother and grandmother.

Bearing in mind the maximum available sentence for sexual assault and possession of child pornography for distribution is one of 14 years, I am placing counts 1, 2 and 7 in the upper midrange for those offences and I am applying headline sentences of six years. In respect of count No. 27, the child exploitation offence, taking into account the lengthy period of time over which [X] was exploited by the accused, which is a further aggravating factor, I am applying a headline sentence of seven and a half years. In respect of count No. 4, by reason of the vast number of images concerned and the extreme content of the videos in particular, I am applying a headline sentence of the maximum available sentence of five years for the possession offences. Count 19 is the first of nine emails containing a total of 34 images distributed by email containing category one and category two material. These offences were committed by the accused whilst on bail and awaiting sentence for the earlier assault on BC. Further aggravating factors are the influential role of the accused as an administrator of the forum through which the images were distributed, the youth of the children involved, and the sexual exploitation of children necessary to produce these images. I am therefore placing count 19 in the upper range and applying a headline sentence of six years.

In arriving at the post mitigation sentence in respect of all of the offences, the Court must have regard to the need for a structured sentence which reflects the gravity of the offending and accommodates the particular need for personal deterrece and rehabilitation which arise in the case and also which take into account the particular circumstances of the accused. In so doing, I am giving the accused credit for the following: his pleas of guilty; the cooperation he gave to the investigation in the form of disclosures and material assistance; the isolated unhappy circumstances of his childhood and the abuse he himself experienced as contained in the probation report; the candour with which he engaged in the probation assessment; the remorse he has expressed in his letter to the Court and to [X] and his mother, his developing insight into the harmful nature of his offending and his stated intention to obtain treatment during and following his release; his educational and employment achievements. And I am also giving him significant credit for the fact that he has already spent a three year period in prison in the Philippines without having been convicted of any offence and the extremely poor conditions of his incarceration there. I do so in spite of the fact that his incarceration resulted from his own actions and was not the result of any act on the part of the Irish authorities. I also take into account his productive use of time in prison and his letter of apology to his former neighbours.

So in respect then of the counts to which he has pleaded guilty: on count No. 1, I am imposing a sentence of four years' imprisonment; in count No. 2, I am imposing a sentence of four years' imprisonment; in respect of count No. 4, I am imposing a sentence of three years' imprisonment; in respect of count No. 7, I am imposing a sentence of four years' imprisonment; in respect of count No. 19, I am imposing a sentence of four years' imprisonment; and in respect of count No. 27, I am imposing a sentence of five years' imprisonment. All of the sentences are to date from the 8th of May 2018.

And in addition, I am going to impose a period of five years' post release supervision pursuant to section 29(1) of the Sex Offenders Act of 2001. And during that period, the accused shall be under the supervision of a probation and welfare officer and will be required to comply with such conditions as are specified during the course of that supervision. And the conditions are …” [as specified at paragraph 6 above].

(Redactions by the court)

The Grounds Upon Which a Review is Sought

77. The applicant, i.e., the Director of Public Prosecutions, contends that the sentences imposed upon the respondent were unduly lenient and seeks a review of those sentences on the four grounds: -

i. the sentencing judge erred in principle by arriving at headline sentences that did not apply sufficient weight to a number of important aggravating factors surrounding the commission of the offences;

ii. further, or in the alternative, the said sentences did not adequately reflect the nature of the charges and the consequences of the acts of the respondent and their effects on the victims;

iii. further, or in the alternative, the sentencing judge erred in principle in the manner in which she structured the sentence imposed by applying undue weight to the mitigating factors present which resulted in her failing to adequately reflect the seriousness of the offending behaviour before her;

iv. the sentencing judge erred in principle in circumstances where the sentence imposed failed to adequately reflect the principles of specific and/or general deterrence.

Submissions

Submissions on behalf of the Applicant

78. The written submissions filed on behalf of the applicant addressed us at some length in respect of the jurisprudence on undue leniency appeals pursuant to s. 2 of the Criminal Justice Act. At this stage this is well trodden ground in this Court and we consider it unnecessary to review the submissions that were made. Suffice it to say that the submissions made were thorough and comprehensive and drew our attention to all of the relevant authorities.

79. The applicant’s written submissions helpfully contained a number of appendices, one of which, appendix 6, set out pertinent details of various judgments that might potentially be utilised as comparators. It is clear from the submissions that close regard was had to observations and guidance provided in earlier judgments of this court concerning the correct use of comparators, and our judgments in *People (DPP) v D.M.* [2019] IECA 147; *People (DPP) v Maguire* [2018] IECA 310 and *People (DPP) v K.C.* [2019] IECA 126 were specifically referenced in that context. We have found it helpful to have the cases scheduled in the applicant’s appendix 6 and include them later in this judgment in our review of appellate sentencing judgments in child pornography cases to date, although we have ultimately concluded that they still represent an insufficiently extensive survey to allow for the discernment of distinct trends in sentencing in this area.

80. However, the applicant goes on to emphasise that notwithstanding putting a large number of comparators before the court for our assistance, her case is that the judgment in this case was unduly lenient regardless of what a review of those comparators might reveal in terms of any trends in sentencing, and represented a divergence from the norm according to the understanding of that phrase previously indicated by this court in *People (DPP) v Mahoney* [2016] IECA 27, where we said:

“40 … we do not consider that in referring to a divergence from the norm, the Supreme Court, in The People (Director of Public Prosecutions) v. McCormack, intended that the word norm should applied and understood in the narrow sense of being a usual situation referable to comparators. Rather, we believe the norm spoken of refers to what might be predicted to be the result, within a reasonable margin of appreciation, of a faithful application to the facts of the individual case of the appropriate sentencing principles, whether or not there are any useful comparators.”

81. It was submitted in support of Ground of Application No 1 that the sentencing judge failed to identify the appropriate headline sentences and that they (we presume “they” means those headline sentences actually nominated) do not reflect the seriousness of the offending in all counts.

82. It was acknowledged that the sentencing judge identified the following aggravating factors, but it was submitted that she erred in failing to attach adequate weight to those factors:

(a) the multiplicity of offences involved;

(b) the extended time over which the respondent offended;

(c) the harm caused by the respondent’s offending;

(d) the respondent’s previous conviction for a sexual assault in 2006 for which he received a suspended sentence;

(e) the breach of trust in relation to X;

(f) premeditation;

(g) grooming;

(h) the youth of X;

(i) the potential for future harm;

(j) the distress caused to X’s mother A, and grandmother;

(k) the lengthy period of time over which X was exploited by the respondent;

(l) the influential role of the respondent as an administrator of the forum through which the images were distributed

(m) the youth of the children involved; and

(n) the sexual exploitation of children necessary to produce these images.

83. We should comment at this point that we have some reservations as to whether item (n), in the terms stated, is properly to be regarded as an aggravating factor. The sexual exploitation of children is an inherent ingredient in all child pornography offences. The fact that children have been exploited in the production of child pornography does not therefore aggravate *per se* an offender’s culpability in having committed an offence involving child pornography. In all such cases it is an inherent part of the basic offence that there was such exploitation, and the fact that there was such exploitation does not represent an added factor, that might exist in some cases but not in others, such as might provide aggravation of culpability. What may, however, provide aggravation is the degree to which children have been exploited in the production of the child pornographic images at issue (our emphasis). The more serious the abuse depicted, and the greater the degree of depravity and degradation of the child exhibited, the greater will be the accused’s culpability. Accordingly, it is not the existence of sexual exploitation *per se* which provides aggravation, but rather the degree to which there has been, and the extent of, such sexual exploitation.

84. It was submitted that while the trial judge appropriately placed counts 1 and 2 (both sexual assaults of a child) in the upper mid-range, she erred in setting the headline sentence for either sexual assault as being at 6 years and in circumstances where the maximum penalty for the offence is 14 years.

85. It was submitted that the sentencing judge correctly identified the maximum penalty as being 5 years imprisonment in respect of count 4 (possession of child pornography) and did so having regard to the quantity and extreme content of the videos in particular. However, it is complained that while the learned trial judge appropriately placed count 7 (producing child pornography) in the upper mid-range, she erred in setting the headline sentence for count 7 at 6 years imprisonment in circumstances where the maximum penalty for the offence is 14 years.

86. The applicant agrees with the sentencing judge that count 19 (possession of child pornography for distribution) should be placed in the upper range. However, the applicant has expressed respectful disagreement that, as such, it should attract a headline sentence of greater [the written submissions say “greater” but think what was meant was “no greater”] than 6 years when the maximum sentence available is 14 years. Further, while the sentencing judge acknowledged that the offence comprising Count 19 was an offence committed by the respondent while on bail and awaiting sentencing for a sexual assault on Y (to which he pleaded guilty on the 2nd June 2006 and was sentenced on the 6th November 2006), he was also on bail when he committed all of the other possession for distribution counts that were taken into consideration (counts 20 to 26). It was submitted that, while implicitly acknowledging that the fact of being on bail was an aggravating factor (and being the administrator of the forum through which images were being distributed), this was not reflected in setting the headline sentence at 6 years for Count 19 to which a guilty plea was entered. It was submitted to be beyond controversy (which we accept) that committing a further offence while on bail is an aggravating factor.

87. It is further complained that the sentencing judge erred in failing to identify where on the scale she placed count 27 (sexual exploitation). We must immediately comment that this complaint is not clearly understood, at least in the terms in which it is cast, in circumstances where the sentencing judge nominated 7 ½ years’ imprisonment as being the headline sentence where the scale was between non-custodial options and life imprisonment. It was therefore clear where she was placing it on the scale.

88. The applicant goes on, however, to further complain that the sentencing judge should have placed this at the upper end of offending behaviour (not least having regard to the period of time over which this offending conduct occurred, a factor acknowledged by the sentencing judge as aggravating culpability). The true gravamen of the complaint therefore seems to have two facets, i.e., (i) that the sentencing judge did not seek to characterise the offending conduct by attaching a narrative label to it, i.e., that it belonged “*at the upper end*” of the scale or range, and (ii) that, insofar as the offence carries a maximum penalty of life imprisonment, the identification of a headline sentence of 7 ½ years was too low in all of the circumstances.

89. The applicant makes the further point that the respondent received specific sentences for six offences only out of twenty-seven on the indictment, the remaining twenty-one being taken into consideration. She submits that the fact that those twenty-one other offences were being taken into consideration should have led to the nomination of higher headline sentences in the case of the six offences for which it was intended to impose specific sentences. Moreover, in the interests of transparency, the extent to which the headline sentence was to be increased in each case resulting from the taking of other offences into consideration ought to have been identified.

90. It was submitted in support of Ground of Application No 2 that the sentencing judge erred in principle by not adequately reflecting the extremely serious nature of the offending and the potential for any long-term harm to the victims (to include the unidentified persons), including their families. In this context we were referred to several quotations from the Supreme Court’s judgments in *The People (DPP) v F.E.* [2019] IESC 85 emphasising the need for a sentencing judge in applying the totality principle, when sentencing for multiple offences, to objectively consider the overall impact of the offence (or offences) on the victim or victims in structuring an appropriate sentence (or sentences); and also the rehabilitative effect of the overall result in light of the final total; and the justice of retribution and the need to mark the harm to the victim or victims.

91. The applicant submitted that the sentence in this case did not reflect the overall criminality of the respondent and did not adequately reflect the harm to the injured parties (identified and unidentified). This is partly due to the low level at which the headline sentences complained of were in fact set, and the concomitant failure to impose consecutive sentences in respect of the offending (and also perhaps to the giving of “*significant credit*” to the respondent in respect of his spending three years in custody in the Philippines).

92. It was submitted in support of Ground of Application No 3 that excessive credit was afforded by the sentencing judge in respect of mitigating factors. The sentencing judge had identified the following mitigating factors as requiring to be taken into account:

a) His pleas of guilty;

b) The cooperation he gave to the investigation in the form of disclosures and material assistance;

c) The isolated unhappy circumstances of his childhood and the abuse he himself experienced as contained in the probation report;

d) The candour with which he engaged in the probation assessment;

e) The remorse he has expressed in his letter to the court and to X and his mother;

f) His developing insight into the harmful nature of his offending;

g) His stated intention to obtain treatment during and following his release;

h) His education and employment achievements;

i) His productive use of time in prison;

j) A letter of apology written by him to his former neighbours.

93. At the oral hearing of this appeal, particular exception was taken to the placement by the sentencing judge of reliance on item (b), the applicant contending that it was not borne out by the evidence that the respondent had given meaningful cooperation in the manner suggested.

94. Complaint is also made about the fact that the sentencing judge said that the respondent was being given “*significant credit*” for the three-year period he had spent in prison in the Philippines without having been convicted of any offence, and the extremely poor conditions of his incarceration there, despite the fact that that his incarceration resulted from his own actions and was not the result of any act on the part of the Irish authorities. It was contended that the respondent should not have been entitled to credit or significant credit for his being detained in the Philippines arising out of his having obtained a substitute passport.

95. The applicant submitted that the factors identified were not capable, either individually or cumulatively, of justifying the level of discounts actually afforded by the sentencing judge. These ranged from 33% of the headline sentence in the case of counts 1, 2, 7, 19 and 27 and 40% of the headline sentence in the case of count 4.

96. We were referred to a passage from O’Malley on “*Sentencing Law and Practice*”, 3rd edition, in support of a submission that absence of previous conviction, positive good character and genuine remorse are mitigating factors although (in the case of child pornography offenses) a prolonged involvement in using or distributing the material may diminish the credit otherwise forthcoming for the absence of previous convictions. We accept that that is the law.

97. Relying upon the principle just stated, it was submitted that insufficient weight was given to the fact that the offences of producing child pornography continued over the period 2000-2001, 2003-2004 and 2011 to 2013 and that the sexual exploitation of X continued over a period of 19 months.

98. It was submitted in support of Ground of Application No 4 that the sentence imposed by the sentencing judge does not adequately serve to pursue the sentencing principle of deterrence. Whilst the respondent has made commendable efforts whilst on remand in custody, he was found by the Probation Services to be “*at high risk of re-offending*”. Further, was contended that the sentencing judge’s remarks to the effect that the respondent “*is manifestly an intelligent person who is an expert in information technology and who progressed rapidly through the ranks in* [his employment]*, eventually gaining a position in software development*” serves to demonstrate why a specific sentence of deterrence should be imposed in order to dissuade the respondent from committing further offences of this nature.

99. Finally, it was submitted on behalf of the applicant that the trial judge failed to give adequate consideration to the imposition of consecutive sentences. It is said that the penalty actually imposed in this case does not adequately punish, or deter, this offender in order to protect society from this type of offending. It is contended that the sentence imposed was not just and reasonable in all the circumstances of the case and represents a substantial departure from what could be regarded as an appropriate sentence.

Submissions on behalf of the respondent

100. It has been submitted on behalf of the respondent that the sentencing judge imposed a thoroughly considered and carefully constructed sentence in this case. Further, the nature of each offence was set out in turn, and the sentencing judge clearly considered all of the relevant aggravating and mitigating factors.

101. It was submitted that the headline sentences reached by the sentencing judge were appropriate and reached after a comprehensive assessment of the aggravating factors, including the respondent’s previous conviction.

102. It was further submitted that the mitigation afforded to the respondent, who had pleaded guilty at the first available opportunity, made full admissions, provided valuable assistance to the Gardaí and who had unique and compelling personal mitigation, was appropriate. The sentencing judge noted, for example, the material assistance the respondent gave Gardaí in investigating others involved in the “Young City” website by allowing them to take over his role as an administrator.

103. It was contended that in almost all cases, the mitigation afforded was a third, and this was within the discretion of the learned sentencing judge in the specific circumstances of this case. In respect of the charge with the lowest maximum sentence, the mitigation afforded was 40% but that was from a headline sentence set at the maximum available sentence; a three-year sentence for count 4 was perfectly appropriate in the circumstances of the case.

104. The respondent maintains that is clear that the sentencing judge gave consideration to the issue of his eventual re-entry into the community, and sought to construct a sentence which would feature either a partial suspension on conditions or a post-release supervision order carrying similar conditions, from the outset:

“JUDGE: Yes. Well I think whatever sentence is ultimately imposed in relation to these, Mr [M] will be re-entering the community at some stage and as many safeguards as possible need to be incorporated to ensure that the community is protected and that his rehabilitation, if it's possible, is monitored within the community following the completion of the prison sentence. So, it is a case where I think guidance will be required from the probation service as to what kind of conditions need to be incorporated to post-release supervision or a part suspended sentence, whichever the probation service considers best meets the situation.”

