



THE COURT OF APPEAL

Record No: 57/2022

**Edwards J.
McCarthy J.
Donnelly J.**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL
JUSTICE ACT 1993**

AND

IN THE MATTER OF BILL LHDP0007/2021

Between/

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

APPLICANT

V

B.O'S

RESPONDENT

**JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 27th of
March 2023.**

Introduction

1. The present application before the Court has been brought by the Director of Public Prosecutions (i.e. "the applicant" or "the Director"), she having formed the view that the sentence imposed upon B.O'S (i.e. "the respondent") by the Circuit Criminal Court for the Eastern Circuit and County of Louth on the 24th of February 2022 was unduly lenient.
2. The respondent had appeared before the said Circuit Criminal Court on the 8th of October 2021, on which date he was arraigned and subsequently pleaded guilty to count no. 1 on the indictment (LHDP0007/2021), specifically a count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001. A further charge of causing a child to watch sexual activity contrary to s. 6(1) of the Criminal Law (Sexual Offences) Act 2017 was also preferred against the respondent on the same indictment, but that count was abandoned following a nolle prosequi which was entered into by the prosecution on the day of sentencing for the sexual assault count.

3. Having pleaded guilty to the foregoing count, which plea proved satisfactory to the Director, the matter was adjourned until the 11th of January 2022, on which date the sentencing hearing was listed for the 24th of February 2022. On that date, the respondent was sentenced to 4 years' imprisonment on count no. 1, which custodial sentence was suspended in its entirety for a period of 4 years, subject to certain probation conditions, namely, to keep the peace and be of good behaviour for the length of his probation period, to engage with Probation Services and comply with all their instructions, and to engage with addiction services.

Factual Background

4. At the sentencing hearing of the 24th of February 2022, a Detective Garda Sharon Meredith gave evidence in relation to the factual background of the respondent's offending. The particulars of the complaint outlined by Garda Meredith were described with reference to a statement arising from a video-recorded interview of the complainant conducted by members of An Garda Síochána in accordance with s. 16(1)(b) of the Criminal Evidence Act 1992.
5. Garda Meredith identified the relevant time period as spanning the night of the 5th of October 2019 into the morning of the 6th of October 2019. On these dates, the complainant, who was born in 2007 (approximately aged 12 years at the time of the offending), was enjoying a sleepover at a dwelling-house in a named town. This residential property was the home of the complainant's aunt and her partner, the respondent.
6. That night, the complainant, her parents, and her sibling attended at this dwelling-house, the idea being that the adults would enjoy a games night and that the children assembled there would enjoy a sleepover. Among the adults assembled there that night included the complainant's parents, her aunt and the respondent, and other relations. The children in attendance included the complainant, her sibling, a child of the respondent, and two other cousins. The children ranged in age from approximately 8 to 12 years.
7. On the night of the 5th of October 2019, the children had fallen asleep in the sitting room on the ground floor of the dwelling-house, scattered between couches and the floor. The contents of the complainant's videorecorded statement detailed how the complainant was on the sofa in the sitting room of the dwelling-house with the other children watching films when she fell asleep while using her mobile phone. The respondent came into the sitting room in an intoxicated state (he had been drinking vodka) and smelling of cigarettes and sat on the edge of the sofa. He initially attempted to show her some lewd material, but his focus turned to touching the complainant, as the complainant put, he touched "*like down here between my legs and then up here beside my chest and all*". He had started by touching her over her clothes, and she awoke to the cold touch of his left hand slipping underneath both her pyjama trousers and underwear and touching the top of her vagina. The complainant averred that she had asked the respondent to desist from this touching, slapping his hand away and saying, "*please don't*". The respondent tried to put his fingers near her vaginal area, between her legs and rubbed her upper thighs. The complainant described that she had fallen back asleep briefly but awoke once more to the

respondent trying to put a hand up her pyjama top to touch what she described as "*the boob area*", and she pointed to her breast area on her own person in the interview.

8. In cross-examination, it was confirmed by Garda Meredith that no digital penetration of the complainant's vagina occurred.
9. The complainant further averred that the respondent had tried "*to unbuckle his trousers and zip it down and tried to you know, taken down like his boxers and all, but before he did, I asked him please not to*". The respondent, who in unbuckling his trousers had his underwear in hand also, pulled back up his trousers. He was standing at a right angle to the complainant who was lying down on the sofa at this point, and he was "*hovering over the sofa a wee bit*". The complainant recalled the respondent saying into her ear, "*promise you won't tell anyone about this*"., "The complainant agreed to do so, saying "*okay*", but privately thought to herself that she was going to tell her uncle, who she knew was a "*counsellor*" by profession. The respondent tendered €20 for her silence, saying "*take this*" and insisting that she accept the money which the complainant ultimately refused to take.
10. At this stage the complainant was crying and wanted matters to come to an end. She then gave an account of going to the bathroom in the dwelling-house, the door to which room did not have a lock. Initially apprehensive of the possibility that the respondent might enter, she stood by the door at first for approximately a minute (in the knowledge that the kitchen door she had closed enroute to the bathroom would squeak if the respondent opened it) before then deciding to chance it, sitting down on the toilet to relieve herself. At this point, the respondent came into the bathroom, the complainant "*jump[ing]*" at the sound of the door opening and quickly pulling up her pyjama bottoms. The respondent apologised and asked her to promise him that she would not tell anyone. The complainant averred that she could not sleep for the remainder of the night afterwards, such was her discomfort, and that she felt "*scared*" and was crying and "*weepy with tears coming down her face*". Seeking comfort, the complainant slept beside one of the dogs in the house, feeling as though the animal would protect her.
11. The respondent increased his offer to the complainant, counting aloud upwards of €100 to €600, and telling the complainant that she was going to be "*a rich girl*". This conversation awoke the respondent's son who was curious as to why his father was counting. It would appear that this marked the end of the events complained of; the respondent replying, "*no reason*" and laying down on one of the couches and there then falling asleep.
12. On the morning of the 6th of October 2019, the complainant had a conversation with one of her cousins who had slept over at the dwelling-house, who Garda Meredith described as being the complainant's best and closest friend and was of approximately equal age to the complainant. Therein, the complainant described to her how the respondent had woken her up while she slept on the couch and had touched her vagina and breasts under her pyjamas. Subsequent to this disclosure, the complainant disclosed same to an uncle who was staying at the complainant's maternal grandmother's house nearby. Following these initial disclosures, the complainant informed her mother of what had happened. And

on the 7th of October 2019, the complainant's father presented at a Garda Station to make the complaint on the complainant's behalf.

