THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 170
Record No.: 194/2019

Birmingham P.
Donnelly J.
Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

S.M.

APPELLANT

JUDGMENT of the Court delivered on the 24th day of June 2020 by Ms. Justice Donnelly

Introduction

1. The Appellant was convicted of five counts of indecent assault in respect of his first sister and 1 count of indecent assault on his second sister. At the time of the indecent assaults on his first sister, the appellant was 14/15 years old and at the time of the offence on his second sister, he was 18/19 years of age. These offences occurred in the 1980s. The first sister was aged 11 or 12 at the time of the offence and the second sister was aged 12/13 at the time she was indecently assaulted.

2. The offences against the first sister occurred between June 1981 and June 1983. The appellant snuck into the bedroom of his sleeping sister. He was naked and masturbated himself whilst licking her vagina. This happened on at least five occasions.

3. The offence against the second sister occurred on a date unknown between March 1985 and March 1987. The appellant performed an indecent assault on his sister without her consent by kissing the outside of her vagina and inserting his tongue into her vagina.

4. He was later sentenced on 22nd July 2019 to a total term of imprisonment of 5 and half years with the final two years suspended, a net term of imprisonment of three and half years. This was structured as follows:

    a) Counts 1,2,3 (offences against the first sister) - One year imprisonment in respect of each to run concurrently.

    b) Count 4 and 5 (further offences against the first sister) - Two years imprisonment to run concurrently to each other but consecutively to the term imposed in respect of Counts 1, 2 and 3.

c) Count 6 (offence against the second sister) - two and half year imprisonment to run consecutively to Counts 4 and 5.

5. The appellant appeals against his conviction and his sentence.

Appeal against Conviction

6. The sole ground of appeal against conviction is as follows:

> *"That the learned trial judge erred in law and in fact in admitting into evidence the no comment answers given by the Appellant during his Garda detention."*

7. The trial judge allowed the prosecution to re-examine a Garda witness and elicit from her the content of a number of questions and the "no comment" answers made by the appellant to those questions. The permission to do so had arisen in very specific circumstances, the understanding of which is vital to the appeal.

8. While the appellant was in detention, he was questioned by the gardaí in relation to the allegations that had been made against him. The appellant answered many of these questions at great length. Indeed, the memoranda of interviews left to the jury ran to 78 pages. Significantly, the appellant did not answer some 13 questions relating to the allegations. He did so in a variety of ways: by not replying, by saying no comment or by saying he had already given his account and was not commenting further. In this judgment, those type of answers will generally be referred to as "no comment" answers.

9. During the course of the trial, prosecution and defence counsel edited the interviews to exclude reference to any questions to which a 'no comment' answer had been given. By convention, and in accordance with the practice that has grown up since the decision in *The People (DPP) v. Finnerty* [1999] 4 I.R. 364, the jury were not informed that material had been excluded from the original memoranda of interview. No such evidence was therefore given by the interviewing garda who was aware that such evidence was expressly excluded and was not to be introduced.

10. In cross examination of the interviewing Garda by counsel for the appellant, the transcript records the following exchange

> *"Q: Thanks, good afternoon, [Garda K], just a few questions. [S.M.], [S.M.] is a person with no previous convictions, I understand?*
>
> *A: That's correct, yes.*
>
> *Q: And I think that obviously it's apparent now from the long process that we've just gone through in relation to the interviews and I think when we total it all up, I think altogether I think the two interviews I think comprise about 78 pages or thereabouts?*
>
> *A: That's correct, I'd imagine, yes.*

Q: Yes, okay, and ***I think to strip it all down and to boil it all down, when [S.M] was asked about the allegations that were made individually by [E.M.] and [N.M.], and what his attitude in response to those was he denied the allegations that were made by each of them; isn't that correct?***

A: That's correct.

JUDGE: I think the jury have figured that out.

COUNSEL: Yes, Judge?

A: Yes.