105. It was submitted that the sentencing judge had ultimately structured his sentences to include a significant and onerous post-release supervision order, and the overall sentence imposed can be seen as comparable to a longer sentence with a portion of it suspended. It was submitted that this was a carefully constructed sentence, and one that was appropriate in the unique circumstances of this case.

106. It was further submitted that the sentencing judge had been correct, in dealing with the respondent’s incarceration in the Philippines, to treat it as a significant point of mitigation.

Analysis and Decision

107. The Court is grateful to have received the comparators produced by the applicant. We have commented in other judgments about how comparators may legitimately be used and how they may not be used, and about the need for a representative survey. See in that regard our judgments in *The People (Director of Public Prosecutions) v D.M.* [2019] IECA 147; *The People (Director of Public Prosecutions) v K.C.* [2019] IECA 126; and *The People (Director of Public Prosecutions) v Maguire* [2018] IECA 310, respectively. In so far as representativeness is concerned, all of the comparators to which we have been referred comprise decisions of the appellate courts in which there are written judgments, being either the transcribed record of remarks made *ex tempore*, or a formal reserved judgment. The point is often made, and it has some validity, that appellate judgments can never be truly representative because only a minority of cases are ever appealed. That having been said, in a situation where there is a paucity of accessible other data concerning sentencing practices at first instance, it is the best we have available to us with which to work.

108. At one time researchers from the former Judicial Researchers Office (JRO) of the Courts Service (now re-organised as the Legal Research and Library Services Office (LRLS)) sought to partially address the lacuna just alluded to by compiling data on sentencing from print and broadcast media reports, and other informal sources, for the assistance of sentencing judges. Much valuable data was gathered and collated, and reports on this data by JRO researchers were considered most useful by sentencing judges. They have been referred to in several leading judgments on sentencing, such as by Charleton J. on behalf of the Supreme Court in *The People (Director of Public Prosecutions) v Mahon* [2019] IESC 24, and more recently in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 85. However, the practice of collating this kind of informal data was discontinued some time ago by the JRO, at least partly due to perhaps understandable concerns that had been raised in some quarters about the informality of the source material and whether it could be reliably depended upon.

109. We allude to this former practice because it highlights the current data deficit (which is a real problem), and past attempts to address it. The point should be made that others have also felt the need to have recourse to similar methodology on a “needs must” basis and in the absence of any other data sources concerning sentencing practices at first instance. Specifically, in the area of child pornography offences, the eminent criminologist Professor Ian O’Donnell, with his colleague Claire Milner, of University College Dublin published a book entitled “*Child Pornography, Crime, Computers and Society*” (2011) (Abingdon Oxon: Routledge) which heavily relied on such data sources. The book had its origins in a mixed methodology study funded by Ireland’s Department of Justice, Equality and Law Reform into how child pornographers are investigated and brought to justice. It deals, *inter alia*, with *“Choosing an appropriate penalty”* and the sub chapter on this (admittedly now very out of date) describes *inter alia* the range of sentences that had been imposed for child pornography offences in Ireland from enactment of the legislation to the date of publication of the study. The data underpinning this was gleaned from a review of newspaper reports.

110. No such informal material has been produced to us, and we therefore intend for the purposes of this judgment to confine our review to the appellate judgments to which we have been referred. Acknowledging that they may not be wholly representative, we nevertheless treat this as valuable data which compensates in some respects for its lack of representativeness by its unique strengths. First, it is believed to be a complete (or at worst nearly complete) record of those sentencing cases that have come before the appellate courts involving child pornography offences. Secondly, these judgments tend to be rich in detail. Even the records of *ex tempore* judgments will, in most cases, provide a summary of the evidence given at first instance concerning the offending conduct, the personal circumstances of the offender, the impact on the victim(s), of probation reports and other relevant reports, and set out (frequently by means of direct quotation of material extracts) the sentencing judgment given at first instance. They further will set out the grounds of appeal, will frequently summarise the parties’ respective submissions, and finally set out the appellate court's analysis of the issues and its decision.

The case-law to which we were referred –

comparators and guideline judgments

111. We propose to review this material in chronological order, before considering the trends in sentencing, if any, apparent from it. The cases the subject matter of our intended review are all Irish cases, with one exception, namely the case of *R v Oliver & Ors*. Though an English case, it will be included because of the extent of its influence on the approach to the sentencing of offenders who have committed child pornography offences in this jurisdiction.

*R v. Oliver & Ors*

112. In 2002 the Court of Appeal (Criminal Division) of England and Wales considered issues around the sentencing of those accused of child pornography offences in the case of *R v. Oliver & Ors* [2003] 1 Cr. App. R. 28; [2003] 2 Cr. App. R. (S) 15. The background to the case was that in an earlier case of *R v. Wild (No 1)* [2002] 1 Cr. App. R. (S), that court had sought the views of the Sentencing Advisory Panel (SAP) in relation to sentencing for offences involving indecent photographs and pseudo-photographs of children. The SAP’s advice having been recently published, the court was in a position to sentence Mr Oliver and his co-accused with the benefit of the SAP’s advice, which the court was prepared to adopt, save in one or two respects.

113. The judgment of the Court of Appeal (Criminal Division) commences by setting out the statutory context in England and Wales which, although there are some similarities, is different from our statutory context, and at all stages this has to be borne in mind. Nevertheless, the court went on to offer some general guidance of, we would say, universal application regardless of statutory context. Rose L.J., who gave judgment for the court, observed:

8. “… it is worth pointing out that it is likely that the number of child pornography offences detected and prosecuted is only a small proportion of the real total.” [This observation was made with respect to child pornography offences generally.] “Furthermore, increased access to the internet has greatly exacerbated the problem in this area by making pornographic images more easily accessible and increasing the likelihood of such material being found accidentally by others who may subsequently become corrupted by it. This additional risk adds to the culpability of offenders who distribute material of this kind, especially if they post it on publicly accessible areas of the internet.

9. We agree with the Panel that the two primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it.

10. As to the nature of the material, it will usually be desirable for sentencers to view for themselves the images involved, unless there is an agreed description of what those images depict. Subject to one matter, we accept the Panel's analysis of increasing seriousness by reference to five different levels of activity, derived from the COPINE Project's description of images. We do not that agree with the Panel that COPINE typologies 2 and 3 are properly within Level 1. As it seems to us, neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise, of itself, to a pornographic image. Accordingly, with that amendment to the Panel's proposals, we categorise the relevant levels as:

(1) images depicting erotic posing with no sexual activity;

(2) sexual activity between children, or solo masturbation by a child;

(3) non-penetrative sexual activity between adults and children;

(4) penetrative sexual activity between children and adults;

(5) sadism or bestiality.

11. As to the nature of the offender's activity, the seriousness of an individual offence increases with the offender's proximity to, and responsibility for, the original abuse. Any element of commercial gain will place an offence at a high level of seriousness. In our judgment, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles, and by reference to the shame and degradation to the original victims.

12. Merely locating an image on the internet will generally be less serious than down-loading it. Down-loading will generally be less serious than taking an original film or photograph of indecent posing or activity. We agree with the Panel that the choice between a custodial and non-custodial sentence is particularly difficult. On the one hand, there is considerable pressure, demonstrated by Parliament increasing the maximum permissible sentence, to mark society's abhorrence of child sexual abuse and child pornography by the use of custody. On the other hand, there is evidence that sex offender treatment programmes can be effective in controlling offenders' behaviour and thus preventing the commission of further offences. We agree with the Panel's recommendation that, in any case which is close to the custody threshold, the offender's suitability for treatment should be assessed with a view to imposing a community rehabilitation order with a requirement to attend a sex offender treatment programme. We also agree with the Panel that the appropriate sentence should not be determined by the availability of additional orders, or by the availability of treatment programmes for offenders in custody.”

114. The judgment went on to suggest levels of appropriate punishment for such offending in a variety of circumstances, and to indicate the court’s view as to where the custody level should be set. As the statutory context is quite different we do not think that that it will assist for our purposes to have regard to that specific guidance. However, the judgment helpfully goes on to identify specific factors which are capable of aggravating the seriousness of a particular offence:

(i) If the images have been shown or distributed to a child.

(ii) If there are a large number of images. It is impossible to specify precision as to numbers. Sentencers must make their own assessment of whether the numbers are small or large. Regard must be had to the principles presently applying by virtue of R v Canavan, Kidd and Shaw [1998] 1 Cr App R 79.

(iii) The way in which a collection of images is organised on a computer may indicate a more or less sophisticated approach on the part of the offender to trading, or a higher level of personal interest in the material. An offence will be less serious if images have been viewed but not stored.

(iv) Images posted on a public area of the internet, or distributed in a way making it more likely they will be found accidentally by computer users not looking for pornographic material, will aggravate the seriousness of the offence.

(v) The offence will be aggravated if the offender was responsible for the original production of the images, particularly if the child or children involved were members of the offender's own family, or were drawn from particularly vulnerable groups, such as those who have left or have been taken from their home or normal environment, whether for the purposes of exploitation or otherwise, or if the offender has abused a position of trust, as in the case of a teacher, friend of the family, social worker, or youth group leader.

(vi) The age of the children involved may be an aggravating feature. In many cases it will be difficult to quantity the effect of age by reference to the impact on the child. But in some cases that impact may be apparent. For example, assaults on babies or very young children attract particular repugnance and may, by the conduct depicted in the image, indicate the likelihood of physical injury to the private parts of the victim. Some conduct may manifestly (that is to say, apparently from the image) have induced fear or distress in the victim, and some conduct which might not cause fear or distress to an adolescent child, might cause fear or distress to a child of, say, 6 or 7.”

115. While the judgment does discuss possible mitigation, the approach of the courts in England and Wales is very different to that in Ireland, and the guidance provided in that respect is not of assistance to an Irish judge.

*The People (Director of Public Prosecutions) v. G. McC*

116. The first reported Irish case to address sentencing for child pornography was *The People (Director of Public Prosecutions) v. G. McC* [2003] 3 I.R. 609. This case involved an appeal against the severity of sentences imposed in what was primarily a rape case, although it was also concerned with secondary offences involving production of child pornography contrary to s.5 of Child Trafficking and Pornography Act 1998 (“the Act of 1998)”, possession of child pornography contrary to s. 6 of the Act of 1998, and sexual assault/indecent assault. He received a life sentence for rape, 14 years imprisonment for the s. 5 offences, 5 years imprisonment for the s. 6 offences and 5 years imprisonment for sexual/indecent assault, all to run concurrently. The sentences imposed at first instance for the child pornography offences were the maximum available.

117. There were six child victims in all, with the charge of rape relating to just one of them. The other victims had not been raped but they had each been sexually / indecently assaulted. The appellant had been in a position of trust *vis a vis* his victims. The forms of sexual abuse engaged in are described in detail in the judgment of Geoghegan J. in the report of the case in the Irish Reports. However, it was part of the appellant’s *modus operandi* to video record / take still photographs of his molestation of the victims, and it was this aspect of the case that had precipitated the production charges under s. 5 of the Act of 1998 and the possession charges under s. 6 of the Act of 1998.

118. The sentencing judge at first instance appeared to have interpreted an earlier judgment of the Court of Criminal Appeal, *The People (Director of Public Prosecutions) v. McKenna* [2002] 1 I.R. 347 as at least discouraging him, if not precluding him, from having recourse to consecutive sentencing which would have been his preferred sentencing option; and so he opted instead for maximum concurrent sentencing on the basis that credit for mitigating factors would be catered for in the concurrency. The Court of Criminal Appeal considered that the trial judge had misinterpreted the earlier judgment, and (at p. 617) stated that:

“… it is of course true and always has been true that where there have been a number of offences relating to different victims and especially if they are unconnected, there is discretion on the sentencing judge as to whether he or she makes the respective sentences concurrent or consecutive. In such a case, it is not the discretion that presents the problem but rather the exercise of it. It has long been the sentencing practice in this jurisdiction that a discretion in favour of consecutive sentences is exercised sparingly.”

119. Geoghegan J. went on to say (at p.618):

“Here there were different victims, different incidents to some extent, different types of offences and different degrees of depravity. In theory therefore, the sentencing judge clearly had a discretion to impose consecutive sentences. But given that the maximum sentence for rape was a life sentence and that there were substantial maximum sentences of fourteen years under the Act of 1998 for the production of the pornographic pictures, it would not seem to accord with long established practice to impose consecutive sentences in those circumstances in the absence of some special reason.”

120. The Court of Criminal Appeal went on to substitute a sentence of 10 years’ imprisonment for the life sentence that had been imposed for the rape, with Geoghegan J. going on to state (at.p.619):

“Turning now to the offences in respect of which the learned sentencing judge imposed sentences of fourteen years to run concurrently. In each case these were the maximum sentences permitted by the statute. Yet even if there were no mitigating circumstances, such as absence of previous convictions, the plea of guilty and cooperation with the gardaí, the maximum sentence would not appear to be appropriate. Although the English legislative scheme is different, the court in arriving at a proper sentence can gain some assistance from the recent judgment of the Criminal Division of the English Court of Appeal comprising the Vice-President Rose L.J., Gibbs and Davis JJ. in R. v. Oliver and Others [2003] 1 Cr. App. R. 28. The court took the view that in relation to offences involving indecent photographs or pseudo photographs of children, the two primary factors determining the seriousness of a particular offence were the nature of the indecent material and the extent of the offender's involvement in it. As to the nature of the material, pornographic images were to be categorised by the following levels of seriousness: -

1. images depicting erotic posing with no sexual activity;

2. sexual activity between children or solo masturbation by a child;

3. non-penetrative sexual activity between adults and children;

4. penetrative sexual activity between children and adults;

5. sadism or bestiality.

` In relation to the offender's involvement, the seriousness of the offence increased with the offender's proximity to and responsibility for, the original abuse. To quote Rose L.J. from R. v. Oliver and Others [2003] 1 Cr. App. R. 28 at p. 467: -

"Any element of commercial gain will place an offence at a high level of seriousness. In our judgment, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles and by reference to the shame and degradation to the original victims.

Merely locating an image on the internet will generally be less serious than down-loading it. Down-loading will generally be less serious than taking an original film or photograph of indecent posing or activity …"

The judgment goes on to suggest different levels of sentence for different degrees of seriousness of the offences. Under the relevant English Act, ten years and not fourteen years, as in our jurisdiction, is the maximum. This is relevant when considering the following sentence in the same judgment at p. 469: -

"Sentences approaching the ten-year maximum will be appropriate in very serious cases where the defendant has a previous conviction either for dealing in child pornography, or for abusing children sexually or with violence. Previous such convictions in less serious cases may result in the custody threshold being passed and will be likely to give rise to a higher sentence where the custody threshold has been passed."

121. In considering the circumstances of the case before them, the Court of Criminal Appeal regarded the breach of trust as being a serious aspect of the case. It found that further aggravating factors included the use of alcohol by the appellant to further his desires, and the strong element of depravity in the surrounding circumstances in which the photographs / videos were taken. The court noted that the images had not been used, nor were they intended to be used, for anything other than the appellant’s own sexual gratification. There had been no commercial or quasi-commercial user. Neither had there been evidence of swapping the images with others, still less in connection with any paedophile ring. Although there were multiple victims, the offences had all come to light at the same time and were included in the same indictment. It was observed that:

“A higher sentence has to be imposed than would be imposed if there was simply one individual child involved, but that does not mean that the sentence should be the maximum sentence and certainly not on the basis that the overall sentence would be more than fourteen years if consecutive sentences were imposed.”

122. The Court of Criminal Appeal concluded that in the circumstances of the case the appropriate sentence for the s. 5 production offences was one of eight years’ imprisonment, while the appropriate sentence for the s. 6 possession offences was one of three years’ imprisonment. With regard to the possession offences, Geoghegan J., having considered the English case of *R v. Oliver & Others* [2003] 1 Cr. App. R. 28 observed:

“English precedents can only be of very limited value but it is probably fair to say that the level of public disapproval of and revulsion against computer offences relating to children is much the same in both jurisdictions. Although there is no evidence that the "possession" of the child pornography was for any commercial use or for the purpose of any swapping of pictures, etc., there is certainly evidence that the collection was being used to show to others when it suited the applicant for his own sexual gratification. In these circumstances, a custodial sentence is appropriate and given the surrounding circumstances in this case as to how this collection was put to use, this court considers that the correct sentence is three years notwithstanding the mitigating factors.”