Garda Investigation

13. Due to a delay of one to two days in making the complaint, the window for forensic examination had closed. The focus of the Garda investigation thus centred on statements. In the course of the investigation, gardaí consulted with the various adults in attendance at the dwelling-house on the night in question and took statements from *inter alia* her uncle to whom the complainant made disclosures and the complainant's parents.
14. On the 7th of October 2019, the respondent presented at the aforementioned Garda Station where he spoke to a Garda Ó Droma to whom he disclosed that he had done "something bad" on the night of Saturday the 5th of October 2019 but that he was very drunk and could not remember much from the night in question. Garda Ó Droma advised the respondent of his rights and advised him to consult with a solicitor, which he did, and he subsequently declined to make a formal statement and left the station on advice from his solicitor.
15. On the 18th of October 2019, the complainant met with a Garda Christine Malone and a social care leader of Tusla with a view to clarifying the content of the complaint being made. At this meeting, the complainant repeated her previous disclosure of indecent touching and further averred that the respondent had tried to expose himself to her by unbuttoning his trousers. As a result of this meeting, it was subsequently deemed necessary that the complainant should be interviewed in accordance with s. 16(1)(b) of the Criminal Evidence Act 1992 and her statement thereby videorecorded as evidence. The contents of this video-recorded statement, had the matter gone to trial, would have been broadly supported by the contents of an interview of the complainant's cousin in whom the complainant had confided the morning following the events, which interview was conducted by specialist interviewers and provided an account of what the complainant had disclosed the morning of the 6th of October 2019.
16. The respondent, having ultimately been identified as a person of interest following these specialist interviews, was arrested, detained, and interviewed in relation to the events of the 5th/6th of October 2019. Nothing of substance in terms of these events emerged from these Garda interviews with the respondent, he made no full admissions but at no stage did he dispute the complainant's account or seek to undermine it.

Respondent's Personal Circumstances

17. Garda Meredith then described the personal circumstances of the respondent. At the time of the offending, the respondent was in a relationship with the complainant's maternal aunt with whom he had two children. However, following the events of the 5th/6th of October 2019, this relationship came to an end and since then he had resided with his parents in a named town. He continued to pay maintenance for his children. Garda Meredith averred that the events continued to have an effect on family relationships: while the complainant continued to remain close with her aunt and her cousins, the relationship was complicated by the fact that "it's their dad who's the accused". Garda

Meredith described the effect on the family as “*widespread*” and noted that the complainant would have once been very close to her uncle, the respondent, which closeness was affected by events which “*broke her heart*”.

18. A plumber by trade, the respondent was independently employed. The respondent was approximately 38 years of age at the time of the sentencing. He had no previous convictions and had never previously come to Garda attention. He had struggled with cocaine addiction for over a decade but had never come to adverse Garda attention in relation to this drug use.

Psychological Reports

19. Two psychological reports were tendered to the sentencing court. One was prepared by a Dr Rochelle Toolan of The Psychological Society of Ireland, the other was prepared by a Dr Oliver O’Donoghue of a private, third-party, counselling service provider.

Report of Dr Toolan

20. Dr Toolan interviewed the respondent as part of a psychological assessment on the 30th of October 2021 and described her findings in her report dated the 9th of December 2021.
21. In relation to the respondent’s background, Dr Toolan noted that the relationship of the respondent’s parents was “*conflictual*” and characterised by regular arguments but no physical violence. The respondent denied any knowledge of mental illness within his family. The respondent’s education was afflicted by learning difficulties which necessitated his moving from a gaelscoil to a local CBS at around the age of 8 years. Notwithstanding additional learning supports which were provided to him, he never learned to read or write sufficiently, and he struggled to focus in school, “*always talking, drawing or fidgeting*”, and was assigned practical tasks by teaching staff to prevent him from “*messing*”. The respondent was never assessed for attention/concentration difficulties, and he stated that his siblings had no issues in this regard. The respondent was the subject of childhood bullying because of these learning difficulties and was the subject of verbal taunts until he was able to stand up for himself, though he denied having been involved in any physical confrontation. He was educated to Junior Certificate level. Following completion of his Junior Certificate, he left school, with the blessing of his parents, with a view to learning a trade and he started working as a plumber.
22. The respondent’s alcohol and substance usage evolved as it “*enmeshed*” with his social life. The respondent reported no interests in hobbies or sports and described spending his spare time going to the pub with his colleagues and friends. This lifestyle continued until he was 21 years of age, at which point he emigrated to Australia for one year. He returned home and met the complainant’s aunt, moving in with her at the approximate age of 24 years. They had a “*fractious relationship*” characterised by “*frequent separations*”. The respondent had two children with her, aged 9 and 13 years respectively at the time of Dr Toolan’s report.