Q: Now, and just in relation to the interview process, just one or two matters, I think as we know and as [Counsel for the prosecution] outlined, prior to each interview very properly of course, An Garda Síochána when they're conducting any interview with a detained person, they have to administer a caution to that person?

A: That's correct.

Q: Advising them that they're not obliged or required to say anything during the course of such interview, but anything that they may say will be maybe taken down in writing and may be given in evidence?

A: That's correct, the jury will have a copy of the memos and on the beginning of each memo the caution is there.

Q: That's correct, yes, and the purpose of that again very properly is to advise essentially, they have already received a notice of their rights when they're detained and this is a continuation of advising a person of the various rights that they have when they're detained?

A: That's correct.

Q: So in essence what the gardaí are saying to somebody is you have a right to silence, if you wish to exercise it; isn't that correct?

A: Yes, that's correct.

Q: And I think that I'm sure in your own experience and you have considerable experience, there would have been occasions when a person has been detained and you would have arrested them and that particular person in light of the caution they have received and the advice and notice they received may have decided to exercise their right to silence, and opt not to answer any questions asked by An Garda Síochána?

A: Yes, that's correct.

Q: But obviously in this case, it's readily apparent from the lengthy interviews we've listened to, they were lengthy questions and lengthy answers given by [S.M]?

A: Yes, that's correct.

Q: And he answered questions given by -- by yourself?

A: He did, he answered questions freely. *"* (**Emphasis** added)

11. Counsel for the DPP considered that the above assertions amounted to a fundamentally inaccurate account of the true facts. In those circumstances, counsel notified the trial court of her intention to re-examine the witness and to bring to the attention of the jury the fact that there were further questions asked of the appellant in interview to which he had made no comment. Counsel also requested permission to elicit the content of those questions and the no comment answers.

12. In the course of her application to the trial judge, counsel for the DPP asserted, wrongly, that it was put to the witness that the appellant "had answered freely". That was said in the following context: "My friend has examined and cross examined this witness regarding the conduct of interviews. And has introduced her general experience in relation to persons exercising their right to silence and in fact we had a series of questions documented by [O.C.] in relation to persons who don't answer. And then in contra distinction it was put to the witness that this individual, [S.M]., answered freely, I think was the term used, as opposed to persons who opt not to answer." Counsel went on to say: "So I say now that I'm entitled, it is my submission to you, Judge, that I'm entitled in re examination to introduce that as a matter that arises as a result directly of the cross examination."

13. In the course of his response, counsel for the appellant did not correct the reference to the word "freely". Indeed, at no point during the course of the trial was it corrected that the word "freely" had not been used by counsel for the appellant. It is apparent in the course of his submissions to the trial judge, that counsel for the appellant understood the point being made by the prosecution with respect to the tenor of his cross-examination.

14. This appeal is premised on the basis that to introduce the no comment answers was a breach of the right to silence. In counsel's submission, the decision of the trial judge had been made based upon an erroneous view of the question he had asked. Counsel submitted that as he had not asked the garda to confirm that the appellant had answered all questions freely, the appellant should not be penalised.

Responsibility of Counsel

15. A criminal trial is a search for the true answer to the question "whether the accused is guilty or not guilty of the offence charged in the indictment". That is the issue jurors have to try "and a true verdict give according to the evidence" under the oath or affirmation that they take at the commencement of the trial.

16. That search for truth is bound by rules of evidence (as required by the Constitution, by statute or by the common law). Only relevant evidence is admissible but not all potentially relevant evidence is admissible. It may be inadmissible because it has been obtained in breach of fundamental rights of the accused or because any probative value the evidence has is outweighed by the prejudicial nature of it. The rules of evidence apply to both the prosecution and to the defence. They exist to protect the integrity of the trial and to ensure that the truth emerges on the central issue.