*The People (Director of Public Prosecutions) v. Muldoon*

123. The case of *The People (Director of Public Prosecutions) v. Muldoon* [2003] 7 JIC 0701 was concerned with an appeal against the severity of a sentence of two and a half years imprisonment on charges of being in possession of and of advertising child pornography, contrary to s. 6 and s. 5, respectively, of the Act of 1998 in respect of which the appellant had pleaded guilty. The possession offence carried a maximum sentence of 5 years’ imprisonment while the advertising offence carried a maximum sentence of 14 years’ imprisonment. In addition, orders had been made under s. 29 and s. 30, respectively, of the Sex Offenders Act 2001 (“the Act of 2001”) imposing an eleven-year period of post-release supervision and prohibiting the appellant from having any control of or access to a personal computer or the internet during the same period. The appeal was dismissed. In his judgment Keane C.J. described the circumstances thus:

“The undisputed evidence was that the applicant, who was clearly skilled in computer science, had been engaged in effect of the advertising the provision of images involving child pornography which were described by the police officers as being of a horrific nature involving extremely young children, and sometimes animals, under a title indicating that it was prepubescent sexual activity of a singularly deviant nature. That is the activity in which the applicant was engaged. He had a password on a codename which made this material accessible to other people including a German police officer who was engaged in investigating the distribution of child pornography by computer and on the internet, and it was because of that that it came to the attention, first of all of the police authorities in Germany and then of the police authorities in this part of the world.”

124. The Court of Criminal Appeal observed that the custodial portion of the sentence was not being challenged, “*obviously rightly so, because there cannot be the slightest doubt that, were it not for the plea of guilty and the fact that he had been engaged in a somewhat limited fashion in this activity, a significantly greater custodial sentence would be justified.*” The appeal was confined to the order made at first instance under s. 30 of the Act of 2001, and the Court of Criminal Appeal was not disposed to interfere with the order.

*The People (Director of Public Prosecutions) v. Loving*

125. In the case of *The People (Director of Public Prosecutions) v. Loving* [2006] 3 I.R. 355 the former Court of Criminal Appeal offered some further guidance concerning sentencing in cases of child pornography. In that case the accused pleaded guilty to, *inter alia*, a charge of possession of child pornography contrary to s. 6 of the Act of 1998. He was being investigated for a suspected deception offence when his home was searched on foot of a search warrant, during which his computer and certain floppy discs were seized. Upon a forensic examination of these items, many pornographic images were found. Most of them involved adults but included amongst the images found were 175 discrete images which were classified as child pornography. The child pornography included naked poses of young girls as well as young girls in the 7 – 14 age group either in naked poses engaged in sexual intercourse or oral sex with adults. The images were downloaded in 15 sessions over 2 months.

126. The appellant was cooperative and made admissions with respect to downloading and saving such material. The evidence was that he had downloaded the illicit images for free, and it was accepted that there was nothing in the nature of distribution going on. He claimed he had no initial interest in pornography, and certainly not child pornography, but pop-ups appeared during his browsing on the Internet and his curiosity got the better of him. He had previous convictions for larceny/theft and criminal damage, possession of drugs contrary to s. 3 of the Misuse of Drugs Act 1977, and for drink driving. While he had not served a prison sentence in this jurisdiction, he had previously served a two-year prison sentence for theft in the United States. The sentencing court had a psychiatric report on the appellant which indicated that he was suffering from an alcohol dependence syndrome and moderate depression. There was a history of the appellant being sexually abused himself in childhood.

127. The sentencing judge at first instance expressed bitter regret that the maximum penalty imposable for the s. 6 offence was 5 years imprisonment. He imposed a sentence of 5 years imprisonment on the child pornography count and suspended the final 2 years of it. The appellant also received a sentence of 2 years imprisonment on a concurrent deception count.

128. The sentence for the child pornography offence was appealed to the Court of Criminal Appeal on the ground of severity. Giving judgment for that court, Fennelly J. examined s.6 of the Act of 1998, and its place within the scheme of that Act as a whole, and its relationship with the other offences created by sections 3, 4 and 5 of that Act.

129. Fennelly J. observed that s.5 of the Act of 1998 created several offences concerned with the knowing production, distribution, printing, publishing, importing, exporting, selling and showing of child pornography and extended to knowingly possessing child pornography for any of those purposes. Section 6, on the other hand, was concerned with knowingly possessing child pornography simpliciter. He noted that both the offences under s. 5 and that under s. 6 could be prosecuted summarily, and in that event, they attracted identical potential penalties. However, “*in the case of a conviction on indictment under section 6, unlike section 5, a fine, subject to a maximum of the euro £5000 (sic) may, as an alternative to or in addition to imprisonment the imposed. Moreover, the maximum term of imprisonment under section 5 is fourteen years and under section 6 five years.*”

130. Fennelly J. commented that there had been just one previous case in which the Court of Criminal Appeal had had to consider the appropriate sentence in the case of a conviction for an offence under s.6 of the Act of 1998, namely that of *The People (Director of Public Prosecutions) v. G. McC* (reviewed above). After quoting from the curial part of Geoghegan J.’s judgment in *G.* McC, Fennelly J. observed:

“27 The offence of possession of child pornography is comparatively new in our law. It is a response to the very serious evidence of gross and shocking child abuse that has emerged over recent decades. It also highlights the possibility of the abuse of the wonders of the internet to transmit degrading images of abuse of both adults and children. The legislature has chosen to criminalise activities concerning child pornography. It has been discovered that many individuals have a propensity to access and use images of child pornography. The task of the courts is, following the guidance given by the Oireachtas, to measure the seriousness of individual cases and to fix appropriate penalties.

28 Two points emerge from the legislation itself. Firstly, the Act of 1998 distinguishes between cases of active use of child pornography involving either dissemination of images for commercial or other exploitative purposes (s. 5) and mere possession (s. 6). Secondly, the Act of 1998 recognises the offence of possession as a "hybrid" one. It may be tried summarily, at the behest of the Director of Public Prosecutions. It follows that the Oireachtas did not intend that every offence of possession of child pornography must automatically attract a penalty of more than one year's imprisonment, still less the imposition of the maximum of five years. The Oireachtas did not prescribe any minimum penalty.

29 Any court imposing a sentence for possession of child pornography will have regard to two of the basic mitigating factors in sentencing. They are: firstly, whether the accused accepts responsibility for the offence, including his plea of guilty. Secondly, the previous character of the accused with particular reference to the offence in question. The court believes that the defendant was entitled to put both these factors forward as mitigating factors, subject, it is true, to some qualification. The value of his acceptance of responsibility is necessarily tempered by the fact that, once the incriminating material had been found in his home, there was little scope for plausible denial. Nonetheless, the garda accepted that he had facilitated their inquiries and he undoubtedly relieved them of the necessity to prove their case. On the second point, the defendant had some previous convictions, but these, as the trial judge fairly acknowledged, dated back for a good number of years and none at all related to this type of offence.

30 Secondly, it is necessary to consider the individual offence. The first question is how serious and numerous were the actual pornographic images. The evidence did not address in any detail the seriousness of the pornographic images. So far as it goes, it suggests that some of the images were in the first category and that some, though not all, of the images qualified for inclusion in the third and even the fourth category of the classification adopted by the English Court in R. v. Oliver [2003] 1 Cr. App. R. 28. On the other hand, the number of images of child pornography was, at 175, much fewer than that in other cases where a shorter sentence of imprisonment has been imposed. The great bulk were of adult pornography.

31 Thirdly, a court should consider the circumstances and the duration of the activity leading to the possession of the images. In the present case, the garda evidence was that they were downloaded during a comparatively short period from December, 2002 to January, 2003, when the applicant accessed the sites in question a maximum of 15 times. He did not subscribe to these sites. Most significantly, it seems clear that he ceased using them after that time. When his house was searched in September, 2003, it seems clear that he had not accessed any of them since January of that year. There is no reason to dispute his own statement that he had lost interest and had left the material unused in a box over that time. It is also of note that he had ceased to abuse alcohol, which, as was accepted by his psychiatrist, was a significant factor in his becoming engaged in this activity.

32 Fourthly, it is fully accepted that the defendant had never shared the material with any other person or otherwise circulated or distributed it in any way. Unlike the case of The People (Director of Public Prosecutions) v. G. McC. [2003] 3 I.R. 609, there was no link whatever with the commission by the applicant of any other sexual offence or any improper relations with children.”

131. The Court of Criminal Appeal accepted a submission on behalf of the applicant that, notwithstanding that two years of the sentence imposed at first instance had been suspended, that sentence had to be considered as one of five years for the purposes of the appeal. Finding that the trial judge had been in error in his approach to sentencing the applicant, Fennelly J. observed:

“37 It is unusual to impose the maximum sentence allowed by the law for any offence. Such a decision implies that the actual offence is at the highest level of seriousness. It also fails to make any allowance for the two most basic mitigating points: previous good character and an early admission of guilt. A sentencing policy which fails to make allowance, in particular, for the latter element provides no incentive to accused persons to plead guilty. For reasons already given, the defendant was entitled to some mitigation of sentence for the two reasons mentioned.

38 Furthermore, the imposition of the maximum sentence allowed by the legislature necessarily implies that the particular offence is at the highest level of seriousness capable of being envisaged for that offence, both as to its intrinsic quality and as to the circumstances in which it was committed.

39 This judgment has recited in some detail the individual elements of this offence. The acts of accessing child pornography were committed over a short period of time and then stopped. The pornographic materials were left unused thereafter. The defendant had ceased to abuse alcohol, which had played a large part in his offending. It was not disputed that the defendant was genuinely remorseful and ashamed, though the trial judge entirely discounted this element.

40 Most importantly, there was no suggestion whatever, in contrast with the case of The People (Director of Public Prosecutions) v. G. McC. [2003] 3 I.R. 609, that the applicant had spread or circulated or shown any of the material to anybody else or that he was likely to do so.

41 The court must approach the matter objectively. It must consider the seriousness of the offence from all the aspects mentioned. It must observe the principle of proportionality, considering, on the one hand, the policy of the law as laid down by the Oireachtas and, on the other the circumstances of the individual and his degree of culpability.”

132. Noting that the applicant had already spend a year in prison, the Court of Criminal Appeal reduced the sentence for the s.6 offence from five years (with the final two years suspended) to one of imprisonment for one year. Fennelly J. concluded by remarking:

“This decision does not imply that the applicant should have received an unsuspended prison sentence in the first place. An examination of the cases shows that the courts have frequently imposed suspended sentences or fines in cases where much more child pornography was involved and where credit cards had been used. Where the offence is at the lower levels of seriousness, there is no suggestion of sharing or distributing images, the accused is cooperative and it is a first offence, the option of a suspended sentence should at least be considered. Finally, it should be recalled that the defendant will be placed on the register of sex offenders.”

*The People (Director of Public Prosecutions) v. Smith*

133. The case of *The People (Director of Public Prosecutions) v. Smith* [2008] 10 JIC 2403 involved a severity appeal against a sentence of 3 years’ imprisonment with two years post- release supervision in respect of a single count of possession of child pornography contrary to s. 6 of the Act of 1998, an offence carrying a maximum penalty of 5 years’ imprisonment. The appellant was addicted to child pornography and the charge preferred covered c.15,000 images of children in various states of undress and involving what was described in the judgment as “some fairly graphic sexual imagery and indeed showing some children engaging in sexual acts of one sort or another”.

134. The appellant had pleaded guilty, was a single man in his mid-40’s, had no previous convictions and had a good work record. The Court of Criminal Appeal felt that it was an important circumstance that he was not part of any paedophile ring, nor had he made any effort to contact any of the children in the images he possessed. An aggravating factor was that he had used his employer’s computer facilities to download the images, and this had been a breach of trust. The appellant had not been immediately co-operative and, indeed, had attempted to destroy the incriminating evidence. There had been a medical report before the sentencing court at first instance from a Consultant Forensic Psychiatrist suggesting a possible link between the appellant’s addictive behaviour and an acquired brain injury in adolescence. The Court of Criminal Appeal considered that the psychiatrist’s report had not been adequately taken into account and felt that if it had been a lesser sentence would have been imposed. In the circumstances the Court of Criminal Appeal effectively halved the sentence by suspending the final 18 months of the 3 year sentence and directed that while serving the custodial element of his sentence the appellant should receive medical attention in accordance with the psychiatrist’s recommendations.

*The People (Director of Public Prosecutions) v. Nagle*

135. The case of *The People (Director of Public Prosecutions) v Nagle* [2009] IECCA 26 involved an undue leniency review of a sentence of 18 months imprisonment imposed for an offence of producing child pornography pursuant to s. 5(1) of the Act of 1998, with a count of possession of child pornography contrary to s.6 of the Act of 1998 and a count of using a child for the purposes of sexual exploitation being taken into consideration. The possession offence carried a maximum penalty of 5 years imprisonment, whereas the production and sexual exploitation offences carried maximum sentences of 14 years imprisonment. The respondent had pleaded guilty and it was accepted that the production in question was for his own purposes and not for any commercial purpose. The victim was a girl of 15 years and 9 months. Her mother was a friend of the respondent who had asked various of her friends, including the respondent, to telephone the victim to congratulate her on her Intermediate Certificate results. The respondent did so and used the opportunity to arrange a meeting with the victim, at which he plied her with alcohol, and gave her a cannabis joint to smoke, before engaging in sexual activity with her, which he video recorded. The recording captured the respondent performing oral sex on the victim and her performing oral sex on him, and a great deal of the footage was focussed on the child’s genitalia, as well as showing her naked, smoking, drinking and clearly drunk. It also showed the respondent penetrating her with a bottle, with a spoon and with his thumb, and showed the victim showering.

136. The Court of Criminal Appeal stated that what it was concerned with was not the acts that were perpetrated but the acts that were portrayed on the recording. The respondent was 45, married but with eight children from a number of relationships. He claimed to have no memory of what had occurred, had expressed neither apology nor remorse, but rather had sought to offer drink as the explanation for his absence of memory. He was an alcoholic and had other health issues, both physical and mental.

137. In the Court’s view the sentence imposed at first instance was unduly lenient. It said the degree of degradation, the advantage taken of the child, the giving of drink and drugs to the child, all in the context of what he proposed to do made it a most serious offence, meriting a sentence, absent other factors of at least seven years. The Court nominated seven years as the headline sentence, but suspended the final three years to take account of the guilty plea and other mitigating factors.

*The People (Director of Public Prosecutions) v. O’Byrne*

138. The case of *The People (Director of Public Prosecutions) v O’Byrne* [2013] IECCA 93 concerned a severity appeal in a case of possession of child pornography contrary to s. 6 of the Act of 1998, for which he received a sentence of 3 years imprisonment in circumstances where the maximum potential penalty is 5 years imprisonment.

139. The circumstances were that, on the basis of intelligence received, Gardaí searched the appellant’s flat pursuant to a warrant. There they found computer equipment. On subsequent examination it was found to contain 15,000 images and of those 3,200 video clips and movies were classified as child pornography. There was a sophisticated system in place for the obtaining of those images utilising what was described as an eMule software programme which ran in the background of the computer using peer to peer technology to search for images and download them to a hard drive. The appellant would later access the images, particularly when he had been drinking. He had been carrying out this activity for two years before he was apprehended.

140. Many of the images obtained were ranked at either the second highest or possibly the highest level of seriousness on a scale then used to assess the content of child pornography. The acts depicted rape and sexual abuse of children of both sexes carried out both by adults and other children. The acts depicted also involved abnormal sexual activity and elements of sadism. The ages of the children in the images ranged from very young children to early teenagers.

141. The Court of Criminal Appeal observed, *inter alia*, that:

“9. The sentencing of persons guilty of an offence of possession of child pornography is not a well worn or well lit path where experience has built up a significant consensus on the appropriate sentences. On the contrary, it is to venture into a relatively new and murky area where knowledge is still developing and where there are few enough landmarks. Child pornography is both baffling and revolting to the general public. Even though the images may be viewed in private, those images can rarely if ever be created without some child somewhere being violated, often unspeakably. Furthermore, the legislature is fully entitled to consider that the personality traits revealed by accessing child pornography are not healthy and that persons viewing such material should not be encouraged to indulge the urges and appetites it excites. It is however difficult to evaluate different cases. The technology, while ubiquitous, is little understood. There are strident demands that the internet should not be subject to any restriction. There is an increasing recognition that some offenders may themselves be damaged. Others may reveal a chilling lack of awareness that their activities are wrong. It is increasingly clear that there is no single template for all cases.”