23. With respect to the respondent's medical history, Dr Toolan noted that she had not seen his medical records but that the respondent had reported experiencing "*gastric difficulties*", which difficulties he had put down to his excessive alcohol consumption. Dr Toolan further noted that the respondent had reported no known diagnoses of mental health difficulties within his family, but that at night the respondent experienced "*a racing heart and racing thoughts*" and he outlined "*recurrent worries*" regarding his offending, particularly the impact that it has had upon his own children. The respondent rated his mood as "*low*", assessing it as falling at a 3 on a scale of 10, which mood was described as "*fluctuating*". The respondent accepted that there was a correlation between his mood and his alcohol/substance usage. Dr Toolan noted that the respondent was not on any psychiatric medication but that he had previously been prescribed Xanax by his GP to address sleeping difficulties, which medication he was reluctant to use owing to his history of substance abuse. At the outset of forensic proceedings, the respondent had reported thoughts of self-harm but denied any plan or intent to give effect to those thoughts and was not, at the time of interview, self-harming. He further denied having any suicidal thoughts and cited his children as "*protective factors*". Dr Toolan described the respondent as having "*poor insight*" into mental health concerns and as outlining "*reluctance*" towards seeking support for these concerns, stating "*that'd mean I'd have to go through my story with another doctor*". She recommended that a psychiatric assessment be carried out on the respondent "*to identify suitable pharmacological treatment options*". The respondent denied having any psychotic symptoms or perceptual disturbances.
24. Dr Toolan then described the respondent's history of substance abuse. She noted that it began when the respondent was approximately 14 years of age when he began drinking alcohol with friends who were older than him, and when he began smoking cannabis and sniffing petrol. From 18/19 years onwards, he tried additional substances and an evolving pattern of cocaine and methamphetamine usage emerged, initially beginning once weekly and thereafter turning habitual, the respondent engaging in substance and alcohol use from Thursday to Sunday. The respondent also tried hallucinogenic mushrooms "*a few times*", and he reported his drug use as occurring in social contexts. The respondent's alcohol and substance use increased following his children's births and it contributed adversely to his relationship difficulties with his partner. Approximately 4 years prior to Dr Toolan's assessment of the respondent, the respondent attended an addiction counsellor and following this attendance he abstained from substance use for approximately 9 months to one year. This abstinence gave way to relapse, the respondent thereafter consumed two 750ml bottles of vodka every three nights in addition to using cocaine at home. The respondent estimated a weekly cocaine expenditure valued at €300 - €400 prior to the events of the 5th/6th of October 2019. Dr Toolan noted that the respondent had reported a history of gambling, though this history was of a minor character inasmuch as it consisted of the weekly placement of €25 bets. While in Australia, the respondent completed a mandatory online drugs awareness course after being caught in possession of cannabis. He had no forensic history relating to drugs in Ireland.

25. Dr Toolan described the appellant as presenting as "*anxious*" at interview, but that he relaxed as the assessment progressed. She described him as "*reactive*" but that overall his mood was "*flat*" and "*tearful*" when discussing the events of the 5th/6th of October 2019. She described the respondent as "*reflective*" and as "*appropriately engaging*", offering information that he remembered as it arose throughout the assessment.
26. Dr Toolan assessed the respondent's responses to the assessment using the Paulhus Deception Scale (PDS), which scale measures conscious distortion, that is the tendency to give inflated self-descriptions to an audience, and self-deception in the sense of a pervasive lack of insight. The respondent scored in the "*slightly below average*" range in respect of conscious distortion which Dr Toolan described as indicative of the respondent "*not engaging in a deliberate attempt to portray a positive view during the assessment*". In respect of self-deception, the respondent was placed in the "*average*" range, which result Dr Toolan described as indicative of the respondent having "*no tendency to engage in self-deception and provide inflated self-descriptions*". Viewed in the round, Dr Toolan regarded these results as typical of a profile than "*tends to be found in individuals who are aware of their problems and whose responses are not unduly influenced by what others may think of them. Individuals with this profile [...] are likely to be honest and valid [in their responses]*".
27. In relation to the respondent's psychosexual life history, Dr Toolan noted that the respondent had reported that sex was not a topic that was spoken of in his household growing up and that his household never discussed emotions, his parents did not exhibit affection towards one another. The respondent stated that he was aged 14 years when he first sexually touched someone and that he first engaged in sexual intercourse with a same aged peer when he was approximately 16 years old. The respondent reported having no difficulties in establishing romantic connections or socialising with members of the opposite sex. He denied any experiences of sexual abuse or early sexual activity as a child and described his sexual orientation as heterosexual. The respondent outlined to Dr Toolan that he felt as though his sex drive was "*not strong enough*" with his ex-partner, which he attributed to their "*conflictual*" relationship. He reported that his libido would increase when he was intoxicated by substances, in particular cocaine and methamphetamines. Dr Toolan noted that the respondent did not identify his reduced libido at the time of assessment with his abstinence from substances. He denied watching pornography with themes of youth, and he further denied having ever sexually touched a child, with the exception of the offending at issue. The respondent described his relationship with his ex-partner, the complainant's aunt, as having been "*tumultuous*" characterised by "*frequent heated arguments*" and "*infrequent intimacy*", which lack of intimacy the respondent attributed to his substance usage and what he described as his ex-partner's mental health difficulties.
28. The respondent presented as a poor historian in relation to the offending and was unable to recall anything that had occurred beyond the arrival of the adults at the start of the night of the 5th of October 2019. He stated that he had consumed cocaine and a bottle of vodka. Notwithstanding his lack of memory, he stated that he "*feels*" that the events

complained of did occur and added that the complainant would not have stated otherwise if they had not. The respondent could not explain his offending but reflected that he might have thought it was his partner, however he subsequently corrected this by saying that that would not have made sense as in any event his partner was upstairs. The respondent stated that he "*couldn't stomach*" the contents of the Book of Evidence.

