AN CHÚIRT UACHTARACH
THE SUPREME COURT

Clarke CJ
McKechnie J
Charleton J
O'Malley J
Irvine J

Supreme Court appeal number: S:AP:IE:2018:000067

[2019] IESC 000

Court of Appeal record number 2016/219

[2018] IECA 53

Central Criminal Court bill number: CCC 2015 no 0009

BETWEEN

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

PROSECUTOR/APPELLANT

- AND -

FE

(RAPE AND ASSAULT, DUBLIN)

ACCUSED/RESPONDENT

Judgment of Mr Justice Peter Charleton delivered on Friday, December 6th 2019

1. This judgment, on an appeal from the Court of Appeal by the Director of Public Prosecutions, concerns sentencing in rape cases in general and in cases where a series of criminal events require a court to consider the interrelatedness of those events in order to arrive at a just result. This requires an analysis of the nature and duration of the facts which constitute a crime, how earlier or later conduct should influence sentencing and, also, the proper approach to concurrent or consecutive sentences where wrongful conduct is reflected in a number of individual convictions. In seeking to reach an appropriate sentence for a group of convictions on this appeal, the most serious of which is rape, the Court must consider the validity of existing judgments and published research on sentencing precedents.

2. A crime may consist of a single event, as where A steals from V. Also a crime can be an event which takes time, as where A falsely imprisons V and subjects her to sexual violence. Sometimes a crime is committed and then is followed by another crime which occurs some time later but is similarly motivated, as where a husband rapes V, his wife, in circumstances of domestic domination and then attacks her weeks later with a view to re-establishing control after V has effectively ended the marriage by leaving the family residence. This last situation is what is in issue here.

Background

3. The accused and the victim married in 2005 and a child was born a few years later. The wife came from Ireland and the accused came from an African country. In the ordinary way, and in circumstances which could never impact on sentencing, unhappy differences emerged in the marriage including issues over absences for work and finance. By early

2014, the wife was actively considering ending the marriage, something with which the husband was not at all content. On 2 May 2014, there was a major row which involved an altercation. The wife moved into her mother's home, but returned in consequence of an agreement with her husband that they would separate. This led to more arguments, since the husband either claimed never to have agreed or had re-thought the matter. On 25 May a row broke out in the matrimonial kitchen. The husband produced a knife and threatened his wife that he would "cut open" her face. He ordered her upstairs and raped her. He had told her that if she rang the gardaí on her mobile phone that they would not arrive in time to save her. During the night, she pretended reconciliation and so was able to leave in the morning. She went to the family law courts and obtained relevant orders of protection. He rang her and threatened to kill her the next day. A charge of assault was laid in respect of the incident on 2 May 2014, but since, at trial, the jury disagreed, the presumption of innocence was not displaced. As for the events of the day of 25 May, three charges were laid: 1 count of rape, 1 count of threat to cause serious harm, and 1 count of threat to kill. The accused was convicted at trial of all these.

4. Living at her parent's home, the wife was not free of her husband's negative attentions; including turning up to her workplace and confronting her at their child's crèche. There are no specific charges on this. The husband took opportunities to initiate rows when meeting with the child and during the course of phone calls to or about the child. These led to no charges. On 9 June, however, the husband accosted the wife at a shopping centre and told her that the next time she saw him she would not see him coming and that he would be armed with a hammer. This was subject to a separate charge and conviction. Over that time there was constant checking by the husband on the wife's movements through smartphone technology. On 6 August the husband turned up at the wife's parents' home and demanded entry while carrying a paper bag. She refused him entry. The next day there were two visits to the parents' home where he first spoke to the wife's mother. On the second occasion he returned carrying a paper bag. Claiming this concealed a present for the child, he gained entry. He produced a hammer and struck the wife several times on the head and also hit her mother on the head with the weapon. Neighbours intervened, one with a dog, and the husband fled, to be arrested by gardaí on a street close by, hiding behind a car. While the injuries from an attack of that kind could have resulted in death or serious injury, the result was multiple injuries to the wife including three deep lacerations and both she and her mother were brought to hospital. The attack was the subject of two charges.

Sentence and appeal

5. Before the trial judge in the Central Criminal Court in June 2016, there were pleas of guilty to the hammer attack, as an attempt to cause serious harm and assault. The rape charges and the various threats to kill were contested but guilty verdicts were returned unanimously on the rape count and on the three threats to kill. One count of threat to kill was directed by the trial judge, Kennedy J.