142. The court acknowledged that valuable guidance was to be obtained from the case of *The People (Director of Public Prosecutions) v. Loving* (reviewed above). The court noted that in giving judgment for the Court of Criminal Appeal in that case, Fennelly J. had observed that in the case of a first offence the court should at least consider the possibility of a wholly suspended sentence. O’Donnell J. observed in turn (in *O’ Byrne*) that:

“It is worth elaborating upon this point. Since the offence of possession of child pornography is often the reflection of the proclivities and appetites of the offender, then any professional assessment of the offender’s attitude and state of mind is valuable. In particular, any assessment of the extent to which the offender genuinely recognises that his conduct is wrong, and is willing to engage in appropriate therapy and treatment, and does so, may be important. In such circumstances, it may be appropriate to consider suspending a portion of the sentence or imposing a supervision order under the Sex offenders Act 2001 (hereinafter “the 2001 Act”) on terms which would require the offender to engage both with probation services, and any treatment recommended and supervised by them. This approach is arguably consistent with the fact that the 2001 Act specifically requires a sentencing court to consider the possibility of imposing a supervision order.”

In the *O’Byrne* case the focus of the appeal was not on how gravity had been assessed at first instance (although the appellant did maintain that gravity had been over -assessed) but rather whether insufficient regard was paid to the available mitigating circumstances. However, for the purposes of this review it may be noted that the Court of Criminal Appeal observed that the sentencing judge had been “*quite correct to consider that this was a case which in terms of the constituents of the offence disclosed by the evidence was at the upper end of the scale.*” The appeal was ultimately allowed by the Court of Criminal Appeal on the basis that the sentencing process at first instance did not sufficiently address the extensive mitigating factors outlined in reports submitted on behalf of the appellant. The court then proceeded to a resentencing and the rigour with which the Court of Criminal Appeal approached that is instructive.

143. The court noted that the nature of the images, their quantity, the way they were obtained and/or were retained, were all relevant in assessing the intrinsic seriousness of the offence and in attempting to place it on the spectrum of possible offences under section 6 of the Act of 1998. O’Donnell J. noted:

“Here the images were themselves of a very serious nature. On the scale which is now broadly accepted, they included images up to the second highest level and also perhaps the highest level of seriousness. Some of the images involved acts outside the bounds of what would be normal intercourse between consenting adults, showed intercourse and penetrative sex between adults and children, and included the rape and sexual abuse of female and male children by adults and other children and included elements of sadism.”

144. The court observed that an assessment of such images on such a scale was a very important component in any child pornography case. Not only did it mean that *“at some level children were subjected to this horrifying level of violation, but it also gave a real and practical insight into the attitude of an accused who would obtain and retain, view and review, such images.”* The court noted that a very significant quantity of images was involved and that a sophisticated system had been set up to obtain these images. Accordingly, this was not a case in which an unhealthy curiosity coupled with the limited understanding of the internet led someone unwittingly through levels of adult pornography and onto sites providing images of child pornography. It was a central and starkly chilling feature of this case that these images had been obtained by the use of software designed for that purpose. It was acknowledged that use of this technology did not involve any acquisition, purchase, commercialisation or onward distribution of the images concerned. Neither was this a case in which the images were shown by the appellant to anyone else, nor were they used in connection with any other sexual offence. The court opined that it was important that the court be given a clear picture of the technology involved and what the accused knew of it. The court also indicated that the length of time over which the images were accessed was itself significant. In this case the activities took place over at least two years with the eMule software program set up to run continuously in the background. The material downloaded could then be accessed and reviewed by the appellant when desired. The court considered that this was more serious than individual instances of temptation leading to search, accessing and downloading.

145. In the view of the court, bad though the case was, it was possible to conceive of worse cases, e.g., cases involving previous convictions for the same or similar type of offending, cases involving an element of commerciality and payment for the images, or commissioning or circulation, or cases involving images of more concentrated depravity and the use of such images in cases of sexual contact or grooming or sexualization of children. The court considered that this was a serious case and that it would have merited a pre-mitigation sentence in the region of four years imprisonment. In the circumstances of the case the court was prepared, following a very detailed analysis of the mitigating circumstances in the case, which it is unnecessary for our purposes to review, to reduce the sentence of 3 years’ imprisonment to one of 2 years’ imprisonment, while at the same time making a post-release supervision order pursuant to s.29 of the Sex Offenders Act 2001.

146. In doing so, O’Donnell J. commented, in conclusion, that:

28 “Notwithstanding his plea of guilty and absence of relevant prior convictions, this is on any view, a serious case. It deserved an immediate custodial sentence and the judge was right to impose one. It was a more serious offence than that involved in the Director of Public Prosecutions v. Loving case. However, it can be said that there are more extenuating circumstances present in this case. The appellant’s early life and experiences provide some explanation (but not an excuse) for the mindset which allowed him to commit the offences. Of most relevance in this regard is the significant evidence that the appellant had sought to address his addiction to alcohol and drugs, and with apparent success, between 2009 and the date of his sentence. It is also very important that he is assessed at being at low risk of re-offending so long as he maintains such sobriety and that he had no innate morbid sexual interest in children. The appellant must be given credit for the significant efforts he has made to address the addictions and mindsets which led him to commit this crime. A court must take account of the fact that the fact of conviction for this offence, the fact of a significant term of imprisonment, and finally the fact that such conviction carries with it the consequence of registration as a sex offender under the 2001 Act, are all heavy burdens which the appellant must bear even after release from prison and which must necessarily, and understandably, make it more difficult for him to obtain employment and to integrate himself in society. In the circumstances of this case the court considers a sentence of three years imprisonment is excessive, and did not give sufficient weight to the mitigating factors, nor did it give sufficient consideration to seeking to insure that on his release from prison, the appellant would have the incentive to continue to attend appropriate courses and avoid behaviour which would put him at risk of re-offending. The court recognises that in many cases which are effectively, first offences, a conviction on a plea of guilty to a charge under s.6, would often lead to a suspended sentence or a very short custodial sentence. However in a number of cases custodial sentences have been imposed precisely because of the nature of the images involved, and the degree of organisation and sophistication in seeking to obtain the images. Those features were present here and made this a serious offence.”

*The People (Director of Public Prosecutions) v. Hussain*

147. The case of *The People (Director of Public Prosecutions) v. Hussain* [2015] IECA 22 was a case involving a severity appeal against a sentence imposed in respect of the offence of meeting a child for the purposes of sexual exploitation contrary to s. 3(2A) of the Act of 1998 as inserted by s. 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007. Nothing turns on it, but s. 3(2A) of the Act of 1998 was later repealed by the Criminal Law (Sexual Offences) Act 2017. The case is arguably anomalous in terms of the review currently being conducted because it is not specifically concerned with child pornography, although as we shall see the current definition of sexual exploitation includes some forms of offending behaviour involving child pornography. It has been included because it is included in the applicant’s schedule of comparators, but it must ultimately be approached with the caveat that it is not actually concerned with child pornography. The sentence appealed against was one of four years imprisonment, and the potential maximum penalty was imprisonment for a term not exceeding 14 years.

148. The victim was a girl aged 13 years and 9½ months, who was living in residential care, although she had frequent contact with her mother. She and a female friend of approximately the same age were walking along a road on their own when the appellant, aged 29, who was driving his car accompanied by a male friend, stopped, engaged the girls in conversation and enquired if they were prostitutes. The girls were persuaded to get into the car and, having represented themselves as being 19, spent the rest of that evening with the two men. On the following day the victim sent a text message to the appellant suggesting that they should meet up again in the village beside the residence. Subsequently the victim’s mother confiscated her daughter’s phone. The appellant called that phone several times while it was in the possession of the victim’s mother, and spoke to the victim’s mother who apprised him, *inter alia*, that her daughter was only 13. Subsequently the victim recovered her mobile phone, unbeknownst to her mother, and exchanged several text messages with the appellant. She later told her mother that she had recovered her phone and returned it again to her mother’s custody. The appellant subsequently made telephone contact with the victim, and on this occasion the mother who was present recorded the conversation. While there was some discussion about sex and sexual matters in that telephone call, the appellant did not commit himself to anything. However, the appellant did agree to meet up with the victim later that evening, and the Gardaí were then contacted by the victim and her mother. Gardaí later intercepted the appellant at the intended rendezvous point.

149. The appellant pleaded guilty to the s.3(2A) offence. He had just one previous conviction for a minor road traffic offence, had a good work record and had provided positive testimonials. The sentencing judge at first instance had characterised the offence as *“falling within the middle range, that is six to eight years”*, before discounting for mitigation. The Court of Appeal considered the ingredients of the s. 3(2A) offence before commenting (at para 55) that:

“Any assessment of the gravity of the offence of which the appellant was convicted and the appropriate sentence before taking into account the mitigating factors requires an examination of the admitted facts at the sentencing hearing in relation to the above ingredients of the offence by reference to the spectrum of offences under s. 3(2A) for which the Oireachtas has prescribed a maximum penalty of fourteen years and no minimum penalty”

150. The Court of Appeal considered that the sentencing judge’s consideration and analysis of the evidence had not been sufficiently rigorous. Notwithstanding that it was an intrinsically serious offence which was gravely wrong, the relative gravity of the case by reference to the facts admitted or proved in the context of the full spectrum of potential offences contrary to s. 3(2A) of the Act of 1998, particularly by reference to the wide range of matters defined as constituting sexual exploitation in s. 3(5), had received insufficient consideration. The evidence had been that the appellant “*invited*” the child which was “*distinct from inducing or coercing the child*”.

151. In re-sentencing the appellant, the Court of Appeal indicated (in a separate judgment [2015] IECA 187) that the gravity of the appellant’s offending conduct was “*at the lower end of the spectrum*”, albeit that “*no matter where it is placed*” it remained “*inherently a serious offence*”. The Court determined that a sentence of four years’ imprisonment was appropriate before mitigation, and ultimately imposed that sentence with the final nine months suspended to reflect mitigation.

*The People (Director of Public Prosecutions) v. P.M.*

152. The case of *The People (Director of Public Prosecutions) v. P.M*. [2016] IECA 49 was also a severity appeal, involving an appellant who had been convicted by a jury of (a) encouraging or knowingly facilitating the production of child pornography, contrary to s. 5 of the Act of 1998, (b) sexual exploitation of a child contrary to s.3 of the Act of 1998, as substituted by s. 3(2) of the Criminal Law (Human Trafficking) Act 2008 (and as amended by s. 6 of the Criminal Law (Sexual Offences)(Amendment) Act 2007), and (c) child cruelty contrary to s. 246 of the Children Act 2001; for which he had received sentences of 5 years’ imprisonment with the last year suspended both for the facilitation offence and for the sexual exploitation offence, and a sentence of 3 years imprisonment for the child cruelty offence. Both the facilitation offence and the sexual exploitation offence had carried potential maximum penalties of 14 year’s imprisonment, while the child cruelty offence had carried the potential maximum penalty of 7 years’ imprisonment.

153. The case arose out of the video-recording, using a phone camera, by the mother of a little girl, of the girl’s involvement in sexual activity with the appellant, who was the girl’s father, in a bedroom in the child’s home. The detailed facts of the case were set out in this court’s earlier judgment in the same case involving the appellant’s conviction appeal, the neutral citation for which is [2015] IECA 325.

154. The Court of Appeal quashed the sentences imposed at first instance in circumstances where it identified an error of judgment on the part of the sentencing judge in discounting the existence of any remorse on the part of the appellant, as the Court of Appeal was satisfied that it was against the weight of the evidence and remorse was a relevant mitigating factor that the appellant had been entitled to have taken into account.

155. In the context of a re-sentencing the Court of Appeal identified five years’ imprisonment as being the appropriate headline sentence for the facilitation and sexual exploitation offences, respectively, and discounted from that by eighteen months to reflect mitigation and suspended a further 12 months to incentivise rehabilitation. A somewhat lesser sentence was also imposed for the child cruelty offence, the details of which it is unnecessary to set out in the context of this review.

*The People (Director of Public Prosecutions) v. J.D.*

156. The case of *The People (Director of Public Prosecutions) v. J.D.* [2015] IECA 231 involved an appeal against the severity of a sentence of eleven years imprisonment, the final two years of which were suspended, in respect of nineteen offences involving sexual assault, possession of child pornography and allowing a child to be used for the production of child pornography. The offences had been committed over a period of approximately twelve months. The facts of the case are set out as follows in the Court of Appeal’s judgment:

“4. On 3rd April 2011, the appellant’s wife, and the mother of the victim, discovered a number of pornographic photographs of her daughter on a digital camera in the hallway of the family home. Gardai were alerted and the appellant was arrested later on the same day. In the course of a search of the family home, a number of computer storage devices were found containing images of a pornographic nature depicting the appellant’s young daughter. It was also discovered that the attic of the house had been converted into what was referred to as a “dress up room” containing a number of sexualised costumes. In the course of the search of the computer storage devices 1,150 still images and 74 movie images focussing on the genital area of the young victim were found, and a number of these also depicted the appellant. The appellant immediately accepted that he had constructed sexualised scenes with his daughter but sought to maintain that the victim was a willing participant, stating that he did not see anything wrong with what had occurred. The appellant identified himself in various movie images simulating intercourse with his daughter. He denied any intention or desire to have intercourse, stating that what had occurred was simply ‘a bit of fun’.”

157. The mitigating factors in the case comprised a relatively late plea of guilty, an absence of previous convictions, a health difficulty in the form of diabetes, and the fact that the appellant’s home was at risk of repossession.

158. The appeal focused on the assessment of gravity, with the appellant contending that the sentence imposed was too severe and that it was out of kilter with the small number of comparators that were opened to the court.

159. The appeal was allowed, to a limited extent. The Court of Appeal said that it was impossible to describe this case as anything but extremely serious. It considered that against a background of a maximum sentence of fourteen years imprisonment, a sentence of 11 years, albeit with 2 years of it suspended, was indicative that the sentencing judge had placed the offending at the higher end of the spectrum although he had expressed the view that “*it was not the most serious that these courts unfortunately have to deal with*.” The sentencing judge had rightly observed that an aggravating factor was the photographing and recording of the sexual abuse perpetrated by the appellant on his daughter. In the Court of Appeal’s view, the sentence imposed by the court below would have been appropriate to an offence “*at the very highest level in terms of gravity*”, but that the offending in this case was “*not quite at that level*”. Nevertheless, it involved offending at “*a very serious level*” and required a significant custodial sentence. Ultimately the court substituted a sentence of 9 years imprisonment with the final 2 years suspended.

*The People (Director of Public Prosecutions) v. D.C.*

160. The case of *The People (Director of Public Prosecutions) v. D.C.* [2015] IECA 256 was a case involving sexual exploitation of a child by inducing him to engage and participate in a sexually indecent or obscene act, contrary to s.3(2) of the Act of 1998 (as amended by s.6 of the Criminal Law (Sexual Offences) (Amendment) Act, 2007) as substituted by s.3 (2) of the Criminal Law (Human Trafficking) Act, 2008. It was a severity appeal against a sentence of six years’ imprisonment, with the final two years thereof suspended, imposed at first instance. The maximum penalty for such an offence was potentially life imprisonment.

161. Briefly, the circumstances were that the victim was a 15-year-old boy with special needs. He came into contact with the appellant, a 40-year-old man, through an adult dating website. The appellant engaged in a grooming exercise via text messages initially before arranging to meet up with the victim. The assignation was to happen during a school lunch break, which the appellant complained would be too short, so the victim arranged to get off from school early on a pretext to extend the lunch break. The appellant then took him for a drive during which he molested the victim, opening the victim’s trousers while driving his car and fondling the victim’s penis. He also persuaded the victim to touch his (the appellant’s) penis through his trousers. The appellant then returned the victim to school. The molestation was not more serious due to some resistance by the victim, the victim’s failure to turn up to a pre-arranged second meeting, and the victim contacting Childline after receiving some further messages from the appellant.

162. The Court of Appeal found the sentence imposed at first instance to have been too severe, stating:

“The potential penalties in this case ranged from non-custodial options up to life imprisonment. That such a wide range of potential penalties was available to the sentencing judge is itself reflective of the fact that sexual exploitation of a child can take a myriad of forms, and cover a wide range of seriousness.”

163. The Court then set out the statutory definition of the offence, and observed:

“21. Accordingly, the potential life sentence available covers cases that could range from non-contact voyeuristic conduct such as the opportunistic photographing of a child in a state of undress, engaged in for the purposes of producing a single child pornographic image, not for commercial use or dissemination, taken for the offender’s personal sexual gratification only, and involving a single victim who might not even be aware that he or she was being so exploited; to forms of exploitation involving grossly depraved and humiliating physical sexual conduct, associated with gratuitous physical or mental violence, torture, or degradation and causing profound suffering to the child or children concerned, involving outrages repeated many times, involving widespread dissemination, involving major commercial gain, and perhaps involving many concurrent victims.

