THE COURT OF APPEAL

Record No: 88/2022

Record No. 89/2022

Edwards J.

McCarthy J.

Kennedy J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

G.O'H

Appellant

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

E.O'H

Appellant

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 11th of March 2024

Introduction

1. On the 31st of October 2023, this Court dismissed, by way of judgment bearing neutral citation [2023] IECA 300, the respective appeals against conviction brought by Mr. G.O'H and Mr. E.O'H (i.e., "the appellants").

2. The two appellants had been tried together before a jury in the Central Criminal Court where, on the 10th of November 2021, they were each found guilty of one count of rape contrary to s. 48 of the Offences Against the Person Act 1861 as provided for by s. 2 of the Criminal Law (Rape) Act 1981, as amended. One of the two appellants, Mr. E.O'H, was further found guilty of

one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended.

3. The appellants are now before this Court again to appeal against the severity of their respective sentences imposed by the Central Criminal Court on the 9th of May 2022. On that date, Mr. G.O'H was sentenced to 12 years' imprisonment, with the final year thereof suspended on certain conditions. Mr. E.O'H was sentenced to 12 years' imprisonment on the rape count, and he was further sentenced to 8 years' imprisonment on the sexual assault count; both such sentences to run concurrently and the final year of Mr. E.O'H's global custodial term was suspended on certain conditions.

Notices of Appeal

4. The appellants lodged separate Notices of Appeal, and as such filed separate Grounds of Appeal. There is some overlap between the two sets of grounds. To the extent that some overlap exists, we note that the following shared grounds of appeal are advanced:

I. Both appellants complain that the trial judge erred in setting a headline sentence at 13 years, and maintain that that was too severe;

II. The appellants complain that the sentencing judge failed to afford sufficient weight to all of the mitigating factors. In particular, it is complained that the sentencing judge erred in concluding that the mitigation in each appellant's case was limited to their respective co-operation with gardaí and the Probation Service. They further complain that the sentencing judge did not accord any or any due weight to each appellant's previous good character, work history, and age at the time of offending. (G.O'H ground no. 7(i) and (ii), E.O'H ground no. (vi));

III. The appellants complain that the sentencing judge erred in failing to consider the belief of each appellant as to the age of the complainant. (G.O'H ground no. 7(iii), E.O'H ground no. (vii));

IV. The appellants complain that the sentencing judge erred in regarding as an aggravating factor that the event the subject matter of the indictment was cynical, calculated and planned, when such an assertion was not supported by evidence. (G.O'H ground no. 7(v), E.O'H ground no. (viii)(a));

V. The appellants complain that the sentencing judge failed to approach the assertion of significant intoxication of the complainant with caution having regard to the evidence of sober adult witnesses, and that she attached too much significance to the complainant's asserted high degree of intoxication and lack of consciousness. (G.O'H ground no. 7(vi), E.O'H ground no. (viii)(d)).

5. Distinct from the foregoing, the remaining grounds of appeal advanced on behalf of Mr. G.O'H comprised the following:

> "*(iv)* [The sentencing judge] *[o]bserved, as a negative noteworthy factor in the case that the Applicant (with his co-accused) befriended the complainant initially by buying her and her friends drink when the evidence did not support the Applicant in that role or take account that the complainant and her friends were making their own arrangements in relation to acquisition of drink.*
>
> [...]

(vii) [The sentencing judge erred in] *[f]ailing when balancing servility with mitigation to see the decision to contest the matter in the light of delay in complaint with avoidable lost evidence*".

6. Also distinct from the shared grounds of appeal outlined at para. 4 above, the remaining grounds of appeal advanced on behalf of Mr. E.O'H comprised the following:

"*(viii) The learned trial judge appeared to treat several matters as aggravating factors when in fact said matters were not established at all, and in reality the evidence was to the contrary:*

[...]

(b) Notwithstanding that the charge of sexual exploitation was not proceeded with and that the accused has not been convicted of same, the elements of the said charge appear to have been treated as an aggravating factor by the learned trial judge in sentencing;

(c) The learned trial judge placed reliance on an erroneous assertion that the alleged offence had occurred in a secluded area. The evidence had clearly established, both orally and by use of maps, that the location was in an open area adjacent to a main road;

[...]

(ix) In all the circumstances, the learned trial Judge erred in law in imposing an unduly severe sentence on the Applicant".