6. Sentences were imposed: of 14 years on the rape, a headline sentence reduced to 10 years through 2 years reduction in respect of mitigation and 2 years being suspended; of

5 years for the threat to kill on the occasion of the rape; of 3 years for the threat to kill, delivered by phone the day after; of 5 years for the threat to kill at the shopping centre on 9 June; of 7 years and 6 months for the attempt to cause serious harm at the wife's parents' home on 7 August; and of 3 years and 6 months for assault causing harm to the wife's mother on that same day. These sentences were all concurrent. The trial judge also imposed a 5 year post-release supervision order. The accused appealed his conviction unsuccessfully in the Court of Appeal; [2018] IECA 314. However, the accused succeeded in February 2018 in his appeal on sentence; [2018] IECA 53.

7. In the Central Criminal Court, Kennedy J, in her sentencing remarks, considered the aggravating factors for the offences of 25 May. These, she said, were to include "the threat of violence with a weapon, the breach of trust, the violation of the injured party in her own home while her son was asleep, the fear that he instilled in her and the severe effect on his victim." She correctly approached the sentence by arriving at a headline, that is by, firstly, identifying the severity without taking mitigation into account and then, secondly, by factoring in mitigation in terms of reduction of time served and suspension. The Court of Appeal reduced the headline sentence on the rape to 12 years and took off 2 years for mitigation, the same as the trial judge, and suspended 18 months. Thus the 10 year actual time to be served became 8 years and 6 months. The Court of Appeal did not overturn the sentence of 7 years and 6 months for the assault on the wife with the hammer. On the rape, giving the court's judgment, Edwards J stated at paragraph 34:

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

8. The Court of Appeal regarded their function only to correct any error as to whether a consecutive sentence should or should not have been imposed. As to whether the sentences were to be consecutive or concurrent, the court considered this to be dependant on whether the Director of Public Prosecutions had appealed on undue leniency. Thus the court required a ground of appeal stating that the sentences in respect of the two main group of incidents, the rape and its attendant circumstances and the events of the assault, should not have been concurrent. At paragraph 35, Edwards J stated:

> We would remark at this point that the appellant is perhaps fortunate that the sentencing judge did not decide to make the sentences on Counts Nos. 8 and 10, respectively, concurrent inter se but consecutive to the sentence on Count No 7. If

she had chosen to do so, and it was an option that was certainly open to her in the circumstances of the case, while she would have had to reduce the aggregate total considerably to take account of the totality principle, the final result would almost certainly have been a sentence of at least as long as the sentence on Count No 2 now appealed against, and it is far from certain that Court would have been disposed to interfere with such a sentence. However, the sentencing judge did not in fact opt for consecutive sentencing, and her decision in that regard has not been criticised at the hearing before us.

9. This Court granted leave on 15 February 2019 based on the contention by the Director of Public Prosecutions that a point of law of general public importance arose:

> The Director's primary complaint relates to the reference by the Court to "viewing the offence in isolation". She submits that the rape should have been seen as part of a pattern of violent and abusive behaviour, and the sentence should have reflected the totality of that behaviour. This could have been done by imposing consecutive sentences, and indeed the Court of Appeal observed that if that course had been taken, and the trial judge had come to the figure of twelve years, it might well not have been disturbed. However, the Director's preferred proposal is that the sentence for the most serious offence should be set at a level reflecting the surrounding circumstances. It is said that this would be particularly appropriate in cases of marital rape, where there may well be a pattern of violence and abuse.

10. Arising from the judgment of the Court of Appeal, the first issue that arises is whether the rape offence should have been "viewed in isolation". That, in turn requires an analysis of what constitutes the circumstances of a crime for sentencing purposes.

Circumstances of a crime

11. Here, two fundamental principles of sentencing may seem in conflict. A crime cannot be viewed in isolation from its surrounding circumstances. Nor can events entirely separate in time and character in respect of which the accused was either acquitted or never charged be factored into account in order to aggravate a sentence. Those apparently conflicting principles only arise if an unnaturally diffracted analysis is made of the surrounding facts and circumstances of criminal conduct that are essentially part of the sentencing judge's duty to analyse in coming to a just sentencing result. That difficulty does not arise where a crime is not seen in isolation but is analysed as an event in itself and as one with an aggravating or mitigating background. A crime is an event and, as such, may take place over an instant or over a stretch of time. It should be analysed as such and in the context of its background. What led to the crime, in terms of what tempted the accused, or the pressures he or she was under, is part of that background as are factors which aggravate the seriousness of the crime or mitigate the individual culpability of the criminal. Sentencing is undertaken by judges on behalf of the community and an approach which reflects the ordinary sense of the crimes as they occur over time and the context that led to the events as reflected in the convictions represents the best approach.