22. The form of sexual exploitation charged in the present case was inviting, inducing or coercing the child concerned to engage or participate in a sexual, indecent or obscene act. The sentencing judge assessed it as falling “in the middle to slightly higher range” and determined upon a sentence of six years imprisonment before application of mitigating factors. While it cannot be gainsaid that there were some serious aspects to the present case, the Court considers that this was not a case that fell on the higher side of the notional mid line in terms of the range available. One of the difficulties that always arises in any case where a potential maximum sentence is life imprisonment is determining where in fact any notional mid line, or for that matter any other relative bench mark, is to be located. Be that as it may, it is sufficient for the purposes of the present case for the Court to express the view that on the facts of the present case the trial judge’s starting point of six years was simply too high in our judgment.”

164. The Court reasoned that the offending conduct, though significantly culpable in terms of the age disparity involved, the grooming involved, the vulnerability of the victim and the nature of acts planned or envisaged though not all realised, at the same time involved only one victim, involved only one actual meeting and such sexual contact as was actually engaged in did not involve physical violence, or gross humiliation or degradation, or anything penetrative. In addition, what was engaged in was engaged in for personal sexual gratification, and not for any form of commercial gain. Moreover, the victim had not been physically harmed, although the Court was prepared to infer that some psychological harm had been done notwithstanding the absence of a psychological report. In the circumstances the Court of Appeal determined that four years imprisonment was the appropriate headline sentence and imposed a sentence of four years but suspended two years of it to reflect mitigating circumstances and incentivise rehabilitation.

*The People (Director of Public Prosecutions) v. Arkins*

165. The case of *The People (Director of Public Prosecutions) v. Arkins* [2018] IECA 171 concerned an undue leniency review in respect of sentences on two bills of indictment for which he had received sentences to be served concurrently. The first concerned a sentence of four years imprisonment on a count of possession of child pornography for the purpose of distributing, publishing, exporting, selling or otherwise showing it, contrary to s. 5(1)(e) of the Act of 1998; the second concerned a sentence of three years imprisonment on a count of possession of child pornography contrary to s. 6 of the Act of 1998. The final eighteen months of each sentence was suspended for a period of three years post release resulting in a net custodial term of two and a half years. Unfortunately, the Court of Appeal judgment does not record what headline sentence was determined upon at first instance in either case, but does record that at the sentencing review the applicant had argued that there ought to have been consecutive sentences.

166. The s.5(1)(e) offence came to light after the respondent inadvertently transferred a number of images of naked boys onto a friend’s computer. The matter was reported to the gardaí. The respondent’s home was searched pursuant to a search warrant in the course of which a laptop was seized. The laptop was shown to include images of child pornography being seventy video clips of which sixty-five included young boys engaged in sexual activity with an adult or another child. There were a smaller number of still images. When later arrested, the respondent made full and frank admissions and confirmed that he had shared the images in movie files with third parties. He pleaded guilty at an early stage.

167. The circumstances of the s. 6 offence were that the respondent’s home was searched under warrant after an image of concern had been uploaded to a Facebook page and was traced to the respondent. Various multi- media devices, including an Apple iPhone and iPad were seized for examination. The respondent co-operated fully with the gardaí in relation to aspects of their investigation including the provision of passwords. 1,108 images were found on a Drop Box folder, together with 2 movie files. 505 images were of young boys under the age of fifteen years engaged in sexual activity, 674 of them depicted young boys under the age of fifteen years with their genital or anal area exposed and visible, and 2 movie files depicted young boys under the age of the ten engaged in sexual activity. 179 relevant images were located on the Apple iPhone, on which 89 depicted predominantly young boys under the age of fifteen engaged in sexual activity and 90 depicted young boys under the age of fifteen with their genital and anal area visible. The Apple iPad revealed 12,000 images and 8 movie files. Approximately one third depicted young boys under the age of fifteen involved in sexual activity and two thirds depicted young boys under the age of fifteen with their genital and anal area exposed. The movie files depicted young boys under the age of fifteen engaged in sexual activity. The respondent was co-operative and pleaded at an early stage.

168. Apart from the co-operation and pleas, mitigating and personal circumstances taken into account were the fact that the respondent was “addicted” to child pornography, had previously sought therapy and had engaged with that but had unfortunately re-offended.

169. The Court of Appeal considered that the sentences imposed while undoubtedly lenient were not unduly lenient. While they were “*less than the members of this court might have imposed at first instanc*e”, they were nevertheless within the limits of the discretion available to the learned sentencing judge having regard to the unusual features in the case and the extent of the admissions and cooperation provided by the respondent. The contention that recourse should have been had at first instance to consecutive sentencing was not specifically commented upon.

*The People (Director of Public Prosecutions) v. McGinty*

170. The case of *The People (Director of Public Prosecutions) v. McGinty* [2019] IECA 27 was an undue leniency review in respect of a sentence of 18 months’ imprisonment on a count of possession of child pornography contrary to s. 6 of the Act of 1998, and a sentence of 2½ years’ imprisonment on a count of distribution of child pornography contrary to s. 5(1) of the same Act. Both sentences had been suspended in their entirety. The respondent’s home had been searched under warrant during which two computers were seized, containing a total of 260 images and 4 video files which had been shared from the devices on a number of occasions.

171. One device contained 148 of the images, 82 of which involved children under the age of seventeen engaged in oral or penetrative sexual activity. 20 of these, in turn, involved pre-adolescent girls. The remaining images were pictures of boys and girls with exposed genital areas. The video files also found on it showed girls under seventeen stripping and performing sexual acts. A fifth video which had been deleted had a title suggestive of pornographic images of a seven-year old child.

172. The other device had 112 images, 25 of which were of pre-adolescent girls engaged in oral sex with adult males; 3 of these involved infants. The remaining 85 images were of the exposed genitalia of girls under the age of seventeen. Forensic analysis showed that some of the images had been shared. Further, two Skype chats were recorded, and these were of a sexual nature. In these the respondent discussed his own sexual experience with someone who appeared to be a thirteen-year old child and enquired of another child of apparently fourteen years as to the sexual acts in which they would engage if they met. In the latter the respondent also made a request to have sex with the child’s nine-year old sister.

173. In overview, the material had involved images of over 100 children under 17 years of age engaged in penetrative sex, 42 images involved pre-teens engaging in penetrative sex, and three of those images involved infants performing oral sex.

174. The respondent, aged 45, was a nurse by profession but was suspended by his employer when the offences came to light and was at risk of losing his job. He had entered early pleas of guilty, had no previous convictions, was accepted as being remorseful, and had sought out treatment and had undergone extensive therapy. The risk of re-offending was assessed as being low. There had also been considerable delay between detection of the offences and the sentencing process, none of which was attributable to the accused.

175. The Court of Appeal considered that the images varied between categories one and four as set out in the judgment in *R v. Oliver*. Indeed, as the court observed, the only category of images absent were those involving sadism or bestiality. The court expressed the view that the nature and extent of the material was such that a custodial sentence was always likely. On the other hand, there were factors present which weighed in favour of the respondent. The court considered that the sentence imposed was undoubtedly lenient. The DPP had pressed the case that it was unduly lenient on the basis that it had failed to have adequate regard to the principle of general deterrence. The Court of Appeal agreed that cases of this nature were ones where the question of general deterrence must weigh heavily. Ultimately, however, the court concluded that, while the decision to suspend fell, in the circumstances of that case, at the very outer limit of the margin, the sentence was not unduly lenient.

*The People (Director of Public Prosecutions) v. Lordan*

176. The case of *The People (Director of Public Prosecutions) v. Lordan* [2019] IECA 136 involved an undue leniency review in respect of a sentence of three years imprisonment that was suspended in its entirety in respect of possession of child pornography under s. 6 of the Act of 1998. An old mobile phone belonging to the respondent was voluntarily handed over by the respondent to gardaí in the context of a garda investigation into suspected possession of child pornography and in circumstances where the gardaí were on their way to the respondent’s home with the intention of searching it on foot of a search warrant. The mobile phone, when examined, was found to contain 1,027 images in all, comprising 638 images of child nudity where children between three and four and twelve and thirteen years of age were seen to have exposed genitalia; 368 images depicting children of three or four years of age up to thirteen or fourteen years of age, both male and female, engaged in sexual activity with an adult and/or other children; and 3 images depicting a child of seven to eight years engaged in sexual activity with an animal.

177. The judgment referred to a five level or tiered categorisation of the images in ascending order of gravity, involving images:

1. Depicting erotic posing with no sexual activity;

2. Sexual activity between children solo (sic) or masturbation as a child;

3. Non-penetrative sexual activity between adults and children;

4. Penetrative sexual activity between children and adults;

5. Sadism or bestiality.

178. This was in fact the COPINE scale, as adopted and amended, by Rose L.J in the Court of Appeal (Criminal Division) in England and Wales. Although the judgment of McCarthy J., who gave judgment for this Court is silent on the issue, it is surmised that gardaí may have used the amended COPINE scale to categorise the images for the purpose of presenting the evidence to the sentencing judge at first instance. At any rate it was said that “*three of these images fall within the most serious category involving sadism or bestiality, six hundred and thirty-eight fall into the first of them and three hundred and eighty-six fall within the third.*”

179. The respondent had accessed the material over a period of two years. The mitigating and personal circumstances taken into account were that the respondent had pleaded guilty and had returned from Spain to meet the case, had no previous convictions, had certain psychological issues including a social anxiety disorder (but was said by his psychologist not to have paedophile tendencies), had undergone psychotherapy, had a physical medical condition for which he required surgery, had been co-operative, had a supportive family, had been exposed to pornography himself at an early age, and had been bullied and socially isolated at school.

180. The Court of Appeal found the sentence to have been unduly lenient because it had been suspended in its entirety. They said:

“It seems to us that having regard to the nature of the images and the consequent severity of the offence, together with the importance of the necessity of general deterrence this is one of those cases where a non - custodial sentence was not appropriate notwithstanding the mitigating factors”

181. The Court distinguished *McGinty* on the basis that in that case the principal factor which motivated the court to suspend the sentence was the long, if not inordinate, delay between the time when the offence occurred and its ultimate disposition as well, of course, as the fact that the images did not extend to those in the most serious category. The sentence of three years imprisonment was re-imposed but with the final two years thereof suspended.

*The People (Director of Public Prosecutions) v. Watters*

182. *The People (Director of Public Prosecutions) v. Watters* [2019] IECA 191 was concerned with a severity appeal against a sentence of five years imprisonment, with the final year suspended, imposed in respect of an offence of possession of child pornography, consecutive to two concurrent sentences of fifteen months and two years’ imprisonment, respectively, in respect of committing an indecent act in public.

183. The latter offences had involved, in one instance, approaching a group of primary schoolgirls on Francis Street in Dublin City while holding his penis which was sticking out through the fly of his pants; and in the other instance presenting himself with his penis out to a 10-year-old girl and her friend. Ignoring consecutivity, the sentence of two years imposed at first instance for the more serious of these two offences was the maximum available.

184. So far as the possession of child pornography aspect is concerned, that came to light when gardaí came upon the appellant in Dublin city centre. They followed him into an Internet café on Middle Abbey Street in Dublin. With the assistance of the café manager, gardaí were able to establish that the appellant was accessing social media dating sites and was moving between those sites and sites showing photographs of preteen boys and girls, with girls in bikinis. When he left the premises, gardaí approached him and spoke to him and he produced a USB stick to them. In all, there were some 422 images on that stick, of which 23 were of concern. Seventeen showed images of boys and girls engaged in sexual activity with other children and with adults, and six showed children with their genitals exposed. For this offence the headline sentence of five years determined upon at first instance, and mitigated only by the suspension of 12 months, meant that the sentencing judge’s starting point was at the maximum permitted by statute.

185. In terms of the appellant’s background and personal circumstances, he was 43 years of age. He had not been in any trouble until he reached 32 years of age. Up to that point, he had lived with his parents, but thereafter, he had accumulated six previous convictions, of which three were relevant convictions. In 2008, he had received a two-and-a-half-year sentence in respect of the offence of possession of child pornography. That sentence was initially suspended. However, it was activated in 2009. He then received a sentence of three years imprisonment in 2010 in respect of a similar offence; and a sentence of four years, with the final 12 months of the sentence suspended, for yet another similar offence in 2012. Again, that was a sentence in respect of the offence of possession of child pornography. That matter, too, was re-entered in December 2014 when he was in breach of several conditions of the suspension, including conditions which restricted him from entering Internet cafes. The Francis Street public indecency offences were committed some eight or nine days before the reactivation application was due to be dealt with by the courts. The appellant had pleaded guilty at an early stage to all the offences the subject matter of the appeal.

186. At the sentence hearing, there was a psychologist’s report before the Court. This disclosed that the appellant suffered from significant cognitive deficits. His thinking and reasoning ability were exceeded by 97% of adults of his age; his general cognitive ability was in the borderline range of intellectual functioning and the report queried whether he might have ASD (Autism Spectrum Disorder).

187. The Court of Appeal allowed the appeal saying that it had not been appropriate in the circumstances for the sentencing judge to have started at the maximum available sentence for either type of offence. Moreover, notwithstanding that the appellant had a significant prior record his offending “*had not reached the stage where the entry of a plea of guilty would not inure to his benefit*”. The Court substituted sentences of 12 months and 20 months, to be served concurrently for the public indecency offences. It then went to say:

“So far as the child pornography offending is concerned, the striking factor, and it must be said highly unusual factor, is the presence of directly relevant previous convictions. It is the case that the quantity and nature of the material located was not such that a maximum starting point would ordinarily be considered, and even in the particular circumstances of this appellant, the Court’s view is that the maximum starting point was not the place to begin. In the Court’s view, a more appropriate starting point would be one of four years imprisonment, and in respect of that sentence, the Court will suspend 18 months. The child pornography sentence will, as it was in the Circuit Court, be consecutive to the public indecency offence.”

*The People (Director of Public Prosecutions) v. S.L.*

188. The most recent case that requires consideration in the context of this review is the decision of the Court of Appeal in *The People (Director of Public Prosecutions) v. S.L.* [2021] IECA 222. This case involved a mix of sexual offences, including charges in respect of both the production and distribution of child pornography contrary to s.5 of the Act of 1998, and possession of child pornography contrary to s. 6 of the Act of 1998. The facts were succinctly stated by Kennedy J. who gave judgment for the Court of Appeal, as follows:

2. On the 11th April 2016, members of An Garda Síochána executed a search warrant in relation to an individual residing in Co. Donegal. Among the items seized was a tablet which contained communications with another individual who was subsequently identified as the appellant. These communications included images and video recordings shared by the appellant which depicted the injured party in the bathroom. The appellant had filmed the injured party by means of a spy camera which he had hidden in the bathroom for this purpose. Skype text conversations relating to pornographic material followed, the nature of which was obscene and depraved.

3. On foot of this discovery a search warrant was issued in respect of the appellant’s house and a further quantity of child pornography (which depicted persons other than the injured party) was discovered and forms the basis of the possession of child pornography offence.

4. Following the search, the injured party was interviewed by a specialist interviewer and the allegation regarding sexual assault came to light. The injured party described an occasion on which the appellant, who was in a relationship with the injured party’s mother and resided with her, was home alone with the injured party. Under the pretext of treating the injured party’s eczema, he touched the injured party inappropriately along the chest and bottom area. This occurred when the injured party was between the ages of 11 and 12 and forms the basis of the count concerning sexual assault.

5. Subsequent to that assault, the appellant obtained and placed a hidden camera in the shared bathroom of the house and filmed the injured party in the bathroom and while undressing to take a shower. The production of those recordings and their subsequent distribution form the basis of the remaining two counts to which the appellant pleaded guilty.”