Factual Background

7. The Court has already provided a detailed summary of the complainant's evidence at trial in its judgment dismissing the appellants' respective appeals against conviction (see judgment bearing neutral citation [2023] IECA 300, paras. 6 to 28, inclusive). We do not intend to rehearse *ad longum* the factual background to the matter, beyond providing a precis of the evidence of Garda Gary Murray (otherwise "Garda Murray") tendered at the sentencing hearing in the court below on the 28th of February 2022.

Evidence of Garda Murray

8. The complainant was aged approximately 14 years at the time of the offending; G.O'H was approximately 22 years of age; and E.O'H was approximately 21 years of age. The offending behaviour took place in a seaside town on the west coast of Ireland in April 2017. In particular, it occurred at a location referred to as "*the cliffs*", a grassy verge adjacent to a road heading out of the seaside town. The complainant was residing in the town at that time with her mother and was attending a local school. The appellants are cousins, and the evidence at trial was that they were staying at a local caravan or mobile home park.

9. Garda Murray outlined that the complainant occasionally engaged in social drinking with other young people on the weekend, and that this behaviour was frowned upon by her mother. In this context, the complainant and her mother would clash, the complainant would be "*grounded*", and the pair would not speak. On one occasion, a number of weeks prior to the date of the appellants' offending behaviour, the complainant and her friends, approached passersby on the street to see if they could find somebody of legal age who would be willing to procure alcohol on

their behalf. They then gathered in an underground carpark and drank there. It is in this context that the complainant encountered the appellants who sourced alcohol on her friend group's behalf.

10. On the date of the offending, the complainant and her friends had started drinking in the changing rooms at a local sports ground, and from there they made their way to the cliffs. The complainant's evidence at trial was that the appellants had supplied alcohol on this occasion. In cross-examination at the sentencing hearing, Garda Murray confirmed that the group had previously acquired their own drink in advance of the appellants later providing alcohol, and that the group had also sourced more alcohol while enroute to the cliffs. The group that gathered at the cliffs would later disperse, eventually leaving the complainant alone with the two appellants. The appellants brought the complainant back to the caravan park where they were staying to get more drink, and following this they moved off to a different part of the cliffs to go drink there. It was at this location at the cliffs that the offending behaviour took place.

11. The complainant's recall of the event was that she was inebriated at the time. She was wearing a hoodie and leggings, and E.O'H had provided her with his jacket which she then wore "*like a blanket*". At some point in time, the complainant fell asleep. She awoke to find E.O'H touching her and trying to kiss her, and she recalled falling in and out of consciousness. The second time she awoke, she recalled her leggings coming down and that E.O'H was kissing her legs. She stated that he then performed oral sex on her vagina. She fell back out of consciousness again, and she then recalled awaking to find E.O'H penetrating her vagina with his penis. Garda Murray's evidence was that the complainant was "*not in a place to call him to stop*". She could not recall the duration of the rape, but when it ended she remembered attempting to gather herself and put on her clothes. It is at this remove in time that the complainant recalled E.O'H remarking to G.O'H "*it's your turn*", and she was then "*nudged*" over towards G.O'H who then penetrated her vagina with his penis. She recalled that they were "*all on the ledge on the cliff edge, either beside it or behind it*", and that while G.O'H was having sex with her, E.O'H was masturbating close by. She could not remember how long this rape lasted, but she recalled E.O'H coming up behind her, stating that he was going "*to finish in her anus*", and he thereafter ejaculated on the general area of her bottom and anus. There was no penetration of the complainant's anus. Garda Murray confirmed in cross-examination that the complainant had testified that her recall was "*foggy*" in relation to G.O'H's involvement. The complainant recalled it being really dark outside and remembered feeling "*sticky*" as she tried to put her clothes back on.

12. Subsequent to the sexual acts, the complainant walked with the appellants back through the fielded area towards the caravan park. She recalled that her mother and a few other people were there. She knew that she was in trouble, and that she was "*extremely drunk*". She recalled her mother being "*extremely cross*" with her, and the pair went home. In cross-examination, Garda Murray confirmed that a number of witnesses at trial were at the caravan park with the complainant's mother looking for her daughter. He confirmed that none of these witnesses gave evidence to the effect that the complainant appeared "*extremely drunk*". The complainant's mother learned what had occurred after she had found a used pregnancy test kit down the side of the complainant's bed, and she thereafter confronted the complainant about it. Subsequent to this disclosure, a complaint was made to gardaí, which complaint was made around mid-May 2017. The complainant thereafter attended at a Sexual Assault Treatment Unit ("SATU") for examination.