12. A person cannot be given a heightened sentence for one crime by taking another crime of which that accused was either acquitted or was never charged into consideration; *R v Kidd* [1998] 1 WLR 604. In the context of sexual violence by men on women, it frequently happens that a charge of rape is laid against an accused and the jury assess that some element of that offence has not been proven beyond reasonable doubt and, instead, convict of a lesser included offence, or alternative charge if laid in the indictment, of sexual assault. The jury verdict cannot be gainsaid. Hence, the sentence will be on the basis of the lesser offence. But the circumstances of the actual offence must be looked at closely and not naively. Where a man is caught on one occasion in possession of stolen cars, the engine and chassis numbers of which have been erased and replaced by false data, the suspicion of the investigating gardaí may be expressed to the sentencing court that the conduct discovered was the tip of the proverbial iceberg, but the court cannot sentence on the basis of professional receivership stretching over a decade. That may be the suspicion, but it is only the circumstances of the crime as proven, or from which inescapable inferences arise, that a court is entitled to act on. In that instance, even though other offences appear to lurk over the horizon and cannot be taken into account unless the accused admits them and asks for his record to be finalised, it is the counts in respect of which there is a conviction upon which the court will act. But, a crime is an event and the gravity of a criminal event is assessed according to its circumstances. In the example given, the number of stolen cars, the circumstances in which the accused engaged in criminal business, and the professionalism of the concealment of the cars' identity are part of the matrix of fact which the court must consider. Such a case would be much more serious than that of an accused caught in possession of a single stolen car not in the way of trade but having foolishly purchased it from another person at an undervalue.

13. The principle is as stated by Lord Bingham in *R v Kidd*, the circumstances matter. At page 607 of the report in that case, he also correctly stated that to take unproven crimes into consideration in sentencing for counts to which the accused has pleaded guilty can amount to a separate conviction which a sentencing court is not entitled to enter. Other events can, of course, be taken into account at the accused's own request after admission. Otherwise, an accused "may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see *Reg. v Anderson (Keith)* [1978] A C 964." In *The People (DPP) v Gilligan* [2004] 3 IR 87, the accused was convicted of 5 counts unlawful importation of drugs for the purpose of sale and supply over a period specified in each count of about half a year, the possession being "on a date unknown". The sequential timescale of those counts coupled with similarly titrated importation counts showed a course of drug dealing over more than two years. The Special Criminal Court, in convicting the accused, had found as a fact, later upheld on appeal by the Supreme Court, that he was the leader of a drug gang which operated a commercial operation in criminality. McCracken J for the Court of Criminal Appeal stated at page 91 that "quite clearly a sentencing court cannot act in blinkers." He continued:

> While the sentence must relate to the convictions on the individual counts, and clearly the applicant must not be sentenced in respect of offences with which he was neither charged nor convicted and which he has not asked to be taken into account, nevertheless the court in looking at each individual conviction is entitled to, and indeed possibly bound to, take into consideration the facts and circumstances surrounding that conviction.

14. On behalf of the accused, the argument had been made that what was involved in consequence of the verdicts against him were six isolated importations on one occasion and five isolated instances of possession on five individual occasions. For the Director of Public Prosecutions, it was contended that the crime was an event and that the sequence and context of events informed the gravity of offences. The accused's argument was rejected, and that principle accepted, McCracken J continuing:

> Indeed, if that were not so and these were treated as isolated incidents occurring at six month intervals, it might well be that the proper course for the court to adopt would be to impose consecutive sentences. The court does, therefore, accept the basic principle behind the argument of counsel for the Director of Public Prosecutions. However, the court does think it important to emphasise that in many cases there may be a very narrow dividing line between sentencing for offences for which there has been no conviction and taking into account surrounding circumstances, which may include evidence of other offences, in determining the proper sentence for offences of which there has been a conviction. It is important that courts should scrupulously respect this dividing line.

15. In adjusting the sentences, the Court of Criminal Appeal considered that "the facts and circumstances surrounding the commission of the offences" were part of the exercise. These disclosed a concealed and sophisticated operation by organised crime. The facts were a necessary aspect of any rational consideration of the criminal conduct of the accused.