17. Counsel submitted to the trial judge that the point he was making in general terms was that when he was interviewed, the appellant "could have *ab initio* decided not to answer any questions." In answer to a question from a member of this Court, counsel for the appellant insisted that his questioning had simply been designed to alert the jury to the fact that his client had answered questions. With respect to counsel for the appellant, that answer does not withstand even the slightest scrutiny. The jury had already listened to hours of questions and answers and they knew well that the appellant had been asked and answered many questions. Furthermore, the answer to this Court fails to engage with the full line of questioning. It was specifically raised by counsel for the appellant that "when [the appellant] was asked about the allegations…he denied the allegations". Not only that but the line of questioning directly referred to other persons who fail to answer questions when being interviewed by gardaí. There is no doubt that this line of questioning was designed to emphasise to the jury that this was an accused person who did not rely on his right to silence in contrast to other persons who do so.

18. The reliance in this appeal on the erroneous attribution of the word "freely" to counsel for the appellant by the prosecution and subsequently by the trial judge, is entirely misplaced. In the overall context of the line of his questioning, this attribution was immaterial. The application to adduce the "no comment" answers was made by the prosecution because of the entire line of questioning by counsel for the appellant. The trial judge made clear, especially in the context of the application for the discharge, that it was the entirety of the questioning he was relying on. He made reference to the questions regarding other persons relying on their right to silence.

19. Any person, including a juror, could only conclude that counsel was intending to convey that his client, unlike some other detained persons, had not relied upon his right to silence in the course of garda interviews. What counsel sought to achieve by this could be inferred from his questioning. Undoubtedly, counsel must have considered this an advantageous line of questioning for his client. It is sufficient to say that in conveying the impression with his questioning of the garda that his client had not relied on his right to silence in the course of his interviews, was a significant misrepresentation of the facts to the jury. The garda, who would have been hyper-alert to the editing process that had taken place and the reason for it, was placed in an impossible position.

20. In the cauldron of a trial, counsel may occasionally step over a line, not through a conscious violation of rules but through a failure to keep at the forefront of their mind the necessity not to mislead though inadvertence or otherwise. Counsel at all times, must

bear in mind not just the rules of evidence, but the actual evidence. Evidence which is inadmissible for a reason cannot be confused with the fact that such evidence does not exist at all. There is no doubt that a bright red line was crossed in this case. The jury were being told that this man had not exercised his right to silence when the true position was that he had so relied on this protected right at certain points in the interview.

The Consequence of Misleading a Jury

21. Where counsel misrepresents a factual situation to a jury it is perhaps too trite to say that it can and should be remedied. Such misrepresentation can and does occur not infrequently. More often than not, these misrepresentations may be inadvertent and/or can be remedied without any difficulty by simply telling the jury the true position. The issue that arises here is whether a misrepresentation in respect of the exercise of a constitutional right can or should be corrected.

22. The answer to that question necessitates an examination of the relevant authorities on the right to silence. Counsel for the appellant concentrated his efforts at trial on the prejudicial effect that allowing the evidence in respect of the true position at interview would have on him. In written submissions to this Court, counsel for the appellant concentrated his complaints on the issue of the constitutional right to silence and on the decision in *Finnerty* above and the more recent case of *The People (DPP) v. K.M.* [2018] IESC 21.

23. In written submission, counsel for the appellant submitted:

> "…the appellant was irretrievably prejudiced by the disclosure of the full interview to the jury, and that this was a clear violation of his right to silence contrary to the principles confirmed in *DPP v Finnerty* [1999] 4 I.R. 364.
>
> In the decision of Director of Public Prosecutions v K.M. [2018] IESC 21, O'Malley J. states;
>
> > '*The three rules set out in Finnerty apply to evidence relating to questioning of the accused while in garda custody and are as follows*
> >
> > *(i) Where nothing of probative value has emerged as a result of such a detention, but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained, but that nothing of probative value emerged.*
> >
> > *(ii)* ***Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.*** (Emphasis added in the appellant's submissions)
> >
> > *(iii) In the case of a trial before a jury, the trial judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention.*"'

24. The implication of the appellant's submission is that the rule originally set out in *Finnerty* is emphatic; it is never possible to cross-examine in relation to the refusal of a defendant to answer questions in the course of interview. In our view that cannot be a correct reading of *K.M.* and *Finnerty*. If it were the position, it would permit and indeed encourage clear untruths to be presented to a jury by an accused without any fear of consequences. That would completely trammel the purpose of a criminal trial; the search for the truth bound by rules of evidence. It would amount to a travesty of justice.