29. Applying the Multiphasic Sex Inventory (MSI) tool, Dr Toolan assessed the respondent's psychosexual characteristics. The results suggested that the respondent had "*normal*" sexual interests and desires; that he had no cognitive distortions regarding the index offence and that he accepts accountability; that the respondent is "*motivated*" insofar as he is open to future treatment in relation to his sexual thoughts; he did not attain significant scores in relation to "*Sex Deviance Development*", "*Gender Identify Development*", or "*Gender Orientation*"; he attained elevated scores in relation to "*Marriage Development*" which were indicative of disharmony with his relationships, and; he scored very low (2 out of a possible 39) on the "*Child Molest Scale*" relating to the index offence.
30. Dr Toolan further applied the Static-99R actuarial tool to assess the degree of risk for recidivism in sex offending by the respondent. This application yielded a score of 1 out of a possible 12, placing the respondent in the "*below average risk*" category and reflecting certain factors, namely his age, his history of living with a consensual sexual partner, his lack of previous forensic history and the profile of the complainant as a non-male relation. Application of the STABLE-2007 tool to measure risk factors relevant for the treatment and supervision of the respondent as a person convicted of a sexually motivated offence placed the respondent in the "*low*" risk category of recidivism, which score was reflective of his self-reported intimacy deficits and his general self-regulation relating to his history of addiction and difficulty with cognitive problem-solving skills. Application of the Acute 2007 and Risk Matrix-2000 (RM2000) tools yielded analogous results.
31. Dr Toolan noted that the respondent history of alcohol and substance abuse and the role of same in the context of the offending represented risk factors to sexual recidivism, making his risk profile liable to change should he use alcohol/drugs again. Moreover, Dr Toolan considered the respondent's low mood and difficulty in working following the offence as risk factors for "*emotional collapse*". Dr Toolan recommended that the respondent engages with his GP or a psychiatric service provided to assess and access appropriate psychiatric and psychological supports. Having regard to the respondent's infrequent gambling use, Dr Toolan recommended that he monitors this and seeks support for same on account of his history of addiction which makes him "*vulnerable*".

Report of Dr O'Donoghue

32. Dr O'Donoghue compiled his report following nine sessions which were attended by the respondent from the 29th of October 2021 to the 4th of February 2022. The respondent is described therein as having been a "*very straight forward and affable person*" who did not "*hesitate*" to inform Dr O'Donoghue of the incident and charges preferred against him when asked why he had been referred for psychotherapy. While he had no issue with

accepting responsibility for his actions, he nevertheless maintained that he had no recollection of the events in question, and that he had consumed a lot of alcohol that night as well as an unknown street drug that was meant to have been cocaine.

33. Dr O'Donoghue reported that the respondent did not present any major trauma, sexual or physical, indications in his childhood history. While the respondent referred to childhood bullying in late primary school, such bullying was of a lesser degree and limited to teasing and ridicule centring on his difficulty to read aloud in class. Dr O'Donoghue reported that the respondent's first sexual experiences growing up, according to the information that the respondent had provided, were within the general psychosexual developmental age range. The respondent had no significant medical history, no history of psycho medical intervention, and no psychiatric history. The extent of his medication was limited to sleeping tablets which were prescribed by his GP following the events of the 5th/6th of October 2019.
34. Dr O'Donoghue reported that the respondent had left school early, seeking out an apprenticeship at 16 years of age. He reported that at around this time, the respondent was having "*the odd drink the weekend (sic)*" and was already experimenting with cannabis. From the age of 17/18 years until around 22/23 years, the respondent informed Dr O'Donoghue that he was taking ecstasy with his friends approximately twice a month. By the time he met the mother of his children, the complainant's aunt, at the age of 23/24 years, the respondent was using cocaine. The respondent's relationship with the complainant's aunt was described as "*very unsettled*" and characterised by intermittent periods of living apart. Throughout this unsettled relationship, the respondent continued his lifestyle of weekend alcohol and illicit substance consumption. The respondent described his usage of alcohol and drugs as getting "*real bad*" from the age of 31/32 years, the respondent drinking four nights a week and consuming cocaine, which two substances "*went together*" for him.
35. Throughout the psychotherapy sessions, Dr O'Donoghue described the respondent as "*progressive and willing to meet his history in an honest and open manner*". Dr O'Donoghue noted that the respondent had been displaying symptoms of "*paranoia and intense fear*" when speaking about leaving his house, and that he had "*a constant fear he is going to be attacked verbally or potentially physically*". Dr O'Donoghue reported that the respondent had lost all his close friends, who "*shun*" him, in the wake of his offending, and that the respondent had been demonstrating "*intense agitation*" and describing his life as "*a nightmare*". The respondent had closed himself off from the prospect of any form of intimate relationship, asking "*who would want him*".
36. It was Dr O'Donoghue's expert opinion that the respondent would benefit from a long term developmental therapeutic process and structured support for addiction recovery from all substances that have been a large part of his life. Noting that the respondent had remained sober since the events of the 5th/6th of October 2019, Dr O'Donoghue reported that the respondent would likely continue to remain sober with the correct supports in place and that the respondent had agreed to extended therapy which will be necessary "*in*

terms of personal reflection and addressing these issues in a very open and honest manner”.