16. Stating the principle that the circumstances of the commission of an offence inform its gravity is so fundamental that it has not been necessary for either the courts or the academic community to debate it. Once offences which have not been admitted are not used to enhance the gravity of what the accused is convicted of, or pleads to, it is beyond argument that background and circumstances require consideration. In Emmins on Sentencing (4th edition, 2001) and in other valuable texts such as O'Malley, Sentencing Law and Practice (3rd edition, 2016) lists of both aggravating and mitigating circumstances to a crime are set out and analysed. Since it is part of mitigation that, for instance, the accused was young or a naïve follower of criminals of experience, it is part of aggravation that the accused was the leader of an organised crime gang and conducted his operations with sophistication and foresight. A court will always ask how serious the offence was. In this context, Emmins unimpeachably states the principles at page 54-5:

> It is very difficult to define 'seriousness' in the abstract, and no attempt is made to do so in existing sentencing law. It is of great importance, however, for the

> sentencer to gauge the seriousness of one offence in relation to another, and to distinguish within each offence, for example one case of burglary from another case of burglary. Distinctions also need to be drawn between the respective roles played by co-defendants in a particular case. This is a demanding task for the sentencer, but it is central to the sentencing decision. It is perhaps not so difficult as it might sound. In assessing seriousness, the sentencer should have regard to the immediate circumstances of the offence, and the degree of the offender's culpability in relation to that offence… In determining the seriousness of the offence, the sentencer must always take into account any aggravating or mitigating factors which impinge upon the question of offence seriousness. Some of the factors apply across a range of offences. An example … is where the offender has committed the offence in 'breach of trust'. This has relevance in theft and deception offences, for example where a senior employee abuses his position of responsibility to embezzle funds or provide an outside team of offenders with a key to a storeroom. It also has relevance in sexual offences, for example where a schoolteacher or a social worker abuses that position of authority to commit a sexual offence on a child. An example of a general factor which tends to make an offence less serious is where there was provocation immediately before the offence. … There are other factors which are relevant to seriousness in a more restricted range of offending. Thus, if the offence is one involving dishonesty, the court, as well as considering any breach of trust, will also be influenced by matters such as whether the offence was carefully planned or was committed on impulse, the value of the property involved and by whether any, and how much, of it has been recovered. If the offence is one of violence, the court will be influenced by the severity of the injuries caused to the victim, the extent to which the victim has recovered, the offender's intention (or lack of it) to cause serious injury and the nature of the weapon (if any) which was used. By weighing up factors such as these, the sentencer will be able to reach a view on offence seriousness and hence a provisional view on the appropriate sentence.

17. Depending on the definitional elements of an offence, the duration of a crime may vary from a moment to perhaps several months. To return to *Gilligan*, importation occurs where a person brings contraband, meaning for instance firearms or explosives or controlled drugs, into the State from outside. Thus, that offence could be analysed as occurring over a single instant, the moment of landing at Dublin Airport for example. Such an approach in defiance of surrounding circumstances would be wrong. In a simple case, a girl may be approached at a foreign airport and asked to bring a package into Ireland. That is one kind of case. In another, as in *Gilligan*, several criminals may carefully plan a route for the importation of drugs, enticing a person without a criminal record to allow port facilities in Cork to be used, setting up a chain of command and a supply and distribution route and agreeing the counting, the splitting, and the exportation to foreign countries, of profits. Otherwise, in another contrast to the girl in the airport being tempted, a cocaine importation may be carefully organised, with an ocean-going yacht sailing the Atlantic, false documentation and carefully laid plans; *The People (DPP) v Wharrie* [2017] IESC 47. These two types of situation are clearly very different. An

assault can be spontaneous, with mild ill-effects or it can be a planned act of revenge effected by inveigling others into the scheme and with very serious consequences.

18. A crime may be committed in an instant, as where a person in a supermarket takes away a frying pan without paying for it, or it may take time, as where a person steals from a supermarket in the middle of the night by breaking in through the roof with accomplices and stealing cash. Both of these are event crimes, but both differ in circumstance, and circumstance informs gravity. The possession offences in Gilligan were situation crimes. Certainly, to possess contraband a person needs to get it from somewhere or someone, be it drugs or explosives or firearms. But possession can be for a short time, the situation of having an article and passing it to another, or of keeping a stash of drugs long term to supply other dealers, or of keeping ammunition or machine guns in a store to have it available to terrorists. Where crime is organised, possession offences may involve several people and some may keep the contraband for others. The possession is then part of a common design and both the custodian and the person directing the custodian are in possession. Central to a just resolution is a judicial decision as to the degree of responsibility or authority. Situations can be radically different from each other. The event in crime may be importation or it can be manufacture. Thus, while possession of amphetamine in a warehouse is the situation which is the crime, the effort put into a manufacturing operation that led to the drugs being there in the first place and the level of organisation clearly aggravates the circumstances.