25. In our view, both the common law and the statutory encroachments on the rules of evidence permit factually incorrect but relevant matters to be countered through cross-examination, by calling evidence in rebuttal or re-examination as appropriate. One important example is the Criminal Justice (Evidence) Act, 1924 as amended where cross-examination on character evidence is permitted in certain circumstances. Thus, an accused may be cross-examined on his previous convictions, otherwise kept from a jury, where he has by himself or through prosecution witnesses asserted his good character. As all counsel know and by extension all accused know, there is a consequence to putting forward propositions that are factually incorrect.

26. Both *Finnerty* and *K.M.* were dealing with situations where the extent of the protection of the right to silence was at issue. On a crude and simplistic view, the right to silence had been respected in each case. There had been no requirement for the accused to speak at interview. The issue was whether adverse inferences to be drawn (or possibly to be drawn) from that silence were permissible. In the circumstances of those cases, there was no basis for either the cross-examination of the accused in *Finnerty* on his perceived failure to give an explanation to the gardaí, and on the giving in evidence of the reliance by *K.M.* on his voluntary statement when saying he had nothing further to say.

27. It is important that the quote from *Finnerty* is understood in the context of the circumstances of that case and the issue that arose. There is nothing in either of those cases to which counsel has directed us that demonstrates that the Supreme Court meant that in every single circumstance there can be no reference to the exercise of the right to silence. The rules were derived to deal with the particular facts of that case, an encroachment by the prosecution on the right to silence without any justification.

28. In *K.M.*, having recited the development of the right to silence in case law, O'Malley J. confirmed it was part of the constitutional right to a fair trial as well as a right protected at common law and by the European Convention on Human Rights. She stated that it was a right that could be waived and indeed it is commonly waived. She said however that the right must not be lightly waived and it must be clear that it has been waived. In the context of the facts of *K.M.* she held that it was incorrect to parse and analyse the formula used by that appellant in his answers to the questions in interview. That accused had, she held, been refusing to answer questions about the allegation and that was an exercise of his right to silence.

29. The fact that a person has a constitutional right to silence does not mean that they have an immunity from all appropriate reference to the times they exercised it. There are

statutory encroachments on the exercise of that right which have been held to be constitutional (*Rock v. Ireland* [1997] 3 I.R. 484). Similarly, the common law does not permit an accused to misrepresent the factual situation. The constitutional right to a fair trial of an accused does not extend to the right to misrepresent facts. Where facts are misrepresented they must be allowed to be corrected. The constitutional right to silence does not sit above the right to a fair trial but is part and parcel of a fair trial. An accused person, and counsel acting on their behalf, must respect the integrity of the trial. To the extent that the exercise of the right to silence is misrepresented, it is akin to a waiver of the right to the extent necessary to rectify the misrepresentation.

30. In the present case, counsel for the appellant has not engaged with the factual situation. There was a misrepresentation to the jury. As set out above, the purpose was to distinguish this appellant from other detained persons who relied upon their right to silence throughout the interview process. That was a deliberate strategy. That is not to say that counsel set out to deceive in a deliberate manner. It can sometimes happen that in focusing on minutiae counsel can lose sight of the bigger picture. Or indeed, counsel may be careless in the use of language. While this appellant may have answered a lot of questions at interview, he did rely on his right to silence in respect of some very specific matters that were being put to him. However, there is simply no doubt that the result of the deliberate cross-examination was that the jury were misled in a fundamental and relevant aspect i.e. they were being asked to accept that he was not a man who relied upon his right to silence unlike others who did so.