At trial, a Dr Roger Derham gave evidence in relation to the SATU Report compiled in respect of the complainant (which evidence is summarised at paras. 29 to 31, inclusive, of this Court's judgment dismissing the conviction module of the appellants' respective appeals). Garda Murray confirmed in cross-examination at the sentencing hearing that "*nothing of note*" was contained in that Report; that there were no injuries reported therein; and that other matters which may have helped the Garda investigation, such as clothing, were no longer available.

Arrest and interview of E.O'H

13. In cross-examination, Garda Murray confirmed that Mr. E.O'H was arrested and interviewed in June 2017. It was further confirmed that he co-operated fully with the investigation process. The appellant maintained his innocence at all times in interview. He further maintained his belief that the complainant was aged 16 years based on what he had purportedly been told by the complainant whenever he had asked about her age.

Arrest and interview of G.O'H

14. In cross-examination, Garda Murray confirmed that Mr. G.O'H was arrested and was thereafter interviewed on two occasions. It was stated that the appellant answered all questions put to him in the course of these interviews, but that he maintained his innocence throughout. He made admissions, insofar as he admitted having met the complainant and her friends on previous occasions, having met them on the date of the offending, and drinking on the cliffs with the complainant and her friends. In the course of the interviews the appellant was asked by gardaí did he send a particular text message to the complainant after the event, which stated "*Tell your mother I'm sorry I gave you drink*" and the appellant admitted to this. The appellant denied having any physical or sexual contact with the complainant, and he extensively described how the group returned to the caravan park at about half past ten that evening after the complainant had expressed her concern that she would get in trouble for being drunk. The appellant at all times in his interviews expressed his belief that the complainant was aged 16 years. In cross-examination, Garda Murray confirmed that the ages of the group of friends ranged widely, but that two particular friends of the complainant were then aged 15 and 16 years, respectively.

Victim Impact Statement

15. The complainant prepared a victim impact statement which was read into evidence by Garda Murray. On account of its length, we do not propose to reproduce it here in full, but instead we provide the following summary.

16. The complainant stated that on the date of the offending she left her home as "*a bubbly, fun loving, outgoing kid with* [her] *whole life to look forward to*", but that she later returned that night as "*a frightened, confused, guilt ridden victim*". She spoke of how following the incident she had spent weeks alone in her room asking whether what had occurred was the result of something that she had done wrong, and that she was "*consumed*" by the fear of being pregnant. This fear drove her to confide in her best friend and stepsister who tried to convince her to disclose what had happened to her family. When she finally did inform her family, far from feeling better she stated that instead her disclosure made "*one victim multiple*", and she spoke of how news of what had occurred had spread around the locality, which gave rise to rumours, stares, questions, and vulgar remarks; and she stated that this treatment by third parties in the community made it

"*impossible*" to attend school there, or to do other things around the locality which she previously could do. She stated that "*life became unbearable and we were unable to heal*". Her family subsequently left Ireland for another country to give the complainant "*a chance to live a "normal" life*", but the complainant stated that the pain, anger, and shame followed her. She expressed regret that she was the reason her family had to uproot their lives and that her family had struggled as a result. She stated that this guilt she bears "*doesn't belong to* [her]", and that she felt as though she had lost her true self on the cliff where the appellants' offending took place.

17. The complainant then spoke of "*the crippling anxiety*" with which she suffers; how she was dependent on cannabis use for solace; how she slept in the same bed as her mother and went to work with her everyday as she could not be on her own, and; how she was on anti-depressants and had experienced suicidal ideation.

18. The complainant then referred to the impact the trial experience had on her. Specifically, she spoke of how she had spent four and a half years feeling "*afraid*" while she waited for the trial to come on for hearing, and that this fear was of "*the unknown* [...] *of seeing the people who had ruined* [her] *life* [...] [and] *of not being able to cope*". Referring to her experience at trial, the complainant stated "*[b]eing on the stand was undoubtedly one of the hardest days since that day on the cliff*"; and she complained of her presentation by the defence and certain matters which were said at trial, which she lamented "[were] *extremely hard to sit through*". The complainant further lamented that notwithstanding the reassurance and relief that the jury's guilty verdict gave her, the "*damage*" that she had experienced at the appellants' hands remains.