Victim Impact Statement

37. A Victim Impact Statement was tendered to the sentencing court, which was prepared by the complainant’s mother together with the complainant. This statement was read into evidence, the complainant preferring not to read it aloud:

“The [complainant] now is not the [person] she used to be two years ago. She was always bubbly and happy all of the time. Now she is sad and angry. She fights with her siblings all the time because she can't control her emotions and will lash out. [the complainant] has, on many occasions, cried herself to sleep, crying asking herself why; why did this happen to me? As a parent, I can't answer this question for her and feeling as I failed as a parent in protecting her from something so horrible. [The complainant] suffers with bad anxiety now and went to counselling in the past and is going at the present. [The complainant] has had suicidal thoughts and was self-harming. Most days of the week, she is very depressed and very sad, crying. She is very, very wary of people and will always take a step back from crowds, and has had panic attacks on many occasions in these situations. [The complainant]’s anger has made her lash out and hit, thump walls and hit them that hard her knuckles would bleed and left cuts all over them. What [the complainant] went through no 12-year-old child should ever have to experience this. These last two years as a parent, sitting in the next room, not being able to sleep, listening for sounds of noises, fearing for my daughter's life, extremely heartbroken and hard to watch as a parent. These thoughts and images left with [the complainant] are terrifying. She will have to live with these for the rest of her life and as she thought, he was a man she trusted and looked up to, left this heartache with her. I'm sitting here with my daughter writing this because when she went to put pen to paper, she burst out crying and found it difficult to talk about. Her heart is broke. Her confidence is gone. I'm looking at my wee girl's face, it truly breaks my heart to see her so sad and numb.”

38. Garda Meredith indicated that “closure” resulting from the sentencing hearing would assist the complainant “greatly” and later described the complainant’s preference for retributive justice: “she wants him to know what he’s done is wrong and he gets punished for it”.

Plea in Mitigation

Expression of Remorse

39. Counsel on behalf of the defence read a statement the sentencing court, which statement was authored by the respondent and in which he expressed his remorse:

“I'm sure the last two years have been very difficult for [the complainant] and her family. I'm deeply remorseful for my actions and I wish to offer my sincere apologies to [the complainant] and her family. I can't imagine the pain and

suffering I have caused and the effect that this would have on all of them. I'm deeply ashamed of my actions and I can assure you it won't happen again in the future. My actions on the night have made me realise I've had issues with drink and substance abuse. I brought embarrassment on myself and my family. I've received treatment and counselling and have not touched drink or drugs since that night two years ago, and I pledge to remain sober and always be in full control of myself for the rest of my life. [The complainant], I know you are cousins with my children and I am so sorry for what I have done but please be assured I will never cause you hurt again."

Submissions in Mitigation

40. Counsel submitted to the sentencing court that the value in the respondent's guilty plea was that *"the blame is going where it belongs"* and was demonstrative of the respondent taking responsibility for *"his appalling actions"* and accepting that *"the blame lies squarely with him"*.
41. Counsel conceded that in the circumstances, the sentence had to be custodial, on account of its seriousness, and characterised by a significant headline sentence. Nevertheless, counsel submitted that the respondent had no history of custodial disposals, having never come to Garda attention before and having never committed a previous offence, and that in such circumstances an immediate custodial disposal would have a *"devastating impact"* for a person in his position.
42. Counsel drew the sentencing court's attention to testimonials tendered to the court below by *inter alia* his aunt, his sister, and one of his former employers. Counsel submitted that they indicate that the respondent was a *"hardworking person"*, that he supported his children and that he helped people out during the Covid-19 pandemic, that he was a person of good character. In this regard, counsel submitted that the respondent's circumstances were an *"aberration"* inasmuch as he contrasted from other people who come before the courts who are *"wildly antisocial"* and are engaging *"in all sorts of harm to society"*. Counsel submitted that the sentencing court must take into account the risk of recidivism and that the two psychological reports pointed to the respondent's case as *"a genuine aberration"*, and counsel pointed to the conclusions of these reports as suggesting that *"to cut somebody off from their social support for too long might be [...] not in the public interest"*. Counsel further noted that the two reports suggested that the respondent's offending was linked to alcohol and substance abuse and submitted that the sentencing court should build into the sentence a period spent in the community under supervision in relation to alcohol and substance addiction.

Sentencing Remarks

43. The sentencing judge noted the contents of the various material furnished to him in the course of the sentencing hearing. The sentencing judge then set out his approach to sentencing in this matter, having regard to s. 2(2) of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s. 37 of the Sex Offenders Act 2001, which

section provides for a maximum sentence of 14 years' imprisonment for a person guilty of sexual assault.

44. The sentencing judge noted that headline sentences for sexual assaults vary on account of wide differences in gravity. In relation to the gravity of the present offending, the sentencing judge believed it important to look to the nature of the acts complained of, in particular the indecent touching of the complainant's vagina and breast area, both inside and outside her clothing, and the circumstances of the incident, namely that it was a once-off incident that occurred late at night by an inebriated person who was in a position of trust in relation to the complainant, a child. Further, the sentencing judge noted that the complainant was sleeping over at her aunt's house in a room shared with other children, including the respondent's. The sentencing judge remarked "*She was entitled to feel safe and secure and certainly entitled to believe and feel, that her auntie's -- uncle was not the one that would do something as horrible as this to her*". Of "*crucial consideration*" to the sentencing court was the age of the complainant, the sentencing judge remarking "*although the assault may not be particularly serious in terms of its physical contact, it still may merit a reasonably severe sentence where the victim was very young at the time of the offending*" and he had regard to *DPP v. L.A.* [2011] 1 I.R. 38 in this vein. The sentencing judge further quoted O'Malley on *Sentencing Law and Practice* (3rd edn, Thomson Round Hall, 2016), at 13-21:

"The impact, both short and long term on the victim, the breach of trust or abuse of power relationship heightens the culpability of the offender, and will very often outweigh any leniency that might be forthcoming because of his conduct".