19. In that regard, what a court is looking at is the event of the crime. It should not be difficult to say when that begins and when circumstances become so remote as to be beyond the point where a criminal event ends. Thus, for an accused to engage in covering his or her tracks so that the crime is concealed remains part of the circumstances of the crime and its effects; as in *The People (DPP) v O'Donoghue* (Unreported, Court of Criminal Appeal, 18 October 2006) where a body was hidden after the victim was unlawfully killed. When judges consider the effect of a crime on a victim that analysis still remains, in the words of Macken J in *The People (DPP) v Mulhall* [2010] IECCA 72, an exercise which involves "scrupulous respect of the dividing line" between offences which are not before the court, because there is no conviction or request by the accused that these be taken into account, and the circumstances and effects of the crime, which self-evidently are. In *Mulhall*, it was remarked by Macken J that:

> It is evident that in all the cases that the issue depends on the particular facts. In each of the cases the court also recognised, in quite different contexts, the difficulties which may arise for a sentencing judge when seeking to delineate between such surrounding circumstances as he may properly have regard to in constructing an appropriate sentence, and those actions or matters in respect of which the accused was not charged or which he had not admitted or asked to have taken into account, as arose for example in the particular circumstances of the Gilligan case supra. It is for the trial judge, when sentencing, to consider whether the actions which could have formed a separate charge bear a close relationship to the events surrounding the charge in suit, or whether these actions are, rather, too

> remote to be taken into account. It is undoubtedly the case that it may be difficult, in particular circumstances, to ensure that the dividing line … However, it would not be possible to fix a precise "extent" to which such actions are to be considered, a "relevant or aggravating factor", in all circumstances, as the question seeks to do. The most that can be said is that the closer the actions are related to the events giving rise to the charge in suit, the more evident it is that they can be taken into account in fixing an appropriate sentence. Having regard to the circumstances in which the issue has arisen in cases such as DPP v Gilligan, supra., and in R v Kidd, supra., it must be accepted that if the events are all proximate to the charge in suit, it may well be appropriate to have particular regard to them.

20. Even by mentioning circumstances of mitigation in a plea on behalf of an accused, it becomes accepted that the crime is not of itself all that is relevant to the correct approach to sentencing. Similarly, the event of the crime is not to be isolated from its contingent circumstances and the harm it causes.

21. In the latest version of the sentencing handbook prepared by the Judicial Researchers Office, 'Rape Sentencing Analysis: The WD Case & Beyond' written by Katharina Ó Cathaoir in 2012 and updated by Jack Meredith in 2017, and by Caoimhe Hunter Blair in 2019 for the purposes of this judgment, among the factors of mitigation mentioned in relation to rape include strong work record, full admission, early plea of guilty, genuine remorse, substance abuse problems, difficult upbringing, intellectual impairment and prior character. In terms of aggravation, among the factors are prior convictions, the duration of the abuse, attacking a victim in their own home, physical domination, systematic grooming, plying a victim with alcohol and being a family member. In the analysis, all of the individual circumstances of the rape cases considered are set out by the sentencing judges in arriving at the appropriate penalty.

The argument here

22. It is notable that in both the submissions on behalf of the Director of Public Prosecutions, as appellant, and of the accused in response, no attempt is made but to accept that the circumstances of this rape included all that happened in the kitchen, involving the knife threat, and the actual sexual violence itself and the aftermath up to the victim fleeing the house in the morning. Those submissions accord both with the law and with ordinary sense. It is clear that the difficulty that gave rise to this case was not in the approach of the trial judge in the Central Criminal Court but rather in the Court of Appeal "viewing the offence in isolation"; meaning that on appeal the horrible threat in the kitchen was treated as being separate from the violence in the bedroom and from the effective detention of the victim until she could flee. As the case law demonstrates, just because what might ordinarily be called a criminal event is split into two charges, that does not mean that the penalty for each offence should not influence the other. When crimes are proximate to each other, then just like events, it is appropriate to have regard to the overall event in sentencing. That was not done by the Court of Appeal. Hence, it is not correct to say that the rape was isolated from the fact that the unwilling submission of the victim was because of fear in consequence of a separate crime, and that an aggravating