31. The appellant contends that it was the no comment answers that created the inevitable impression that the appellant was being evasive and seeking to conceal his guilt. Where an accused person raises the question of whether he remained silent in an interview, he is in effect waiving that aspect of his right to silence. He cannot both approbate and reprobate. His right to silence has been respected by the editing process. When an accused goes behind the agreed (or ruled on) editing of the interviews, then he has in effect waived his right to silence to the extent needed to correct the record. He cannot gain an advantage simply because he sought that advantage. The concept of a trial in search of the truth must permit the prosecution to correct an incorrect impression that has been conveyed to a jury.

32. That is not to say that the prosecution's ability to rebut is unlimited. The issue of proportionality must be borne in mind. The crucial importance is that the centrality of the right to silence is recognised and the risk of improper adverse inferences being drawn is kept to a minimum.

33. The main concern of the Court therefore is not whether the prosecution should have been allowed to correct the mistaken impression given to the jury that the accused had never exercised his right to silence but a slightly different one; whether it was correct to have allowed the entirety of the questions and answers to have been given. In the present case, counsel for the prosecution sought to introduce the content of the evidence because it had been specifically put that when he was questioned about the allegations he denied

them. She submitted in the appeal that a mere general statement that he had been questioned on occasions and exercised his right to silence would not be sufficient.

34. We consider that the prosecution must tread warily when this type of issue arises. It is not the situation that the door once opened permits a flood. On the issue of whether there was a breach here we are persuaded by the submission of the prosecution by reason of the combination of a number of issues:

a) the specific nature of the questioning by counsel for the appellant and in particular, the reference to "when he was questioned" he denied the allegations;

b) there were in fact only 13 questions to which there were no answers and at least two of those made reference back to his previous answers. This reference to "only 13" has to be read in the context of the particularly long list of questions that were in fact answered by this appellant; and

c) the trial judge specifically warned the jury as to the reason why the evidence was permitted and that they could not draw an adverse inference from it.

35. As to the latter point, the trial judge stated to the jury:

> *"You will recall that [Garda K] was re examined by [Counsel for the prosecution] in relation to this, to the fact that certain questions put by the Gardaí were answered, "no comment", or there was no response. That arose in these circumstances, that – [Garda K] was cross examined by [Counsel for the defence] and in answer to a question as to whether [S.M.] had answered questions freely, she said he had and of course there were a great number of questions and that was so. She was then asked, isn't it the case that quite a number of people who are questioned in this way by Gardaí will simply make no comment or refuse to answer questions and she agreed that that was so.*
>
> *Now, that could have -- could have painted a picture for you that [S.M.] answered every single question. And it could also have led you to believe that perhaps some certain specific matters were not put by the gardaí to [S.M]. And you would have therefore formed -- formed a mistaken impression with regard to that. But I want you to be in no doubt that there is no obligation on a person to answer any question whatever when questioned in this way or in any circumstances by gardaí. And [S.M.] was exercising his Constitutional right not to answer these questions with any substantive answer*."

And later;

> *"Just briefly two matters. The first very briefly, in relation to the -- what I said to you about the fact that you can take no adverse inferences whatever, I should have made this clear to you, it probably was clear from what I said, from the fact that [S.M] chose not to give a substantive answer to the questions that were put to him by the gardaí."*

36. It can be seen that the trial judge over the course of the charge and recharge made it abundantly clear to the jury the purpose for which this evidence was admitted and that no adverse inferences of his guilt could be drawn. It was necessary to have the questions as well as the answers as the jury were entitled to have the full interview before them when its contents had been misrepresented. Both *Finnerty* and *K.M.* highlight the risk of adverse inferences encroaching on the right to silence. In the present case, the trial judge expressly warned about drawing any such inferences. The reason why the evidence was admitted was explained to the jury.