45. The sentencing judge nominated a headline sentence of 4 year's imprisonment, which headline was placed on the lower-end of the mid-scale of offending, and noted that "*[the offending] was a once-off, protracted incident, although very ugly*". The sentencing judge cited the aggravating factors as the complainant's age, the respondent's position of trust in relation to the complainant and within the wider family, and the nature of the crime as perpetrated on an innocent 12-year-old girl staying on a sleepover in her aunt's home.
46. In deciding whether to suspend part or all of the sentence, the sentencing judge described his approach:

"Firstly, a Court should not impose a suspended sentence unless the Court is satisfied that the offence is sufficiently serious to merit imprisonment. I have already indicated that I believe that this offence warrants a four-year sentence of imprisonment. Two; there was no evidence of threats or grooming in this case. The incident was a one-off aberration committed whilst the accused was seriously under the influence of intoxicants. There is a low risk of reoffending by somebody who is addressing his addiction. The accused has no prior or subsequent convictions of any kind. A suspended sentence can sometimes be appropriate where serious harm has been caused, but the accused's culpability is diminished by some factor present at the time of offending. As I say in this case, I am satisfied from the evidence, that the accused was seriously inebriated at the time and

something that was known to the complainant. Certain personal circumstances may merit a suspended sentence, even where the offence merits immediate imprisonment. See paragraph 22.13 of O'Malley."

47. The sentencing judge further noted the evidence of Garda Meredith to the effect that the complainant was "anxious" that the respondent be sentenced and that she should not be held to blame for what occurred. He further noted the family circumstances, that the complainant is a cousin of the respondent's children and that the families were close, which rendered the respondent's offending "all the more heinous". The sentencing judge did note that the respondent had accepted responsibility "almost from the outset". In these circumstances, the sentencing judge asked himself "if anything would be served by sending the accused to prison for this one-off crime" and concluded that nothing would be so served. Cognisant of the suffering the respondent was already experiencing as a social pariah and that he had been put out of his home by his ex-partner due to his offending, "as heinous as this crime was, I don't believe it would be just in all the circumstances to require the accused to serve out his sentence of imprisonment in prison. And I feel the incident will define him for the rest of his life". The sentencing judge had regard to *DPP v. Farrell* (6th of April 2016) as a factually analogous case in which a sentence was suspended in its entirety. Accordingly, the sentencing judge suspended the 4 years' custodial sentence for a period of 4 years on certain conditions described at para. 3, above.

Notice of Application for Review of Sentence

48. On the 16th of March 2022, the Director applied to this Court pursuant to s. 2 of the Criminal Justice Act 1993 for review of the sentence imposed upon the respondent on the grounds that it was unduly lenient. In support of this application, the Director advances ten grounds, which in essence may be distilled into four succinct grounds:
1. That the sentencing judge erred in law and fact in failing to have appropriate regard to the range of sentences applicable to the offence of sexual assault.
 2. That the sentencing judge imposed a disproportionate sentence that did not give sufficient weight to aggravating factors / did give excessive weight to mitigating factors.
 3. That the sentencing judge erred in wholly suspending the sentence, having regard to the seriousness of the offence.
 4. That the sentencing judge did not act in the public interest by wholly suspending the sentence, inasmuch as the whole suspension clearly would not have served the sentencing principle of deterrence, having regard to the maximum sentence set down by the Oireachtas.

Parties' Submissions to the Court of Appeal

Applicant's Submissions

49. The applicant submits that the sentence imposed on the respondent was unduly lenient in circumstances where the “*typical*” sentence for the offence of sexual assault might be 5 to 7 years’ imprisonment, and she relies upon commentary by O’Malley in *Sentencing Law and Principle* (2nd edn, Thomson Round Hall, 2006) in that regard. The headline sentence of 4 years nominated by the sentencing judge in this case falls below this tariff. Furthermore, the applicant draws this Court’s attention to O’Malley’s commentary at paras. 13.41-13.42 in which he identified certain aggravating factors the presence of which would ordinarily place a sexual offence in the “*higher echelons of the scale of gravity*”. The applicant submits that these factors include “*breach of trust or abuse of power relationship, the targeting or taking advantage of a vulnerable victim, plying a young victim in particular with alcohol or drugs to facilitate offending, and an occasion where further there was a significant age difference between the parties*”. Additionally, the applicant notes that O’Malley refers to the English authority of *R. V. Millberry* [2003] 2 All E.R. 939 as supportive of the proposition that an especially serious mental effect on the victim is an aggravating factor. Having regard to the foregoing, the applicant submits that the headline sentence nominated in this case was too low, and that is before one accounts for further aggravating factors of the occasion of bribery, the occasion of humiliation/degradation in the bathroom, the occasion of fear leading to the complainant sleeping with a dog. The applicant submits that the sentencing judge failed to have any sufficient regard to each of the aggravating factors identified.
50. The applicant also submits that in describing the events of the 5th/6th of October 2019 as not being “*particularly serious in terms of its physical conduct element*”, the sentencing judge fell into error, the touching in question to be contrasted with a kiss to the cheek. The applicant submits that the effects on the mental health of the complainant as a result of the respondent’s offending would appear to say that the offending was particularly serious.
51. The applicant submits that the sentencing judge had excessive regard for the effect of the respondent’s offending on the family, and in doing so placed an excessive emphasis on the possibilities of circumventing or limiting damage into the future.
52. As regards the respondent’s alcohol usage, the applicant submits that it is well established that this offers no element of mitigation but that the respondent should consider himself fortunate that it was not regarded as an aggravating factor that he drank to demonstrable excess and took the active role he did while in a position of trust amongst a group of children.
53. The applicant submits that the complainant is vulnerable by reason of her age, the age difference between the parties and the position of the respondent as an adult in a position of trust. The applicant submits that while the complainant was vulnerable in part by reason of the alcohol consumption of the respondent, and not vulnerable by reason of herself having consumed some intoxicant or drug, the principle has equal application in this case. The applicant draws this Court’s attention to the dicta of Birmingham J., as he then was, in *DPP v. Krol* [2017] IECA 205 in which he held “*An invasive sexual assault on*

a comatose individual who is not in a position to resist requires to be met by a custodial sentence save in wholly exceptional circumstances". The applicant submits that if one substitutes the word "*vulnerable*" for the word "*comatose*", the principle in substance remains the same, and the applicant further submits that there is nothing wholly exceptional in the circumstances of the present case to warrant a departure from this principle.