189. There was evidence to the effect that there was an age differential of thirty years approximately between the appellant and his victim. The appellant had no previous convictions. Prior to entering a relationship with the victim’s mother, he had been married and had had a child with his estranged wife. Following the detection of these offences the appellant entered a therapy program with One in Four and had further participated in an after-care program. Moreover, he had also sought out and was attending counselling with a forensic psychotherapist, who had produced a report for the sentencing court. That report indicated that the appellant was assessed as being at low risk of re-offending, having been assessed at moderate risk previously in 2016. The sentencing judge assessed the sexual assault as involving offending at the lower end of the mid-range, identified a headline sentence of four years, and ultimately imposed a post-mitigation sentence of three years for that offence. With regard to the s.5 offences she treated these as a continuation of the sexual abuse of the victim. As Kennedy J. recounts:

In respect of both counts of production and distribution the sentencing judge identified the aggravating factors to be the relationship between the appellant and the victim, the planning and the premeditation that took place, the active involvement and the nature of the production. The Court also referred to Skype conversations between the appellant and a third party which accompanied the distribution of the pornographic material. These conversations highlighted the abhorrent nature of the offending, violating a young child, for the perverse sexual gratification of the appellant. The offending was placed at the upper mid-level and headline sentences of nine years were identified.

190. Post mitigation sentences of six years and nine months were imposed at first instance in respect of the counts of production and distribution, to run concurrently *inter se* and with the sentence for the sexual assault. A count of possession of child pornography contrary to s. 6 of the Act of 1998 was taken into consideration, and the final nine months of the sentence for the s.5 offences were suspended on terms to incentivise continued efforts at rehabilitation. The appellant was also placed on the Sex Offenders Register.

On appeal the appellant maintained both that the headline sentences for the s.5 offences had been too high, and that there had been insufficient discounting for mitigation. The Court of Appeal rejected the latter argument. However, with respect to the former, having noted the approach to the assessment of gravity adopted in *R v. Oliver*, Kennedy J observed:

“28. Turning to the facts of this case, insofar as the production and distribution offences are concerned, we do not intend to elaborate on the nature of the material other than to say that there were four videos, each of which depicted the injured party in the bathroom undressing and/or showering and in respect of whom the appellant was in loco parentis. Factors which must be taken into account in assessing gravity include not only the nature of the images or movies, but also the manner in which the material was generated, and the quantity of the images or videos. In the present case there are a number of aggravating factors present which increase the gravity of the offending and in our view the following are of considerable significance.

29. Firstly, the level of planning and premeditation required in order to film the injured party is a very serious factor. The appellant purchased a spy camera which he then hid in a clock in the bathroom with a view to capturing the victim on camera. His conduct was conniving and deceitful, which of course is hardly surprising given his intention to record his victim in her most private moments.

30. Secondly, we believe the Skype messages are egregious. The nature of the conversations between this appellant and the other individual are depraved and properly described by the judge as ‘obscene and grotesque in the extreme.’ The communications make the most disturbing reading and serve to emphasis the deep depravity of child pornography.

31. Aside from those factors, the victim to this offence was a vulnerable young girl to whom the appellant was in loco parentis. The breach of trust on this basis alone was of a most serious order. In addition, the appellant violated her privacy. The injured party was entitled to feel safe and secure in her own home and was, in particular entitled to feel that she was entirely secure in the privacy of her family bathroom. Understandably, the impact on the injured party is of a really severe order. The appellant’s conduct has caused her to endure appalling pain and suffering. The victim was known to the appellant, he was someone she trusted and the knowledge of how the appellant violated her, must weigh very heavily on her.”

191. The Court noted that two devices had been examined by the gardaí on foot of the search of the appellant’s home. Under one hundred images/movies were found on each device. It was remarked that possession of child pornography is not a victimless crime, and that it involves the abhorrent abuse of vulnerable children regardless of the level of classification. The material related to children aged from 3 to 11 years of age and involved sexually explicit acts. There were also images/movies where genital and anal areas were visible. The Court noted that in this case, the number of images involved was very low and the images were not in the most serious category. However, while not for commercial gain, the images were exchanged between the appellant and another party. In the view of the Court this type of ‘swapping’ of images even without financial gain was significant. However, in this case such swapping was limited to one other individual. It ultimately concluded:

“36. … what sets the case apart and means that it has to be regarded as a very serious case is the fact that the images were created by the use of the spy camera which involved a deliberate and premeditated invasion of the privacy of a child to whom the appellant was in loco parentis and the nature of the communications on Skype. We have examined those communications and do not intend to refer to their content at all given the level of depravity expressed therein. Suffice to say, the content is truly shocking.

37. We are entirely satisfied that the judge was correct to take the view that these factors, together with the other aggravating factors meant that these offences should be regarded as mid-range offences. The real issue is whether the judge was correct in identifying a headline sentence above the mid-point on the range.

38. We are of the view that when we consider the nature of the activity; recording the child while in bathroom or taking a shower and the number of the images, such would not merit a pre-mitigation sentence of nine years, that being in the upper mid-range. However, the aggravating factors bring the assessment of gravity of the offence to the mid-range of sentence, but not to the degree identified by the sentencing judge. Undoubtedly, she was heavily and understandably influenced by the nature of the Skype messaging.”

192. The Court of Appeal in re-sentencing the appellant nominated a headline sentence of seven years’ imprisonment rather than nine year’s imprisonment for the s.5 offences and imposed a post mitigation sentence of five years and six months’ imprisonment before conditionally suspending the final twelve months thereof to reward progress towards rehabilitation to date and to incentivise continued efforts in that regard. The offences of sexual assault and possession of child pornography contrary to s. 6 of the Act of 1998 were taken into consideration. Finally, the Court made a post-release supervision order and confirmed that the appellant remained subject to the Sex Offenders Register.

Some Commentary

Summary of offences under the legislation,

ranked in ascending order of seriousness

193. The first thing to be said is that various offences are created by the Child Trafficking and Pornography Acts 1998 to 2004, and different offences have been assigned different penalty ranges by the legislature (some of which have been amended) according to their cardinal seriousness. It will be important in any analysis of the cases reviewed to ensure that comparators to be considered relate to the same offences, and that penalty amendments are considered. The following is a basic summary of the offences, ranked in ascending order by their maximum penalty:

• Possession of child pornography

• Offences relating to the participation of a child in a pornographic performance

• Allowing a child to be used for child pornography

• Offences concerning the use of a child for the purposes of the production of child pornography

• Production, distribution etc. of child pornography

• Sexual exploitation of a child

194. In terms of cardinal ranking, the offence of possession of child pornography contrary to s.6 of the Act of 1998 ranks lowest with a present maximum penalty of up to 5 years imprisonment and/or a fine. A new s.6 of the Act of 1998 was substituted by s.14 of the Criminal Law (Sexual Offences) Act 2017 (“the Act of 2017”), which amended the penalties provided for following conviction on indictment in one respect. Whereas the maximum custodial penalty originally provided for (i.e., imprisonment for up to 5 years) remains unaltered, there is now scope for the imposition of a[n unlimited] fine in lieu of or in addition to any custodial penalty, whereas previously there had been a maximum potential fine of IR£5,000 (or post 01/01/2002, its convenient Euro equivalent per the Euro Changeover (Amounts) Act, 2001).

195. Next in ascending order of cardinal seriousness are offences associated with the participation of a child in a child pornographic performance. In that regard, s. 13 of the Act of 2017 inserted a new s. 5A into the Act of 1998 which made it a specific offence to cause, incite, compel, coerce, recruit, invite, or induce a child to participate in a pornographic performance, the penalty for which is imprisonment for a term of up to 10 years. It also made it an offence to attend such a performance, the penalty for which is imprisonment for a term of up to 10 years and/or a[n unlimited] fine.

196. Above that, there is the offence of allowing a child to be used for child pornography, contrary to s. 4 of the Act of 1998. This provision has not been amended, and the maximum penalty provided for in the case of conviction on indictment is imprisonment for a term of 14 years and/or the imposition of a fine not exceeding IR£25,000 (or post 01/01/2002, its convenient Euro equivalent).

197. Next in ascending order are offences contrary to s. 4A and 5 respectively of the Act of 1998. Section 4A of the Act of 1998 was inserted by s.11 of the Act of 2017 and criminalises *inter alia* controlling or directing the use of a child for the purposes of the production of child pornography, organising the production of child pornography, compelling coercing or recruiting a child to engage or participate in the production of child pornography, gaining from the production of child pornography and inciting or causing a child to become involved in the production of child pornography. The maximum penalty provided for in respect of conviction on indictment is one of 14 years imprisonment and/or a[n unlimited] fine.

198. A new section 5 of the Act of 1998 was substituted for that originally enacted by s.12 of the Act of 2017. This provision criminalises the production, distribution and other forms of handling of or trading in child pornography. It also carries a maximum penalty upon conviction on indictment of 14 years imprisonment and/or a[n unlimited] fine.

199. Finally, the most serious offence provided for under the Child Trafficking and Pornography Acts 1998 to 2004 as amended is the offence of sexual exploitation of a child or the taking or trafficking of a child for the purposes of sexual exploitation, contrary to s. 3 of the Act of 1998 as substituted by s.3 of the Criminal Law (Human Trafficking) Act, 2008 and as amended by s.10 of the Act of 2017. There are a great many ways in which this offence may be committed. However, in the context of our consideration of offences specifically related to child pornography, it is sufficient to note that the definition of sexual exploitation includes the acts of inviting, inducing or coercing the child to engage in the production of child pornography, or the use of the child for the production of child pornography. The penalty for this offence is now imprisonment for life or a lesser term and, at the discretion of the court, a[n unlimited] fine.

Are there any indicative trends based on the cases reviewed?

200. By far the most commonly charged offence in the cases surveyed is the offence of possession of child pornography, contrary to s.6 of the Act of 1998. Of the fifteen Irish cases reviewed, s.6 offences feature in twelve of them. However, only the cases of *Loving*, *Smith*, *O’Byrne*, *Lordan* and *Watters* featured s.6 offences alone.

201. In the cases of *G.McG*, *Muldoon*, *Nagle*, *McGinty*, *J.D.*, *Arkins*, and *S.L.*, there was sentencing for other more serious child pornography offences as well as for s.6 possession offences. In several of the cases in the latter group, namely in *Nagle*, *J.D.*, and *S.L.* the s.6 offences were simply taken into consideration when sentencing for the more serious offences and those cases are therefore of no assistance in terms of whether a trend can be discerned.

202. It is indeed difficult to discern any significant trend in the cases reviewed. The individual cases the subject matter of the review varied considerably in terms of the number of images possessed, the circumstances of their possession, and the nature of them. For example, the offender in Watters had a relevant previous conviction, which was relevant to his culpability.

203. Moreover, as is only to be expected the personal circumstances of the offenders also varied significantly.

204. However, in terms of headline sentences where specified, and against the background of maximum available penalties for s.6 offences indicated at paragraph 188 above, they can be seen to range from between 3 to 4 years. However, this data does not represent a meaningful or representative sample, in circumstances where, of the twelve cases involving sentencing for s.6 offences, headline or pre-mitigation sentences were only identified, or implicit, in five of them, namely in *Smith*, *O’Byrne*, *Arkins*, *Lordan* and *Watters*. There were 4-year pre-mitigation sentences in *O’Byrne* and *Watters*, and 3-year pre-mitigation sentences in *Smith*, *Arkins* and *Lordan*. In the judgments in two of the other cases, *i.e.*, *G.McG* and *Muldoon*, respectively, an undifferentiated term of imprisonment was imposed covering more than one type of offence.

205. Moreover, despite the indication of Fennelly J. in *Loving* that where the offence is at the lower levels of seriousness, where there is no suggestion of sharing or distributing images, where the accused is cooperative and it is a first offence, the option of a suspended sentence should at least be considered, in just one case amongst those reviewed was there a wholly suspended ultimate disposition, i.e., a sentence of 18 months which was wholly suspended was imposed at first instance in the *McGinty* case and upheld by the Court of Appeal in the course of a subsequent undue leniency review. While specific reasons have not been given in most cases for non-recourse to wholly suspended sentencing, it might reasonably be speculated that this may have been because the criteria indicated by Fennelly J. were not met in one or more respects.

206. In terms of ultimate dispositions, partially suspended sentences were deployed in four of the cases, namely in *Smith*, *Arkins*, *Lordan* and *Watters*. In *Smith* 18 months of a 3 year headline sentence was suspended; in *O’Byrne* 2 years of a 4 year head line sentence was suspended; in *Arkins* 18 months of a 3 year headline sentence was suspended at first instance and upheld on an undue leniency review; in *Lordan* a sentence of 3 years with 2 years suspended was imposed at a re-sentencing following a successful undue leniency review; and in *Watters* 18 months of a 4 year headline sentence was suspended.

207. The next most numerous offences amongst the cases surveyed were those contrary to s.5 of the Act of 1998. Section 5 offences were charged in seven of the fifteen Irish cases reviewed, *i.e.*, in *G.McG*, *Muldoon*, *Nagle*, *P.M.*, *McGinty*, *Arkins* and *S.L.*, and in all bar one of those (*i.e.*, *P.M.*) cases s.6 offences were also charged and sentenced. In addition, in two of the cases (*i.e.*, *P.M.* and *Nagle*) yet more serious offences, being offences contrary to s.3 of the Act of 1998, were also charged but in one of those two cases (*i.e.*, in *Nagle*) the s.3 offence was taken into consideration.

208. In respect of the seven cases in which there was sentencing for s.5 offences, headline sentences are identified, or are implicit, in five of them, namely in *Nagle*, *P.M.*, *McGinty*, *Arkins* and *S.L.* They range from 7 years (in *Nagle* and *S.L.*), to 5 years (in *P.M.*), to 4 years (in *Arkins*) to 2½ years (in *McGinty*).

209. A wholly suspended sentence of 2½ years for s.5 offending was imposed and later upheld at an undue leniency review in *McGinty*.

210. Partially suspended sentences were imposed for s.5 offending in three cases, *i.e.* in *Arkins* the sentence was one of 4 years with 18 months suspended, while in *P.M.* the sentence was one of 3½ years with the final year suspended, and in *S.L.* the sentence was one of 5½ years with the final year suspended.

211. *J.D.* was the only case amongst those surveyed in which offences contrary to s.4 of the Act of 1998 featured at sentencing. The appellant faced nineteen charges involving several sexual assaults, and a number of offences under s.4 and s.6, respectively, of the Act of 1998. The case is of no assistance in the present context because the appellant received a 9-year sentence with two years suspended on the first sexual assault count, with all other offences being taken into consideration.

212. Finally, there were four cases amongst those surveyed involving offending contrary to s.3 of the Act of 1998, namely *Nagle*, *D.C*., *Hussain* and *P.M*. In two of the cases (*D.C.* and *Hussain*) there were no other offences charged. Moreover, as has already been mentioned, the offending constituting child exploitation in the *Hussain* case did not actually involve child pornography.

213. The s.3 offence in Nagle did not receive a discrete sentence but rather was taken into consideration in the sentences imposed for the lesser offences charged in that case. Arguably, it is not best sentencing practice to take a more serious offence into consideration when sentencing for a lesser offence. Be that as it may, the case was disposed of in that way. In the *D.C.* case a headline sentence of 4 years was nominated, and a post- mitigation sentence of 2 years was then imposed. In *Hussain*, the headline sentence nominated was 4 years and the final 9 months was suspended to reflect mitigation. The pre-mitigation sentence in *P.M.* was a 5-year term and the post mitigation sentence was 3½ years with the final year thereof suspended.

214. In conclusion, we think a much wider survey than has been possible would be required to discern any meaningful trends in sentencing for child pornography. This will have to await the provision of better data, and particularly data concerning un-appealed sentences imposed at first instance. It is to be hoped that the Judicial Council, through the sentencing information gathering remit of its Sentencing Guidelines and Information Committee may seek to address this deficiency in due course. For the moment, however, comparators based on the judgments of the appellate courts in this area of sentencing provide a sentencer with very little in the way of assistance.

215. Pending the availability of better data, each case must continue to be determined on its own facts according to the valuable narrative guidance provided by the cases of *R .v Oliver*, *The People (Director of Public Prosecutions) v. G. McC*; *The People (Director of Public Prosecutions) v. Loving*; and *The People (Director of Public Prosecutions) v. O’Byrne*.

The Court’s Analysis and Decision in the instant case.

Ground of Appeal No’s i & ii.

(relating to the headline sentences on each count)

216. The basic complaint here is that the sentencing judge erred in principle by arriving at headline sentences that did not apply enough weight to a number of important aggravating factors surrounding the commission of the offences. Further, or in the alternative, the said sentences did not adequately reflect the nature of the charges and the consequences of the acts of the respondent and their effects on the victims.

217. The applicant’s submissions identify the aggravating factors concerned, and they are listed at paragraph 82 above. The applicant acknowledges that the aggravating circumstances in question were specifically referenced by the sentencing judge, but she is of the view that appropriate weightings were not afforded to them, and that this is reflected in the selection of certain of the headline or pre-mitigation sentences. We will deal with each of the specific complaints in turn.