19. She concluded her statement by confidently resolving:

> "*I still suffer with acute anxiety on occasion, but I refuse to let it rule my life. I am still young and intend to be successful and as happy as possible. I will not be a victim forever*".

Personal Circumstances of G.O'H

20. Mr. G.O'H was aged approximately 22 years at the time of offending, and he was approximately 27 years of age at the time of sentencing.

21. At the sentencing hearing, it was confirmed by Garda Murray that the appellant had a number of previous convictions, some for road-traffic related offences which pre-dated the index offence, and one for possession contrary to s. 3 of the Misuse of Drugs Act 1977, for which drugs-related conviction he received a fine in the District Court. The subject matter of that conviction was the possession of cannabis joints.

22. Garda Murray confirmed in cross-examination that at the time of the appellant's arrest in connection with the present offending, he was working in a retail forecourt. The appellant's history of work goes back farther, and it includes time spent working as a plasterer "*and things of that nature*". Garda Murray confirmed that G.O'H was then in a relationship of some 6 years, and that he had a young child then aged 4 years. Garda Murray accepted that in the time since the index offence, the appellant's change in circumstances had been "*quite dramatic*", inasmuch as by the time he came to court he had work, had a partner with whom he was engaged, and he had a young child.

23. A Probation Report in relation to G.O'H was tendered before the sentencing court. In the course of the plea in mitigation made on his behalf to the court below, his counsel stressed that there were positives in the Report. That having been said, it had to be acknowledged that the

Report had referenced the position adopted by G.O'H in not accepting the verdict of the jury. G.O'H had been assessed as being at moderate risk of reoffending and counsel suggested that "*much of that is to do with of course the position adopted*". The court below was urged to look at the protective factors highlighted in the Report in terms of the existence of work and other supports, and family supports.

Personal Circumstances of E.O'H

24. Mr. E.O'H was aged approximately 21 years at the time of offending, and he was approximately 26 years of age at the time of sentencing.

25. At the sentencing hearing, it was confirmed by Garda Murray that he had a number of previous convictions for road-traffic offences, all of which post-dated the offending behaviour in the present case.

26. A Probation Report dated the 6th of February 2022 was tendered to the court below. It detailed *inter alia* Mr. E.O'H's family background, education and work history. It described a supportive and close family background. The Report advised that the appellant had experienced turbulence in his schooling inasmuch as he was expelled from mainstream secondary schooling in his first year. He thereafter attended schooling at a youth justice training centre where he completed his formal education. He subsequently undertook a bakery course through a youth-reach programme. He advised the Probation Service that he has been in employment since leaving school, most recently with a computer company. The appellant at the time of his sentencing was living with a supportive partner of three years with whom he had had two children, one a newborn infant and the other was toddler-aged; the appellant also had another child from a previous relationship, which child lived at the time of sentencing with the appellant's mother. The appellant advised the Probation Service that the elder of the two children the appellant had with his partner at the time of sentencing has a rare medical condition, which condition requires regular blood transfusions and hospital appointments, and further requires 24-hour home care. The appellant advised that he and his partner share responsibilities in respect of that child's care, and that this experience had given him "*a new perspective on life*". The appellant was in receipt of disability allowance and carer's allowance at the time of the Report, and he had left his employment with the computer company to focus on his child's care. E.O'H's partner gave evidence at the sentencing hearing in relation to the medical condition of the appellant's child and to the demands of his care.

27. The Report did not disclose the appellant having any medical history of note. It did state that he was previously a user of cannabis and cocaine, on which substances he had relied to cope with depression; however, the appellant advised that through his own efforts, and without seeking support or external intervention, he had managed to become drug free, which status he had maintained for the 18-month period leading to the Report.