37. We make it clear that in each case if a jury is misled as to the exercise of the right to silence, there must be an individual assessment of the proportionate interference with the right to silence by way of remedy. Not every case will require or permit the full questions and answers to be read to the jury. To adduce evidence of the fact that he did not answer every question will be sufficient in many, if not most, cases.

38. In the present case, the trial judge held in his decision on the discharge application that it was also relevant that the jury be told of the specific questions as otherwise they might wonder why those particular allegations were not put to him. We are not convinced that this would on its own be a relevant basis for admitting the evidence. However, we are satisfied that it was just and proportionate to have admitted the questions in light of the totality of the circumstances in which that evidence was given in this case and where the jury were told as to the reason for the admission and were warned not to draw an adverse inference.

39. For the foregoing reasons we dismiss the appeal against conviction.

The Sentence Appeal

40. The appellant relied upon the following grounds of appeal:

    a) the trial judge erred in law and in fact in imposing consecutive sentences;

    b) the trial judge erred in law and in fact in failing to have any or any adequate regard to the principle of totality;

    c) the trial judge erred in law and in fact in failing to have any or any adequate regard to the age of the appellant during the period of relevant offences; and

    d) the trial judge erred in law and in fact in failing to have any or adequate regard to the good character of the appellant during the period of the relevant offences;

41. At the hearing counsel concentrated his remarks on the purported failure of the trial judge to give sufficient weight to the age of the appellant at the time of the offending and his good character in the intervening time. He submitted that the consecutive sentencing of the appellant was an aspect of the failure to have regard to those factors. That failure accentuated the difficulties with respect to the consecutive sentencing and the overall totality principle.

42. Counsel for the DPP submitted that the sentence was appropriate. The trial judge had identified the place on the scale of these offences. He had appropriate regard to the relevant factors and was entitled to give consecutive sentences to reflect the offending.

43. The trial judge had regard to the victim impact statement made by both victims. These statements indicated the significant and ongoing effects that the abuse had had upon them.

44. The most pertinent of the trial judge's sentencing remarks were as follows:

> *"Well, as in so many such cases, the aggravating factor that stands out is the effect that these crimes have had on the two victims, [E.M.] and [N.M.]. They have given very moving victim impact evidence before the Court. During the trial they gave evidence and were cross examined lengthily, but fairly, and they gave totally credible testimony about what had happened to them in their adolescence in the family home. They have carried the effects of the sexual abuse they suffered at the hands of their brother for well over 30 years in each case.*
>
> *Also, I take into account the fact that despite his youth, despite the fact that back in the 1980s many adults, let alone teenagers, did not know quite how horrific the results of sexual abuse and worse could be, [S.M] knew very well that what he was doing to his sisters at this time was very wrong. I'm not forgetting that there is only one incident relating to [N.M.]. But I am also taking into account the fact that he came into the bedroom, the girl's bedroom on a number of occasions when no offences actually took place. But that was because the occupants, certainly [E.M.] and [N.M.] were very alert to what might happen if they themselves didn't take precautions. And it's interesting that they both took effectively the same precautions, which was to wrap the bed clothes around them so that should they be asleep when their brother came in, they would be alerted to the fact that there was a danger of their being sexually attacked.*
>
> *[…]*
>
> *[S.M] is a man with no previous convictions and that is not surprising since these offences started from the age of 14 or so. But perhaps more importantly in this context, no subsequent convictions, he has led, in the eyes of the law, a blameless life since these events took place. And it is a life which reflects credit on him in many ways […]*
>
> *[…] So I take all these factors into account and in arriving at a proportionate sentence I have to have regard to the principle of totality, because there are no fewer than six counts on the indictment here. Six separate offences by [S.M] against his sisters. It is fair to say that were it not for the principle of totality in sentencing, the sentences in each case would be greater.*

Now, with regard to counts 1, 2 and 3 on the indictment I'm imposing a sentence of one year imprisonment. Those sentences will be concurrent, one with the other. Although there is indeed a very strong argument to be made for making them consecutive. With regards to counts 4 and 5, I'm imposing on each of those a sentence of two years imprisonment. They will be concurrent, one with the others, but consecutive to the one year sentences on each of the other counts involving [E.M.].