54. The applicant finally submits that the present case merited the incorporation of a significant element of deterrence. The respondent was involved in a trusted or "*quasi-parental*" role and offenders in like positions must be deterred from engaging in all of the conduct found reprehensible in the present case. The sentencing judge, the applicant submits, erred in failing to have proper adequate regard to how deterrence might be appropriately reflected in the sentence he imposed and that passing reference to deterrence in society did not suffice. The applicant submits, therefore, that the sentence imposed on the respondent had minimum deterrent effect.

Respondent's Submissions

55. The respondent first submits, as a preliminary matter, that there was an unexplained delay in progressing the undue leniency application by the Director. He notes that the respondent was sentenced on the 24th of February 2022 and that the Director lodged her Notice of Application for Review of Sentence on the 16th of March 2022. Submissions were not filed until the 30th of August 2022 and were not received by the respondent until the 1st of September 2022. The respondent submits that these delays magnify the "*disappointment factor*" in the event that this Court holds that the sentence imposed on the respondent was unduly lenient and imposes a custodial sentence, in circumstances where the respondent has been at liberty for over a year. In the absence of an explanation for the delay, the respondent submits that the delay militates against interference by this Court.
56. The respondent draws this Court's attention to the decision of the Court of Criminal Appeal in *DPP v. Stronge* [2011] IECCA 79 as authority for the principle that interference in applications of this type is warranted only where a "*substantial or gross departure from what would be the appropriate sentence in the circumstances*" is demonstrated by the applicant.
57. In respect of the sentencing judge's ruling, the respondent submits that he gave a considered judgment which took all relevant matters into account and that he did not err in law or in fact. While the respondent concedes that it would not have been an error in principle for the sentencing judge to have preferred an immediate custodial disposal, in any event a "*very lenient sentence*" is not the same thing as "*manifestly inadequate*". Unlike the offence of rape, the respondent notes that there is no presumption of immediate custodial disposal for sexual assault and refers this Court to *DPP v. Damien Farrell*, an unreported case relied upon by the sentencing judge as authority for the proposition that a fully suspended sentence can be imposed in sexual assault cases, and *DPP v. F.M.* [2022] IECA 40, in which such a sentence were upheld on appeal.

58. In relation to the respondent's offending, the respondent submits that the actual touching fell on the lower end of gravity notwithstanding the aggravating factors identified by the applicant. The respondent submits that exceptional factors are at play and points to the offending as an impulsive once-off incident committed while intoxicated and an aberration against a history of non-offending; the expression of remorse and public apology, the early guilty plea and acknowledgement of responsibility; a history of significant substance abuse and addiction for which the respondent had received psychotherapeutic treatment; and, forensic assessments which pointed to a low-risk of sexual recidivism.
59. The respondent submits that in passing sentence, the sentencing judge gave a carefully reasoned judgment in which he considered inter alia, the extent to which the sentence would be suspended; the nature of the offending as a "*once-off protracted incident, although very ugly*" and as falling at the lower end of the mid-scale of offending; aggravating factors namely the age of the complainant and the breach of trust; in relation to the decision to wholly suspend, the fact that the respondent had suffered a *de facto* punishment; the low-risk of reoffending; absence of prior convictions, and; the closeness of the families. The respondent observes that the fact the sentencing judge took into account all relevant matters does not seem to be seriously challenged by the applicant.
60. The respondent notes that the sentencing judge was cognisant of the "*low risk of reoffending by somebody who is addressing his addiction*" and draws this Court's attention to the dicta of Walsh J. in *DPP v. O'Driscoll* (1972) 1 Frewen 351, 359 as authority for the proposition that "*the objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would best be served if the criminal could be induced to take the latter course*". The respondent submits that the sentencing judge structured the suspended sentence to incentivise rehabilitation. The respondent also draws this Court's attention to *DPP v. D.W.* (Unreported, Court of Appeal, 2nd of June 2020) as authority for the proposition that a suspended sentence is still a sentence marking the necessary degree of censure and societal deprecation of the crime and is particularly useful in cases involving first-time offenders or where there is an evidence-based earnest to reform or rehabilitate. The respondent submits that the sentencing judge took the view that the public interest would best be served in this case if the sentence was served in the community.

The Court's Analysis and Decision

61. In this case there was no dispute as to the legal principles to be applied in determining an undue leniency application brought under s. 2 of the Criminal Justice Act 1993. The jurisprudence in that respect is well settled. To succeed, the applicant must establish that the sentence imposed by the court below represented a substantial departure from the norm. Such a departure will usually have been caused by a clear error of principle. It is immaterial whether an appellate court would have imposed, if it had been sentencing at first instance, a different sentence to the one that was actually imposed. That is not the test. For the court to interfere the sentence must have been shown to have been not just lenient but unduly lenient in the sense just spoken about. Moreover, in determining

whether that is the case, an appellate court is obliged to consider and give significant weight to the reasons stated by the sentencing judge at first instance for imposing the sentence that he or she imposed, although this will not necessarily be determinative.