28. The Probation Report detailed that the appellant continued to "*fully deny*" any role in the offence. He maintained an account that he had first met the complainant when she had approached him and his cousin, G.O'H, with a request to buy alcohol for her; that they subsequently exchanged contact details on a social media application and thereafter contacted each other over the course of three weeks; that these social media exchanges were "*flirtatious*", and that he had sent sexually explicit photographs of himself to the complainant; that on the night

of the offending, he and G.O'H had socialised with a group of teenagers at a beach area; that he had procured alcohol for the complainant who was part of this group; that he, G.O'H and the complainant walked up to the mobile home site to get more alcohol; that they returned to the cliffs where they continued to socialise with the same group of teenagers; that this group of teenagers left, leaving the complainant alone with the appellants; and E.O'H maintained that no contact, physical or sexual, occurred among them.

29. In a section of the document entitled "*Victim Awareness*", the Report suggested a lack of insight by E.O'H into the impact of his behaviour on the complainant:

> "*Victim Awareness*
>
> [E.O'H] *disputes the victims account* (sic) *in the Book of Evidence. He denies any physical or sexual contact with the victim. He stated that he did not know that the victim was 14 years old although he acknowledged that she was not the legal age to purchase alcohol.* [E.O'H] *did not demonstrate any awareness of the impact and the serious harm caused to the victim as a result of his actions. He advised that while he understands that she is a victim in the eyes of the law, he nonetheless views himself as the victim in the matter. He put forward that he has been found guilty for something he did not do.* [E.O'H] *would benefit from undertaking further work to explore the perspective of the victim and her family in order to develop his empathy and awareness of the harm caused*".

30. The Probation Report provided details on risk assessment involving the application of the RM2000 and Stable 2007 instruments. On application of RM2000, E.O'H fell within the "*medium*" category of risk of recidivism; the Stable 2007 instrument placed him within the "*moderate*" range of risk for further sexual offending. The Report stated that a number of targets for intervention had been identified, which targets related to his significant relationships and his general regulatory skills including impulsiveness and problem solving. The Report cited as protective factors the appellant's "*supportive circle*" comprising his partner and wider family, and it stated that the appellant presented "*as focused on his families* (sic) *needs which also serves as a motivation to rebuild a pro social life*". The Report concluded by recommending that should the sentencing court consider "*a community sanction*", the following conditions:

> "*1) That he attend all appointments as directed by the Probation Service & advise the Probation Service of any change of contact details.*
>
> *2) That he undertake work with the Probation Service to develop his awareness and empathy for the victims perspective* (sic).
>
> *3) That he undertake offence focused work with the Probation Service.*
>
> *4) That he agree to attend addiction support services as identified by the Probation Service*".

Sentencing Judge's Remarks

31. On the 9th of May 2022, the judge in the court below passed sentence on the appellants. In first considering the appropriate headline sentence in each appellant's case, the sentencing judge started her analysis by acknowledging the content of Garda Murray's evidence at the sentencing hearing regarding the factual background to the appellants' offending, and she further acknowledged the content of the complainant's victim impact statement. The sentencing judge

also made reference to the need to have regard to the rehabilitation of both offenders, and she noted that each appellant came from stable, supportive family circumstances.

32. In respect of E.O'H, the sentencing judge acknowledged the Probation Report, and in particular acknowledged its content and conclusions. She noted that the appellant completely denied raping the complainant; that he had procured alcohol for the complainant previously and on the night of the offence; that he had communicated with the complainant over social media for three weeks prior to the offending; that he had ended up on the cliffs alone with his cousin and the complainant; that he had accepted consuming intoxicants on the night in question but that it did not affect his recollection; that he had stated that he knew the complainant was too young to buy alcohol; that he had denied knowledge of the complainant's true age; that he had considered himself to be the victim in this situation; that he was assessed as falling in the moderate range of recidivism; that he had presented with no victim empathy or acknowledgement of harm; and that he had a number of protective factors including family and partner support.

33. In respect of G.O'H, the sentencing judge also acknowledged the Probation Report, and in particular acknowledged its content and conclusions. She noted that the appellant did not accept responsibility for his offending and that he had denied touching or having sex with the complainant; that he had accepted that he and his cousin had procured alcohol on the complainant's behalf; that he had denied knowledge of the complainant's true age; that he had confirmed going back to the mobile home with his cousin and the complainant to get more alcohol; that he had accepted that he was on the cliffs with the complainant and other teenagers, but had disputed the complainant's account of events and that of other witnesses; that he had not considered the impact on the victim; that he had maintained a position of denial; that he had considered himself the victim in the situation; that he had opined that the complainant did not show any remorse for bringing him before the courts for something which he maintained he did not do; that he did not demonstrate that understanding of the harm caused to the victim or to her family by his actions, and; that he was assessed as presenting a medium risk of recidivism.