In relation to count 6 on the indictment involving [N.M..], at this stage [S.M.], I should say I take full account of his age and I've already referred to that and the state of knowledge which a teenager back in the 1980s would have. But as I said, he well knew that what he was doing was wrong and he must have known that it was very wrong. In relation to count 6 I'm imposing a sentence of two and a half years. He was a good deal first at that stage, he was 18 or 19 at that time and the sentence on that count will be two and a half years. That will be consecutive to the other sentences.

In view of the mitigating factors, I will suspend the last two years of that five and a half year sentence on [S.M.] entering into a bond to keep the peace and be of good behaviour for a period of two years from his release from custody".

45. The appellant submits that the question of his age and maturity must also be viewed in light of the home environment. The abuse, which he continues to deny, took place in what was a dysfunctional environment the details of which are not necessary to delve into but suffice to say that certain behaviour of the mother appeared facilitative of abuse.

46. The appellant relied on *The People (DPP) v. J.H.* [2017] IECA 206 in a judgment delivered by Mahon J. where it was remarked that in those circumstances a sentencing court was required to assess the offender's level of maturity at the time of the commission of the offences and accordingly measure his culpability as of that time.

47. Furthermore, in *The People (DPP) v. M.H.* [2014] IECA 19 the overwhelming majority of the offending occurred when that appellant was legally a child and at para. 12 of his judgment Edwards J. stated that:-

> *"the court considered that as a matter of strong likelihood that the Appellant in this case did not have during the period of offending the level of insight which it is satisfied he now has concerning the nature of his offending behaviour and the effects of what he was doing to the victim."*

48. In relation to the issues of totality and consecutive sentencing the appellant submits that they accentuated the difficulties and errors due to the judge's attitude to the youth and immaturity of the appellant at the relevant time.

49. It is common case that the sentencing judge set out the aggravating factors and the mitigating factors and indicating where on the scale these offences lay. A complaint was

made that he listed the failure to plead guilty as an aggravating factor but this is clearly not so.

Decision on Sentencing

50. The trial judge in this case correctly identified the gravity of these offences. They were serious indecent assaults carried out upon the child victims in their home environment where they should have been safe. He identified in general the aggravating and mitigating factors. The issues under appeal focused on the age of the appellant and his good character in the context of the overall sentence imposed.

51. The trial judge imposed consecutive sentences in respect of the offending against each of the victims. He further imposed a consecutive sentence in respect of various offences committed against the appellant's first sister where the accused was convicted on five counts.

52. This Court has previously opined with approval on the following statement from O'Malley "*Sentencing Law and Practice*", 3rd Edition (Dublin, 2016) at para. 5-27, p. 110,

> "*Insofar as there is any guiding common law principle, it is that concurrent offences should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from* separate and unrelated incidents."

53. Where, as in the instant case, multiple victims have been abused by the one sexual offender, it is appropriate to impose a sentence in respect of the offences carried out against each victim and to make such sentences consecutive to each other. This reflects the harm inflicted on each victim. This methodology has been approved by the Court of Criminal Appeal as being one of the circumstances in which consecutive sentences are appropriate. For example, in *The People (DPP) v. S.C.* [2019] IECA 348 Kennedy J. also quoted approving from O'Malley as follows: -

> "*Where there are several victims....courts are now inclined to impose a set of concurrent sentences in respect of the offences against each victim but to order those sets of sentences to run consecutively to each other. Otherwise an individual victim may feel that harm inflicted on him or has gone unpunished. However, this is just a general principle that has developed through recent practice.*"

54. At the level of principle there was no error in principle by the trial judge imposing a consecutive sentence in respect of the offending against each victim. The issue with respect to the consecutive sentencing with respect to the first victim is somewhat more complex. The offences against the first victim were not "the same incident" and do not fall foul of the general principle in O'Malley set out above. It is necessary to consider the basis for the imposition of the sentences in respect of the first victim.