218. The first specific complaint relates to the 6-year headline sentences chosen for the sexual assaults charged at Counts No’s 1 and 2 on the indictment. These relate to two discrete occasions and involve the same child “X”. The specifics of the assaults were that they involved touching of X’s genitals and buttocks whilst recording it on video. In *The People (Director of Public Prosecutions) v. J.McD* [2021] IECA 31 we have previously identified the video recording of a sexual offence by the perpetrator as being a seriously aggravating circumstance. This is quite separate from any issue that such recording might also, as in this case, involve the production of child pornography which is a separate offence in its own right. The context in which the two sexual offences that we are concerned with occurred is that they were committed when opportunities for abuse presented themselves, or were contrived, during a protracted period when the appellant engaged in a form of grooming, showing an unhealthy interest in X, and cultivating a friendship with X’s mother for the specific purpose of seeking opportunities to abuse X, both through physical sexual assaults and the creation of child pornographic images. In that regard, it is essential that the sexual assaults not be treated as isolated incidents, but rather that regard is had to the approach commended by the Supreme Court in *The People (Director of Public Prosecutions) v. F.E.* [2019] IESC 85 and that appropriate account is taken of the interrelationship of those offences with the other offences charged.

219. The effect of the Supreme Court’s judgment in *F.E.* is, as we understand it, that if, in a case where multiple offences have been committed as part of a single criminal event or continuum of offending, a sentencing court elects not to avail of consecutive sentencing, and concurrent sentences are to be imposed, the sentence to be imposed for the most serious offence or offences (in F.E.’s case the rape) must adequately take account of the interrelationship between that offence and the offences attracting lesser sentences and to be served concurrently, and in that way reflect the totality of the offending behaviour and its effect on the victim(s). As the sexual assaults in the present case were not the most serious of the offences charged on the indictment (rather count 27 which charged sexual exploitation contrary to s.3 of the Act of 1998 was the most serious offence charged) it will be necessary to come back to this when considering the sentence imposed on count 27.

220. Subject to that, we take the view that even without the aggravating factors comprising the appellant’s relevant previous conviction, the breach of trust, the grooming involved, X’s youth, the video recording of the abuse and the use made of such recordings, the intrinsic culpability associated with the sexual assaults committed, and the harm done, would have merited headline sentences towards the upper end of the lower range of potential carceral penalties. This assumes for the purposes of the exercise a three-way division of the available range into a lower range from zero (i.e. non-custodial disposal) to 56 months (4 years and 8 months) imprisonment; a mid-range from 56 months to 112 months (9 years and 4 months); and an upper range from 112 months to the maximum of 168 months (14 years).

221. Normally, the existence of one or two factors tending to aggravate intrinsic culpability would only operate to increase the headline sentence within the sub-range initially identified (unless the initial figure was very close to the upper limit in the sub-range). However, the existence of multiple aggravating factors, as in this case, has the potential to move a case into the next highest subrange (or in an extreme case, higher again subject always to the statutory maximum). Moreover, while the degree of upward movement will depend ultimately on the qualitative extent to which culpability was truly aggravated by the factors identified (they will not all necessarily carry the same weight), the situation in the present case is that culpability was very significantly aggravated, contributed to by all of the aggravating circumstances identified but particularly on account of the relevant previous conviction and the video-recording of the abuse. In our view, this offending conduct in the aggravated form in which it was presented in this case would have merited a headline sentence at, or somewhat above, the mid-point in the mid-range, i.e., between 84 months (7 years) and 96 months (8 years).

222. The actual headline sentence nominated was somewhat lower than that at 72 months (6 years) representing a difference of 14.28% between the figure nominated and the low end of our indicated headline sentence range (i.e., 84 months or 7 years). We will express no view at this point on whether it is to be regarded as outside the norm and as ultimately resulting in an unduly lenient sentence, pending a consideration of the other matters forming part of the respondent’s continuum of offending and for which he faced sentencing, and consideration of the totality principle.

223. The applicant further complains about the 6-year headline sentence nominated in respect of Count No 7 which involved an offence of producing child pornography contrary to s.5 of the Act of 1998. This was a sample count, to be considered against the background that the indictment had contained twelve such counts, some of which related to the video-recording of the abuse of X previously referred to, and to the taking of still child pornographic images of both X and Y, and to the creation of documentary child pornography. X was aged approximate 8½ years at the time, while Y was aged approximately 5 years at the time. Overall the quantity of material, both imagery and documentary, attributed to the respondent as having been actually produced by him was small. The video/images concerned showed the trousers and underwear of the identified children pulled down to expose their genital areas, and their genitals being touched by the perpetrator. In the case of Y the images were taken while the respondent was straddling his victim. Accordingly, the video/images which were created by the respondent personally, although unquestionably gravely violatory of his victims, were of the Category 2 variety according to the categorisation outlined by Detective Garda Mannix, and were not therefore of the most depraved type, or in the same category as other grossly depraved material also found to be in the possession of the respondent and described earlier in this judgment. Nevertheless, it is of relevance that the respondent’s interest in child pornography extended to grossly depraved material. In that regard, the sentencing judge referred in her judgment to the fact that approximately a quarter of the 55,392 images found on computers and computer peripherals/media belonging to the respondent had been Category 1 type material. Although the appellant separately faced charges of distributing child pornography (as attachments to e-mails, it will be recalled) there was no evidence that the video/images of X and Y respectively were shared with or distributed to third parties. The same can be said of the Word documents which listed the respondent as their author (eight out of a total of 1,142 found in the possession of the respondent), and which comprised child pornography stories. There was no evidence that they were actually shared, or indeed as to whether there was a likely intention to share them. We recognise that it is a possibility that there may have been an intention to share them, but that equally the respondent may have written them solely for his own sexual gratification. Our conclusion on this is that the evidence, while suspicious, is not sufficient to justify the drawing of an inference that there was an intention to share such stories.

224. In our assessment, even without the relevant aggravating factors, these offences would have merited a headline sentence in the upper part of the lower third of the range (again the full range is zero to 14 years). The videoing / photography in question is of course intrinsic to this offence and does not strictly speaking aggravate it, unlike in the case of the assault offences considered earlier. However, we are of the view that the offending conduct here involving the creation of video/still images of X and Y is so intrinsically linked to the assaults on those boys that it requires to be assessed as being of equal culpability. Moreover, any theoretical differential in culpability is made up for by taking into account the further production of the documentary child pornography previously alluded to.

225. Again, we would assess this offending conduct, in the aggravated form in which it was presented in this case, to have merited a headline sentence at, or somewhat above, the mid-point in the mid-range, i.e., between 84 months (7 years) and 96 months (8 years).

226. The actual headline sentence nominated was again 6 years, representing a difference of 14.28% and again we will defer commentary on whether it was outside the norm and ultimately resulted in an unduly lenient sentence, pending a consideration of the other matters forming part of the respondent’s continuum of offending and for which he faced sentencing, and of the totality principle.

227. No complaint is made in respect of the headline sentence nominated in respect of Count 4, which is hardly surprising in circumstances where the maximum potential penalty, being imprisonment for 5 years, was nominated. It is contended by the respondent that this was appropriate having regard to the quantity of material involved, and the extreme content of some of it, particularly some of the videos.

228. The applicant further complains about the 6-year headline sentence nominated for Count 19, which was a count of distribution of child pornography (again a sample charge, there being seven such counts on the indictment). This involved the sharing of child pornography material by attaching it to emails. As the sentencing judge pointed out, amongst the material distributed in this way was the Pdf document referred to at paragraph 53 above, namely that entitled, “*How to Practice Child Love: A Guide to Meeting, Befriending, and Sexually Exploiting a Child*”. We regard this document, which was instructional and clearly designed to be shared, as being very sinister. That aside, the number of images detected as having been shared in this way was not large, running to dozens rather than hundreds or thousands. This was not child pornographic material produced or created by the respondent himself, but it included very serious and depraved Category 1 material (i.e., including pre-teenage children engaged in penetrative oral, anal and vaginal sexual activity), as well as Category 2 material, from amongst the very large volume of such material which had been downloaded from the internet and stored by the respondent on his various computers, peripherals and communication devices. It did not however include the most depraved of the material possessed by the respondent. The trial judge was not overstating matters when she referred to that material as including videos “*which record child abuse at its most extreme, either by reason of the unimaginable depravity of the sexual act in question or the age of the child or both*.” She was referring there to the evidence given by Detective Garda Smith which we have alluded to at paragraph 42 of this judgment.

229. Relevant in the context of assessing the appellant’s culpability in respect of the distribution offences was the respondent’s admission to Gardaí to being the administrator of the website called “*Young City*”, designed to facilitate the sharing of child pornographic material. The sentencing judge referred specifically to this admission. We regard it as relevant and consider that the sentencing judge who specifically referenced this fact was also correct in regarding it as relevant, notwithstanding that there was no evidence that this website was in fact used for the actual distribution conduct charged. The distribution charges were all based on the sharing of material by e-mail. Nevertheless, the fact that the respondent was the admitted administrator of such a website speaks to the extent of his willingness to distribute, and to facilitate the distribution, of child pornography to persons sharing his interest.

230. Given the nature and quantity of the material distributed, and relevant aggravating factors including the fact that these offences were committed whilst the appellant was on bail, we consider that an appropriate headline sentence would have been located towards the lower end of the mid-range. The headline sentence nominated, being one of 6 years, was within that sub-range.

231. Finally, with respect to Ground No i, the applicant complains that the headline sentence of 7½ years nominated in respect of count no 27 was inadequate. The applicant contends that the headline sentence nominated took insufficient account of the fact that this offence has been cardinally ranked by the Oireachtas as potentially meriting up to life imprisonment. It is complained that the sentencing judge ought to have assessed the offending behaviour here as being at “*the upper end of offending behaviour*”, and as meriting a sentence towards the upper end of the penalty range. We do not understand the applicant to be making the case that it merited life imprisonment, or anything approaching that, but infer that in referring, as she does at paragraph 101 of her written submissions, to “*the upper end of offending behaviour*” she is referring to the upper end of what we have sometimes characterised in cases involving certain other offences, where the range extends up to life imprisonment, as being the “*effective range*” applicable to the type of offending concerned, other than in rare instances representing truly egregious examples of it.

232. The “*effective range*” we have identified in such cases typically caps out at 15 years for non-truly egregious cases, allowing for a low range from zero to 5 years, a mid-range from 5 years to 10 years, and an upper-range of 10 years to 15 years, within which the vast majority of cases will fall to be sentenced. Operating on this basis does not in any way preclude the imposition of a sentence higher than 15 years in an appropriate case, as has been allowed for by the Oireachtas, but in our experience the need to do so is rare.

233. We consider that the fact that a potential penalty of life imprisonment has been set by the Oireachtas is not of significant help in the circumstances of this case, beyond the fact that it emphasises that sexual exploitation of a child, in all its possible manifestations, is to be regarded as intrinsically serious offending. Nevertheless, we must reiterate a point we made in *The People (Director of Public Prosecutions) .v J. McD* (cited earlier) when considering the intrinsic culpability of an instance of defilement of a child under 15, contrary to s.2(1) of the Criminal Law (Sexual Offences) Act 2006. We said:

“The assessment of intrinsic culpability is difficult where, as in this case, the legislature has provided for a very wide range of penalties to cater for the reality that there is a myriad of different circumstances in which the offence may be committed, and there is no guidance on where to start. As already alluded to, in some cases the offending conduct amounting to defilement may approximate conduct that could also found a charge for rape, while in other cases it may be very far from it and be manifestly much less culpable. Accordingly, there can be no one starting point.”

234. The same is true of the generic offence of sexual exploitation. It can be committed in numerous ways. While always serious, there will be varying degrees of seriousness depending on the circumstances and the way in which it is committed. The wide sentencing range provided for is intended to embrace all forms of such offending.

235. A signal feature of the present case is that the sexual exploitation offence was committed in the context of the befriending of X’s mother, and the grooming and cultivation of her over a protracted period in an effort to develop of a bond of trust (which was ultimately to be grossly abused), all with the view to securing opportunities for gaining access to, and to perpetrate abuses on, X. This was offending of the most premeditated and cynically planned order. The practical manifestation of it was that X was surreptitiously physically abused on several occasions and was further violated by the recording of that abuse. It is further concerning that it was only through happenstance, and good follow-on detective work by members of An Garda Síochána that the abuse of X (and subsequently the further abuse of Y) was uncovered.

236. At the end of the day however the assessment of the gravity of the conduct comprising sexual exploitation of a child by the respondent must bear some relationship to the court’s assessment of the gravity of the associated offending conduct which it facilitated. While the two may not precisely align, and it is only to be expected that the child exploitation offence would attract a somewhat higher headline sentence than that appropriate to the associated offending conduct that it facilitated, there still has to be distributive proportionality between them.

237. There is yet another consideration. This was a case in which the sentencing judge was not criticised for not having recourse to consecutive sentencing, and for dealing with the matter by means of the imposition of concurrent sentences. That being so, the totality considerations discussed in *F.E.*, to which allusion has already been made, are engaged, namely that the sentence for the most serious offence must be set at a level that reflects the totality of the offending conduct and the impact on the victims. Again, application of this consideration would in this case have independently justified a somewhat higher headline sentence for the sexual exploitation offence than would otherwise be nominated for that offence. However, considerations of proportionality would still apply. While a somewhat higher sentence again might also have been merited on this account, it still could not be set at a level which was out of all proportion to that merited by the associated offending which was to be punished concurrently.

238. Another factor to be taken into account was that the offences to which the appellant had pleaded represented sample counts and pleas on that basis were deemed acceptable by the DPP on the express understanding that the other offences charged, but not specifically pleaded to, would be taken into consideration i.e. a “full facts basis” The applicant maintains that, logically, any headline sentence to be imposed for a sample count, where other counts are being taken into consideration, should in principle be somewhat be higher than would be the case if nothing was being taken into consideration.

239. Taking all these matters into account we regard the child exploitation offence committed in this case to have merited the nomination of a headline sentence towards the upper end of the effective mid-range i.e. in the sub-range between 105 months (8yrs and 9 months) and 120 months (10 years). The actual headline sentence nominated was one of 90 months (7½ years), a difference of 15 months or 15.75% between the lower end of our indicative headline sentence and that nominated.

240. In circumstances where the headline sentences nominated were in the order of 14% to 16% (in round figures) lower than those we would have nominated, we can readily conclude that the headline sentences nominated by the sentencing judge were lenient, indeed very lenient. The mere fact that the headline sentences may have been very lenient is not, however, dispositive of the suggestion that the ultimate dispositions, or some of them, were unduly lenient. The extent to which there was discounting for mitigation also requires to be examined and then, with respect to the overall picture, it will be necessary to consider whether the actual sentences that were imposed deviated so far from what might have been expected as to have exceeded the sentencing judge’s legitimate range of sentencing discretion, rendering them in that sense “outside the norm” and unduly lenient.

Ground of Appeal No. iii

241. In this ground it is complained that the sentencing judge erred in principle in the way she structured the sentence imposed, by applying undue weight to the mitigating factors present which resulted in her failing to adequately reflect the seriousness of the offending behaviour before her.

242. With two exceptions, the applicant does not dispute that the mitigating factors which the sentencing judge stated she was giving the accused credit for (listed at paragraphs 92 and 94 above) were matters that the respondent was entitled to have considered, alternatively taken into account to the extent that they ostensibly were.

243. The first item that is disputed is item (b) in paragraph 92, namely co-operation with the investigation. What the trial judge said about that was:

“In his dealings with investigators, the accused admitted to being the administrator of a website called “Young City”. Moreover, he gave Gardaí consent to take control of his email accounts and provided passwords to access those and gave permission to change passwords. It is accepted that this constituted material assistance to the Gardaí in their investigation of other children associated with the forum.”

244. Counsel for the applicant contended at the oral hearing that co-operation at a level deserving of a meaningful discount was not borne out by the evidence. It was contended that the sentencing judge had implied in the passage quoted that the respondent had provided all necessary passwords and that he had been co-operative overall. That was not so. Rather the evidence had been (per transcript 05/11/2018, at pp 16 & 17) that relevant evidence was effectively hidden and disguised within seemingly innocuous files, e.g., files that appeared in format, name and appearance to be ostensibly Word documents, or a Lotus Notes documents, but which in fact were not files of the type suggested, but rather were files which contained illicit videos or images or text. Moreover, the evidence was further to the effect that access to the files in question had been encrypted by means of Dekart Encryption Software, to which the respondent did not provide a decryption key or password. However, during the process of going through the respondent’s stored files, investigators had fortuitously discovered a password within an unencrypted e-mail that worked to allow them to access the files in question.