34. The sentencing judge then identified the aggravating factors in the case:

> "*The complainant, in this case, was a child of 14 years of age, with the two offenders being adult males of 21 and 22 years of age. These were cynical, calculated and planned rapes, with the offenders procuring alcohol for the complainant early in the evening, and procuring further alcohol later from their own mobile home. And then bringing her alone to an isolated area, and both men raping her in succession, while she was extremely intoxicated, which, in addition to the violation of the rape, was extremely humiliating. This was egregious behaviour, taking advantage of a young and vulnerable child for their own sexual gratification, robbing her of her innocence in humiliating and degrading circumstances*".

35. Accordingly, the sentencing judge placed the appellants' offending behaviour in the "*most serious*" category on the scale of offending in *People (DPP) v. F.E.* [2021] 1 I.R. 217, and the sentencing judge nominated in each accused's case a headline sentence of 13 years' imprisonment.

36. In relation to mitigation, the sentencing judge made the following remarks:

> "*Both offenders in this case continue to deny the offending, which leaves the complainant*

without any acknowledgement or vindication of the hurt caused to her. Neither offender can therefore available of the significant credit that would have been afforded to them had they pleaded to these offences, nor can they benefit from the mitigation that would have been afforded to them if they had acknowledged the offending following the jury verdict. Neither offender has any previous or subsequent relevant sexual convictions, with minor convictions only not relevant to this matter. Both men cooperated with gardaí and the Probation Service.

Turning to their backgrounds. As stated, both men come from stable, supportive family circumstances. [G.O'H] *resided with his partner and they have a four-year-old child.* [E.O'H] *had a child from a previous relationship and now has a three-year-old and a new baby with his current partner. His three-year-old has a severe medical condition requiring 24-hour care at home and regular medical appointments. The Court has taken all of these factors into consideration in order to determine a just and proportionate sentence in this case. Having set the headline sentence for each rape count in respect of each offender at 13 years, there is very little by way of mitigation in favour of either man, save for their lack of any previous offending, their age and the fact that they have long lives ahead of them and they will have to reintegrate into society when their sentences conclude*".

37. In relation to E.O'H, the sentencing judge imposed a post-mitigation sentence of 12 years' imprisonment on the rape count, with the final year thereof suspended. The sentencing judge further imposed a concurrent sentence of 8 years' imprisonment in respect of the sexual assault count. The part suspension was to be subject to the following conditions:

"*1) attend all appointments as directed by the Probation Service and inform his probation officer of any change or address or conduct details; 2) that he undertakes work with the Probation Service to develop his awareness and empathy from the victim's perspective; 3) that he undertakes offence focused work with the Probation Service; 4) that he agrees to attend additional support service as identified by the Probation Service*".

38. In relation to G.O'H, the sentencing judge imposed a post-mitigation sentence of 12 years' imprisonment on the rape count, the final year thereof to be suspended on certain conditions:

"*1) attend all appointments as directed by the Probation Service and inform his probation officer of any change of address or contact details; 2) that he undertakes offence focused work with the Probation Service; 3) that he agrees to attend additional support services as identified by the Probation Service*".

Court's Analysis & Decision

39. The appeal was ultimately presented on two bases, namely that the sentencing judge had adopted headline sentences in each case which were incorrect having regard to the Supreme Court's appellate guideline judgment in *The People (DPP) v F.E.* [2021] 1 I.R. 217; and also the basis that the sentencing judge had given insufficient discount from the headline sentences to appropriately reflect the mitigating and personal circumstances of the appellants.

40. Counsel for E.O'H, whose submissions were adopted by counsel for G.O'H, suggested that the gravity of the case had been over-assessed by the sentencing judge. He suggested that it did not properly belong in the category of more serious cases, typically attracting headline sentences

of between 10 and 15 years' imprisonment, identified by Charleton J. in the Supreme Court's guideline judgement in *F.E.*; but that on the contrary the case should properly have been located in the range typically attracting sentences of between 7 and 10 years' imprisonment, which are discussed in the *F.E.* judgement under the heading "*ordinary headline sentence*".