62. Having considered all the circumstances of the present case, including the helpful submissions by counsel on both sides, we have a clear view as to the matter. We are satisfied that the sentence imposed at first instance was unduly lenient in the sense of being a significant departure from the norm.
63. The offence in this case was a serious one. It involved the sexual assault of a child and the Oireachtas has ranked such an assault as being more cardinally serious than the sexual assault of an adult and in consequence of that has provided for a higher maximum penalty. The maximum penalty for the sexual assault of a child is 14 years imprisonment and the range of potential penalties from within which an offender may be sentenced runs from non-custodial disposals up to 14 years imprisonment.
64. The sentencing judge at first instance assessed the gravity of the case as being one meriting a headline sentence of 4 years imprisonment. The Director of Public Prosecutions does not take issue with the headline sentence. We were told by her counsel that she accepts that it was "*there or thereabouts*". We will proceed on that basis, although we would observe that on any view of the matter the nomination of a figure of four years imprisonment was probably at the low end of the sentencing judge's margin of discretion in regard to the setting a headline sentence, having regard to the significant harm done in this case (as reflected in the poignant victim impact statement presented to the court below) and the aggravating circumstances of the case, particularly the appellant's breach of trust, the vulnerable nature of the victim who was a pre-teenage girl, the taking advantage of such a vulnerable victim when she was asleep, and the proffering of money to the victim in the aftermath of the event to buy her silence.
65. It was accepted (properly) by counsel for the applicant that in circumstances where the respondent had pleaded guilty, had no previous convictions, had been a positive contributor to society both before and after the incident, had expressed remorse, had addiction issues with regard to alcohol and certain substances, and had been assessed by a psychologist as being at low risk of reoffending (providing he addressed his alcohol and substance abuse issues), he was entitled to a substantial discount from the headline sentence to reflect those circumstances. That being so, it was further accepted by counsel for the applicant that the Director's principal basis for complaint was that the respondent had received a wholly suspended sentence.
66. The sentencing judge's stated reasons for imposing a wholly suspended sentence are encapsulated in the following passage from his ex tempore judgement:

"I have to ask myself if anything would be served by sending the accused to prison for this one-off crime, for which he has accepted responsibility almost from the outset. I believe not. He's already suffering in that he has lost the society of his social circle and has been put out of his home by his partner and now finds himself

back living with his parents. As heinous as this crime was, I don't believe it would be just in all the circumstances to require the accused to serve out his sentence of imprisonment in prison. And I feel the incident will define him for the rest of his life. I believe there is proposition for this authority. See DPP v. Farrell. I don't have a citation other than it was reported on the 6th of April '16. This led to a suspended sentence wherein an accused was found guilty of three counts of sexual assault committed against his niece on two occasions. As here, there were aggravating factors of disparity of age, abuse of position of trust and the devastating effects on the victim. The Court imposed a two-year sentence of imprisonment which was suspended in its entirety."

67. Neither side has been able to uncover a written judgement in respect of the *Farrell* case referred to by the sentencing judge. Some newspaper references to the case have been uncovered in online research, but there is insufficient detail to enable this court to safely rely upon it. Moreover, we have said many times that taking a single case as a comparator will rarely be of help. The reason is that the case in question may be an outlier either in terms of leniency or severity. The proper way to use comparators is to present the court with a representative sample of broadly similar cases which can justifiably be said to indicate a trend.
68. Be that as it may, the reasons put forward by the sentencing judge in this case were cogent and were anchored in his belief that society would best be served by the imposition of a non-custodial sentence in circumstances where the offence had been a one-off, the offender had accepted responsibility and had no previous convictions, and the offender had suffered a number of adverse sequelae himself in consequence of his behaviour.
69. All of that having been said, however, we believe that this was a case where notwithstanding the substantial mitigation that was available to the respondent, a custodial sentence was required. There required to be more than the mere deprecation of the offender's conduct. Such was the gravity of this offence that a punishment involving the hard treatment that goes with actual deprivation of liberty was required, and was deserved. It is true that the assault was not a penetrative one, but it was one that had profound and long-lasting consequences for the victim. Moreover, the circumstances in which it was perpetrated were highly aggravated and that is relevant to disposition. We accept that what occurred may have been aberrational, but even if that is so the circumstances of it were such that it requires not simply to be deprecated but punished, both for the effect that will have on the offender himself but also for its general deterrent effect, as has been urged upon us by counsel for the Director of Public Prosecutions. The respondent was undoubtedly entitled to a substantial discount from the nominated headline sentence to reflect the mitigating circumstances in his case, but it was wrong, and an error of principle in our view, to go so far as to descend below the custodial threshold. A custodial sentence was required in this case and to have suspended the headline sentence in its entirety represented an error of principle in our view. It exceeded the sentencing judge's legitimate margin of appreciation having regard to the

circumstances of the case. The result was a sentence that represented a substantial departure from the norm.

70. In the circumstances we will quash the sentence imposed by the court below and proceed to a resentencing of the respondent. We have been advised that the respondent is continuing to attend for counselling and psychotherapy, and we have been provided with an updated report from his psychotherapist, Mr O'Donoghue, to which we have had regard. It appears that the respondent is continuing to engage in the therapeutic process and is making progress. While we would have preferred to see a report from an agency specifically concerned with addressing his alcohol and substance abuse issues, we are prepared to accept his counsellors' reported understanding that he is abstaining from alcohol and substances, and that he is deeply motivated to make the necessary changes in his life.
71. In circumstances where the respondent did not request a probation report for the sentencing in the court below, and in the context of this undue leniency review had not requested before now that a probation report should be ordered, we are not disposed to do so at this point. We are satisfied that we have sufficient information to enable us to proceed to a resentencing today.

Re-sentencing

72. We will again nominate a headline sentence of 4 years' imprisonment. From this we will discount by 2 years, or 50%, to reflect the substantial mitigating circumstances in the case.
73. Further, to take account of the fact that there has been some delay in bringing this application before the court, and to incentivise the respondent's continued work towards addressing his alcohol and substance abuse issues, we will suspend a further 6 months of sentence.
74. Accordingly, the respondent is sentenced to 2 years' imprisonment with the final six months thereof suspended. The conditions of the suspension are to be the same as were imposed by the court below and the sentence is to date from Monday the 10th of April 2023. The respondent is required to present himself at a specified Garda Station of which he has been advised at 12.00 noon on that date and surrender to custody.