245. While we think that the applicant is correct in contending that the evidence fell considerably short of establishing full co-operation by the respondent, we think it is going too far to suggest that such co-operation as was in fact received was not meaningful or that it was insignificant. Whatever about the provision of decryption keys and passwords, and co-operation of that sort, it is not controversial that the respondent made a considerable number of admissions in respect of items of real evidence that were shown to him, and moreover that he volunteered to the investigating team that he had abused Y at a named hotel premises on a particular occasion, and made that admission at a time when the investigating team had no inkling that Y was a possible victim. In those circumstances, while the sentencing judge’s recall of the evidence may not have been completely accurate as to the level and detail of the co-operation provided, she was not wrong in her understanding that there had been material assistance provided by the respondent.

246. The second disputed item was the sentencing judge’s decision to afford the respondent “*significant credit*” (the sentencing judge’s characterisation), for the three-year period that the respondent had spent in prison in the Philippines. Notwithstanding the characterisation used it is not clear as to what percentage of the overall figure that was discounted to reflect mitigation can be attributed to this factor. Be that as it may, the question arising is, was the sentencing judge in error in her view that it was appropriate to take “*significant*” account of the time spent in custody in the Philippines.

247. If time spent in custody in the Philippines was capable of being considered, and we believe it was, there were potentially two ways of doing it.

248. One way of doing so, which is the one the sentencing judge in this case opted for, was to treat it as an adversity forming part of the personal circumstances of the offender to be taken into account, namely that he had until recently, regardless of the reason for it, or issues concerning whose fault it was, been deprived of his liberty for the approximately three years that he was lawfully imprisoned in the Philippines. It could be reasonably inferred that any custodial sentence that he was likely to receive from the sentencing judge would be harder to endure on that account, as it would in effect, and for all practical purposes, be a *de facto* add-on in circumstances where the interval between being released from custody in the Philippines and re-entering custody on his return to this jurisdiction was exceedingly brief.

249. We have considered whether an alternative way of approaching it might have been for the sentencing judge to have had regard to the totality principle. It must be acknowledged that the case is an atypical one that does not readily fit with more common examples of the types of cases that trigger application of the totality principle. That having been said, it is not that far removed from the situation where an offender being sentenced is already serving a custodial sentence for another or other offence(s). In such a situation, the law regards the totality principle as being engaged and a sentencing court in considering overall proportionality must consider the total criminality and the totality of punishment involved not only in the offences for which the offender is being sentenced, but also in any offences for which he is currently serving a sentence.

250. The differences here, of course, are several. The respondent, although imprisoned for a lengthy period in the Philippines, was not serving a sentence there, nor was he ever charged with any offence there. Rather, he was detained due to irregularities around, and concerning, his immigration status. Therefore, there was no additional criminality and no additional punishment to be considered. However, that would not per se mean that account should not have been taken in passing sentence here of what would be the total length of his de facto deprivation of liberty. Moreover, a further difference is to be found in the fact that he was not continuously in custody from the time of his arrest in the Philippines to the date of his sentencing. He was ultimately released from his detention in the Philippines, which release facilitated his return to this jurisdiction whereupon he was immediately arrested and detained again. He was not therefore in continuous and uninterrupted custody, but in truth his time at liberty in between was relatively brief.

251. We think that while these differences exist, they are not of such moment as to disentitle the respondent from having any account taken of his prior incarceration in the assessment of whether the intended sentence to be imposed upon would be proportionate. However, we have ultimately concluded that the fact that he spent three years in prison in the Philippines in the circumstances in which he did, does not technically engage the totality principle (because there was neither other offending nor other punishment to be aggregated with the sentence(s) under consideration). However, we are in no doubt that it was an adversity suffered by him which he was entitled to have considered.

252. We are not therefore prepared to say that the sentencing judge at first instance was in error in affording to the respondent, what she characterised as, “*significant credit*” for the time that he was incarcerated in the Philippines. While there may be room for some debate as to the extent of the allowance properly to be made, and as to the sentencing judge’s margin of appreciation in that respect, we are in no doubt that the sentencing judge was ultimately correct in principle to make some significant allowance for the time spent by the respondent in incarceration in the Philippines. Our preferred approach, and the one we will adopt should it be necessary to proceed to a re-sentencing in this case, is not to treat the totality principle as having been engaged, but rather to treat the incarceration in the Philippines as an adversity suffered by the respondent of which account must be taken in considering the overall proportionality of the proposed sentences.

253. Returning to the basic complaint that too much discount was given to reflect mitigating circumstances, we note that the overall discounts afforded were all in the range between 33.3% and 40%. The applicant maintains that these were simply too high. We disagree. We accept that the respondent was entitled to significant discount for the plea in respect of each offence, and while none of the other factors mentioned would have been individually as significant they cumulatively represented further significant mitigation. The discounts afforded were not untypical for cases involving guilty pleas in the presence of other mitigating factors. While discounting for mitigation is not a mathematical exercise, and is never the sum of its parts (rather there is an instinctive synthesis of the mitigating factors leading to an overall percentage figure, or a figure representing actual custodial time, to be subtracted from the headline sentence, we have said many times that the discount for a plea alone will typically range between 15% and 33.3% of the headline sentence depending on circumstances. While it has not been suggested that the pleas alone in this case would have merited a discount at the higher end of that indicative range, we cannot envisage that they would have entitled the respondent to a discount of less than 25%. In circumstances where there were other significant mitigating circumstances to also be taken account of in the synthesis, we do not consider that to have variously discounted at overall levels ranging between 33.3% and 40%, was unreasonable or outside of the norm.

Ground of Appeal No. iv

254. This involves a complaint that the sentence imposed failed to adequately reflect the principles of specific and/or general deterrence. The “principles” alluded to are not identified, but we understand the complaint in simple terms to be that the sentences were not severe enough to adequately serve either as a general deterrent or as a specific deterrent. In this regard we would simply make the point that the scope for the imposition of an exemplary sentence for deterrence purposes is extremely limited. Any desire to do so, is corralled by the constitutionally based requirement that sentences must be distributively proportionate in the dual sense required by our legal system, i.e., sentences must be proportionate both to the gravity of the offending conduct but also to the circumstances of the offender. As was stated in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356, at 359, the sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime as committed by the offender in his/her particular circumstances. Every judge has of course a margin of appreciation in selection of the appropriate sentence. However, the scope for the imposition of an exemplary sentence only exists within that margin of appreciation. We have addressed this before in the cases of *The People (Director of Public Prosecutions) v. Wanden* [2019] IECA 221, and in *The People (Director of Public Prosecutions) v. WM* [2018] IECA 281.

255. In the *Wanden* case, a s.15A drugs case in which an exemplary sentence of 30 years imprisonment was imposed by the Circuit Court Judge, we said:

59. In so far as the objective of deterrence is concerned, there is a strong case for seeking to promote it, both generally and specifically, in a drugs trafficking case. The penal objectives of retribution and deterrence are seen by many sentencing theorists to be interrelated to a degree, and as representing perhaps different sides of the same coin. The relationship between them is indeed arguably symbiotic. Thus, McAuley and McCutcheon in their work “Criminal Liability A Grammar” (2000: Round Hall Sweet and Maxwell) make the point that “it is not true that the principle of deterrence operates independently of retributive considerations”. Further, the renowned legal philosopher and penal theorist Andrew Von Hirsch who in “Censure and Sanctions” (1993: Oxford University Press) and “Deserved Criminal Sentences” (2017: Bloomsbury Professional), amongst his other works, champions the “desert model” of retribution, ostensibly shares this view in that he acknowledges that proportionate punishment which is desert based and which is intended to act upon the offender by treating him as a moral agent, and by communicating to him society’s disapprobation and censure for his wrong doing, frequently also carries with it what he characterises as a “prudential disincentive” to offending or reoffending. Put more simply, punishment for retributive purposes under his desert model also has a degree of deterrent effect. Indeed, in von Hirsch’s conception in order to adequately convey the censure message a deserved punishment must involve, in addition to the expression of disapprobation, a degree of “hard treatment” as “a further reason -- a prudential one – for resisting the temptation” to offend (in the case of those whom it is hoped might be generally deterred) or re-offend (in the case of the particular offender whom it is hoped might be specifically deterred).

60. While every sentence arguably has some deterrent effect, there is a large body of literature concerning whether increasing sentence severity in fact achieves any additional deterrent effect i.e., what is known amongst sentencing scholars as “marginal deterrence”, and there is reason to doubt that it does. Be that as it may, there is no doubt that judges are entitled to impose exemplary sentences to prioritise deterrence amongst other sentencing objectives. There are limits, however, and the principal limiting factor is the constitutionally derived requirement that any sentence to be imposed must be proportionate, both to the gravity of the offending conduct and to the circumstances of the offender. The sentence must be appropriate to the offence as committed by the offender in his or her particular circumstances.

61. The Court of Appeal has previously addressed the issue of exemplary sentences imposed for deterrent purposes, in the case of in The People (DPP) v WM [2018] IECA 281, where we said:

“The important thing to appreciate is that pursuit of deterrence, or any of the other recognised sentencing policy objectives, may only operate to influence the calibration of what should be the appropriate sentence from within the scope of the judge’s legitimate margin of appreciation in terms of proportionate sentencing. The sentence selected, regardless of what policy objectives are being pursued, must at the end of the day be proportionate both to the gravity of the offending conduct and to the personal circumstances of the offender. Pursuit of a sentencing policy objective cannot be used to justify the imposition of a disproportionate sentence.”

256. In considering ground iv, we take on board the view of the applicant that in setting the headline sentences in this case the sentencing judge did not sufficiently prioritise deterrence as a sentencing objective. That having been said, it is of the essence of judicial discretion in sentencing that a sentencing judge should have a wide discretion as to which of the main, and sometimes conflicting, objectives of sentencing (i.e., retribution, deterrence, incapacitation, restitution and rehabilitation) to prioritise, and to what degree and extent. It is not for an appellate court to second guess or micro-manage how courts of first instance exercise that wide discretion. Intervention will only be justified where the sentencer at first instance has demonstrably failed to adequately consider a relevant objective. Accordingly, an appeal court, particularly one engaged in an undue leniency review, will be very slow to intervene on that account.

257. We will return to this issue in seeking to form an overview as to whether the sentences here were unduly lenient.

Were the sentences ultimately imposed unduly lenient?

258. It is necessary at this point to indicate our overview of the sentences ultimately imposed. We can readily state that the sentences on counts numbers 4 and 19 respectively were not unduly lenient.

259. In the case of count 4, involving possession of child pornography, there was acceptance by the applicant that the headline sentence was appropriate. Further, we have found that the discount of 40% from that headline sentence was within the sentencing judge’s legitimate range of discretion. The discount was, we accept, a generous one but it was not so generous as to be outside the norm. The result was a lenient sentence but not an unduly lenient one.

260. In the case of count 19, involving distribution of child pornography, we concluded that the headline sentence nominated was within the range of what would have been appropriate. The discount afforded was 33.3%. Again, this was within the sentencing judge’s legitimate range of discretion. Once again it is a case of a sentence which was perhaps somewhat lenient, but it was not an unduly lenient one.

261. The position with respect to count no. 27, being child exploitation, and then counts 1 & 2, being sexual assaults of X, and count 7 (production of child pornography) including images of both X and Y being abused, is more complex and consequently more difficult to assess. As we have found that the overall percentage discounts applied for mitigation were at an appropriate level, any concern must be with the nominated headline sentences which we have found to have been 14% to 16% (in round figures) lower than the low end of the indicated sub ranges within which we would have nominated headline sentences. Accordingly, if there was any justification, as contended for by the applicant, for nominating a headline sentence above the lowest point on our indicative sub ranges, in furtherance of the objective of deterrence (both general and specific), it may be concluded that the real discrepancy is likely to have been greater than the suggested 14% to 16%.

262. There is an interrelationship between counts 1, 2, 7 & 27 of which account must be taken if the sentences are to be structured on a concurrent basis, as the sentencing judge opted to do. The totality of the offending conduct must be reflected in the overall result, as has the totality of the harm caused to the victims. By the same token there must be a distributively proportionate relationship between sentences imposed for interrelated offences. We have ultimately concluded that the headline sentences nominated in respect of these counts was in each case simply too low with the result that the sentences imposed on these counts were significantly outside the norm and therefore unduly lenient. The sentences imposed in this case did not in our view need to be exemplary in the sense of being at the outer limits of the sentencing judge’s legitimate range of discretion but did need to be set at a level sufficient to adequately punish the offender, to adequately communicate the desired level of censure, and to offer some level of deterrence both general and specific. We think the headline sentences nominated did not sufficiently meet these objectives.

263. Further, we should say for completeness that in all cases the sentencing judge was also required to consider the offender’s possible rehabilitation and reform and to seek to promote that to the extent warranted by the circumstances of the case, rehabilitation having been given statutory recognition as an express objective of our penal system in s.2 of the Prisons Act 1970, as well as receiving repeated judicial endorsement as being the primary objective in sentencing, *e.g.*, in *The People (Attorney General) v. O’Driscoll* (1972) 1 Frewen 351. In the circumstances of this case we are satisfied that sufficient regard was shown to the objectives of rehabilitation and reform by the making of the relevant supervision order.

264. In circumstances where the headline sentences on counts 1, 2, 7 and 27 have been found to be too low for the reasons indicated, we are satisfied that they have led to unduly lenient overall sentences. We must therefore quash those sentences and proceed to a re-sentencing on counts 1 & 2, 7 and 27 respectively.

Re-sentencing

265. In the case of count no. 27, the most serious offence, we nominate a headline sentence of 112 months (or 9 years and 4 months) imprisonment, from which we will discount by 30 months, being 27% (in round figures), to reflect mitigation, leaving a net sentence of 82 months (or 6 years and 10 months) imprisonment before consideration of overall proportionality. The figure of 27% to reflect mitigation is lower than the 33.3% allowed by the sentencing judge in the court below, because her figure included “*significant credit*” to take account of the time spent in custody in the Philippines. We will also take that circumstance into account but, because of the unusual (and possibly unique) circumstances in which the need to do so arises, will do so separately at a later stage of the process we are engaged in. In an exercise not unlike that which must be undertaken where the totality principle is engaged, we will in due course stand back and consider whether any further adjustment is necessary in the interests of overall proportionality in the circumstances of the case.

266. In the case of counts 1, 2 and 7 we will nominate headline sentences of 90 months (or 7½ years) imprisonment, from which we will discount by 24 months, being 27% (in round figures), to reflect mitigation, leaving net sentences of 66 months (or 5yrs and 6 months) imprisonment, again before consideration of whether any further adjustment is merited in the interests of overall proportionality having regard to the respondent’s incarceration in the Philippines.

267. We now must stand back and consider whether, in circumstances where the respondent has spent the time he spent in custody in the Philippines and any sentences now to be imposed, albeit that they are to be served concurrently *inter se*, will be, at least to some extent, an “add-on” to that time in custody, it is necessary to make any adjustment to individual component sentences making up the overall sentencing package in the interests of justice and the imposition of an overall sentence that is distributively proportionate.

268. In doing so we feel entitled to, and that it is appropriate that we should, take some account of the fact that the respondent was in large measure the author of his own misfortune in the Philippines and that he was not in fact imprisoned due to being sentenced for an offence. We think that in the circumstances, and to ensure overall proportionality, the justice of the case would be met by a reduction of the sentence on count no 27 from 82 months (or 6 years and 10 months) imprisonment to 72 months (or 6 years) imprisonment; and as regards counts 1, 2, & 7 by a reduction in each case from 66 months (or 5yrs and 6 months) imprisonment to 58 months (or 4 years and 10 months) imprisonment.

Conclusion and summary

269. The sentences on counts 4 and 19 respectively are not unduly lenient and the application is dismissed in so far as it relates to them.

270. The sentences on counts 1, 2, 7 & 27 respectively are unduly lenient, and the application is granted in so far as it relates to them. The sentences at first instance on counts 1, 2, 7 & 27 respectively are accordingly quashed.

271. The court re-sentences the respondent to 6 years imprisonment on count no. 27, and to 4 years and 10 months imprisonment on each of counts 1, 2 & 7 respectively. All sentences are to be served concurrently and are to date from the 8th of May 2018 as provided for in the court below.

272. The supervision order imposed by the court below is re-imposed on the same terms as previously.