41. We have no hesitation in rejecting that submission. At para. 54 of his judgement in *F.E.*, Charlton J states:

> "*While precise numerical certainty is not possible in this exercise, the precedents in sentencing clearly establish that conviction for rape ordinarily merits a substantial sentence and, further, that consideration should commence in terms of mitigation at a headline sentence of 7 years. These cases of their nature will be ones where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence*".

42. In paras. 55 to 58, inclusive, Charleton J. refers to indicative examples of the types of cases that might properly be classified as coming within that category.

43. Then, at para. 59 of his judgement, Charleton J. states:

> "*There is a category of rape cases which merit a headline sentence of 10 to 15 years' imprisonment. What characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust*".

44. Again, indicative examples are provided of the types of cases that might properly be classified as coming within that category, and we have had regard to those.

45. We consider that the aggravating circumstances in this case were such that it could not properly be located in the 7-to-10-year range. The aggravating circumstances were numerous and multiple, and some of them were particularly egregious. We should identify those aggravating circumstances which take this case out of the category of ordinary rape cases, and which justify this case's placement in the higher category reserved for more serious cases.

- There was a substantial age differential between the appellants and their victim;
- The victim was particularly vulnerable, being just 14 years of age and highly intoxicated, to the point of being intermittently comatose with drink. While there was no breach of trust in the usual sense, the callous exploitation of an exceptionally vulnerable victim equates in the court's view, in terms of the culpability of the perpetrator, to breach of trust;
- The victim's leggings were removed while she was in a comatose state and she was sexually assaulted, with E.O'H performing oral sex on her vagina;
- Both appellants vaginally raped the victim sequentially. Neither intervened to protect her. On the contrary, while one committed rape the other watched and waited his turn. It was expressly said by one appellant to the other, "*it's your turn*".
- While G.O'H was raping the victim, E.O'H masturbated nearby, and later ejaculated over the unfortunate victim;
- The victim was then turned over, still in a state of semi-consciousness. There was then an attempt by E.O'H to anally penetrate her, which attempt did not succeed but which followed the express statement of E.O'H "*to finish*" by doing so, and which resulted in the

victim's bottom area and anus being covered with E.O'H's semen. As far as this court is concerned, this constituted a more than usual level of degradation;

- Profound harm was done to the victim in terms of the psychological effects of being doubly raped in such degrading circumstances.

46. While we accept that the rape was not pre-planned in the sense of there being a conspiracy to commit rape in advance of the event, we have no difficulty with the sentencing judge's characterisation of what had occurred in this case as being cynical, calculated and planned. This was not a case of teenage hormones running amok. The appellants knew of their victim's vulnerability, and they consciously had sexual intercourse with her without her consent in circumstances where they were fully aware that she was not in a position to protest or to do anything about it. It was planned in the sense of it being done deliberately, consciously, knowingly, and selfishly, and with utter disregard for their victim. Moreover, the appellants acted in concert and effectively egged each other on with remarks like "*it's your turn*". It was not accidental, it was not spur of the moment, it was not done in circumstances of a possible mistake as to consent. It was the vilest of double rapes against a child victim who was exceptionally vulnerable by virtue of being so intoxicated.

47. We have no hesitation in rejecting the ground of appeal based on the headline sentence. In our view, the correct headline sentence was chosen by the sentencing judge.

48. Moving then to the second complaint, namely that the sentencing judge failed to give sufficient discount for mitigation. The first thing to be said in relation to this is that the single most valuable potential mitigating factor that might have been relied upon was not available to these appellants because they did not plead guilty; rather, they contested the trial, which was their entitlement. However, the trial was run, *inter alia*, on the basis that the victim had fabricated elements of her allegations to deflect attention from her underage drinking and that she had sought to make the appellants "*easy scapegoats*" in the circumstances. This was rejected by the jury.

49. The appellants were sentenced on the basis that they did not accept the verdict of the jury. We were informed that just before the hearing of the appeal fresh instructions were received by counsel to the effect that the appellants now accept the verdict of the jury, and it was urged upon us that the appellants are now remorseful. It was confirmed that at no stage had either of the appellants communicated an apology for their conduct to the victim, and the late expression of remorse has to be seen in that light.