55. The main contention of the appellant is that no regard was had to the age of the appellant. It is true to say that the trial judge was alert to that issue as to his age. On the other hand, at the point he referred to age, the trial judge took a particular view as to

it. The view he took was that this particular appellant knew very well what he was doing to his sisters was wrong. He took into account that he came into their bedrooms on other occasions but that they were protecting themselves.

56. It is certainly the case that by the time he came to abuse the second sister he knew very well it was wrong. He was no longer a child and that cannot avail of him. Moreover, he had already engaged in the abuse of his other sister years before. She had engaged in protecting herself. All of this points to a level of maturity and knowledge of wrong on his part by the time he came to abuse his second sister.

57. On the other hand, there is nothing apparent on the transcript (and the DPP could not assist) as to why the trial judge felt that he had a maturity and knowledge of wrong at the time of the period of first offending. He was only 14/15 years of age. He grew up in what appears to have been accepted in the course of the trial as a dysfunctional environment. That is quite likely to have had an effect on his own knowledge of what was right and what was wrong. Most importantly, on the facts before us, there is nothing to indicate why the trial judge came to view this particular 14 year old as having greater knowledge and maturity than what might be expected of other young persons of that age.

58. We have come to the conclusion that it was an error in principle to impose a consecutive sentence in respect of the first victim *i.e.* the first sister. While there was ongoing abuse, that was reflected in the decision to give an increased sentence of 2 years in respect of the final two offences against this victim. The making of the one year sentence consecutive to the two year sentence was not warranted in light of the young age of the appellant at the time of those offences.

59. We are satisfied that each of those sentences were appropriate in light of the serious nature of the offending and the mitigating circumstances. Indeed, the absence of a plea of guilty meant that a significant element of mitigation was no longer available to this appellant.

60. In relation to the sentence imposed in respect of the second victim *i.e.* the second sister, we are satisfied that for similar reasons it was a sentence of appropriate length. The trial judge was entitled to impose a consecutive sentence. It was especially relevant in the present case in light of the gap in the time of the offending and the age of the appellant at the time of this offence. There was no error in principle as to the length of the sentence or the making of it consecutive to the sentence imposed in respect of offences 4 and 5 i.e. to the two year sentence imposed in respect of the first victim.

61. We have considered the issue of the good character of the appellant in the intervening time. We are satisfied that appropriate credit was giving in respect of that matter in light of the overall length of sentence for each offence. Moreover, in the present case a large proportion of the sentence was suspended. We are satisfied that there is no error in principle with respect to the length of the sentences individually and combined in the present case, apart from the consecutive sentences imposed in respect of the first victim.

62. At the hearing of the appeal we heard that the appellant was doing well in custody and had no infringements of prison rules. We are satisfied that it is appropriate to resentence the appellant now. We have concluded that the sentences imposed were appropriate in light of the serious nature of this offending which took place while the victims were young and should have been safe in their own homes. The abuse has had significant and lasting effects on the victims. The mitigation in this case was limited in the absence of an acknowledgement of guilty. We consider that the consecutive aspect of the sentences as between the victims is appropriate in the context of the increased maturity of the appellant and the significant gap in time between the offences. Having imposed a consecutive sentence, we have stepped back and considered whether to so impose it would amount to a "crushing sentence" on this appellant. We are satisfied that to so impose it would not amount to such a crushing sentence.

63. We therefore allow the appeal to such an extent that the concurrent sentences of one year imposed in respect of offences 1,2 and 3 are now to run concurrently with the sentence imposed in respect of offences 4 and 5. The sentence in respect of offence 6 remains consecutive to the sentence imposed in respect of offences 4 and 5.