50. The sentencing judge took the view that these appellants could avail of very little by way of mitigation. She noted that neither offender had any previous or subsequent relevant sexual convictions, and that insofar as there was previous offending the convictions in question were minor and not of relevance. She further noted that both men had cooperated with gardaí and with the Probation Service. In the circumstances, she discounted by one year from her nominated headline sentence of 13 years. It is suggested that this was too little in circumstances where the appellants were essentially of previous good character. It is also suggested that they had to some extent lived pro-social lives in that there was a work history. In the case of E.O'H, he had a partner, a child from a previous relationship, and a three-year-old son and new baby with his present partner. The sentencing court was informed that his then three-year-old son has a severe

medical condition requiring 24-hour care at home and regular medical appointments, and that E.O'H had received training in assisting with his son's care. It was very much urged upon the court below that it would be hard on both his partner and on his son if E.O'H were to be sent to prison for a lengthy period.

51. We are completely satisfied that the sentencing judge gave adequate recognition for the mitigating and relevant personal circumstances of both appellants. The Court is aware of the discourse which has taken place in academic literature concerning the impact of sentences of imprisonment on partners, children, and other dependents, and that is argued in some quarters that some allowance should be made for this in the sentencing of offenders. In particular, we are aware of the writings of Dr Shona Minson of the University of Oxford, and others, in this area. We accept that such considerations might be influential in "*cusp*" cases, i.e., in cases where it is borderline as to whether or not the custody threshold is met. However, in an egregious case, such as the present case, it can only have very modest influence. Having regard to long established sentencing policy in this jurisdiction, going back to the decision of the Supreme Court in *People (DPP) v. Tiernan* [1988] I.R. 250 whereby rape offences will usually be met by a substantial sentence of imprisonment, the appellants in this case must inevitably serve lengthy prison sentences. E.O'H cannot reasonably expect to avoid that on account of his family circumstances, however difficult it may be for those left behind.

52. As to the overall level of discount afforded by the sentencing judge for mitigation and personal circumstances, we consider that while there might have been some scope to be more generous than the sentencing judge was, we are satisfied that she acted within her range of discretion. We do not consider that an error of principle in regard to discounting for mitigation and personal circumstances has been demonstrated by the appellants.

53. We do not consider that there was any error in principle on the sentencing judge's part in failing to give greater discount to E.O'H having regard to his family circumstances. We are not aware of any authority which suggests that she should have done so. We acknowledge that it will be hard for E.O'H's partner and child for him to have to serve a substantial prison sentence, but this is not a situation where the child will be deprived of all care. The interests of society require that E.O'H be subjected to substantial censure and punishment, both having regard to the egregious nature of his wrongdoing, and also to deter both him and others from future offending. The same imperatives exist in G.O'H's case.

54. The sentencing judge was further criticised for only suspending one year of the post-mitigation sentence in the interests of incentivising rehabilitation. We regard this argument as being unstateable in circumstances where there was no acceptance by the appellants of the jury's verdict, no taking of responsibility for their actions, no apology, and no concrete expressions of remorse whatsoever. Arguably, there might not have been a basis for complaint if the sentencing judge had not discounted anything in the interests of incentivising rehabilitation. The appellant certainly cannot complain in a situation where they did receive the suspension of a year of the sentence.

55. Finally, it was urged upon us that it is recognised widely in the literature on sentencing, and amongst sentencing scholars, that young adults can act impulsively and that they have greater capacity for change than older persons. We accept that. We are conscious of the literature

in that regard, and we have previously referenced in this Court's judgment in *People (DPP) v. T.D.* [2021] IECA 289 an article to that effect by David Emanuel QC entitled "*The sentencing of young adults: a distinct group requiring a distinct approach*" ((2021) 3 Crim. L. R. 203-217). However, no evidence was adduced either before the court below or before us to suggest that impulsivity played a role in this case. Insofar as the capacity for change is concerned, we note the point that has been made but we do not consider that this is a case in which the penal objective of rehabilitation requires to be prioritised beyond the extent to which it was taken into account by the sentencing judge. The circumstances of this case were so egregious that priority must be afforded to the penal objectives of retribution and deterrence. Some regard was had to rehabilitation, but the scope for doing so was really very small in the circumstances of this case and we find no error in how the sentencing judge addressed it.

56. The appellants' respective appeals against severity of sentence are both dismissed.