circumstance was keeping her trapped overnight and in fear for her child. Good charging practice may involve, as here, a decision being made that events should be divided and that charges, if open, should be founded on each. After all, the jury may not be convinced of one incident, but satisfied of another. In that case, the verdict is to be followed in sentencing. But that was not an issue here. The rape happened because of a horrible threat and the circumstances involved an abuse of the trust which a wife should have in her husband, an abuse in the family home, and the generation of fear to keep the victim in domestic thrall.

23. In order to meet the argument that it may have been appropriate to look at a sequence of events in isolation, and to extract the rape and its circumstances from what occurred in the house that night, the Director of Public Prosecutions has countered with an argument that extended the event of the crime over two months and six weeks so that the aggravating circumstance of the rape in May would include the vicious attack with a hammer in August. While eloquently put, it is impossible to fully accept the argument put in the written submissions of the prosecution that an assault months later was proximate to the rape:

> In the present case, the other actions of the Respondent against the complainant were sufficiently proximate to justify their being taken into account for the purpose of sentencing the rape offence. They were proximate, first of all, in the sense that some, at least, were close in time to that offence, but also in the broader, but no less valid, sense that they were closely intertwined as part of a pattern of deliberate, abusive, harmful and intimidatory conduct directed by the Respondent against the complainant. Therefore, in circumstances where concurrent sentences were being imposed, those surrounding circumstances should have been treated as an aggravating factor for the purpose of assessing the gravity of the most serious offence which, in this instance, was rape.

24. Seeking to anticipate a law reform, and ostensibly bypassing Article 15.5.1º of the Constitution, the prosecution also argue that an offence not then in force should serve as the link which binds together the disparate events of the sexual violence and the physical violence months later:

> The description of the Respondent's conduct set out above in Paragraphs (2) to (6) of these submissions provides no more than a flavour of the Respondent's conduct towards the complainant. The complainant's experience, as well as that of her young child and her parents, is set out in detail in her victim impact statement which is quoted at length in the judgment of the Court of Appeal, and to which this Court's attention will be drawn. It is also relevant to note in this context that, since the offences in this case were committed and, indeed, since the appeal was decided, the Istanbul Convention has been ratified (see further below, at paragraph 29) and the Domestic Violence Act 2018 has come into operation. Section 39 of this Act creates a new offence of coercive and controlling behaviour. It provides that a person commits an offence where he or she knowingly and persistently engages in

behaviour that (a) is controlling or coercive; (b) has a serious effect on a relevant person and (c) a reasonable person would consider likely to have a serious effect on a "relevant person" (defined to include a spouse or civil partner). The conduct will have a "serious effect" if it causes the relevant person (a) to fear that violence will be used against him or her, or (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities. Such a charge could not legally have been brought in the present case, because the relevant legislation did not exist at the time, but its present existence is a clear indication of the seriousness with which society and the law view behaviour of this nature on the part of one spouse or partner towards the other. To this extent, it provides further support for the argument that, in a case like the present, other coercive or abuse behaviour should be treated as an aggravating factor when it provides the context within which the relevant offence was committed. Again, it bears repeating that in this case, there is no doubt about the existence of that other behaviour because it has resulted in both charges and convictions.

25. The accused, on the other hand, has confined any argument as to seriousness to the events of the sexual violence and accepted that this runs from the occasion of the threat in the kitchen to the escape from the house the next morning in informing the seriousness of the rape itself.

26. There is no doubt that domestic domination is a serious wrong. The change brought by the Oireachtas in the form of sections 39 and 40 of the Domestic Violence Act 2018 will be measures of protection, particularly to women, in the future. The passing of that law does not mean, however, that a gap was filled in an approach by sentencing judges which lessened the seriousness of rape within a subsisting marriage or that a background circumstance of domestic domination is not to be taken into account in sexual violence cases. Clearly it is. Equally clearly the 'WD Case and Beyond' analysis demonstrates that violence in the home, breach of trust, domination and a background of abuse are rightly regarded by the courts as aggravating circumstances.

The events here

27. In so far as a problem in relation to separate crimes and whether these are part of and should inform the same incident, the following may be stated: where the event involves an aggravating factor which is also a crime, the admission of the accused to the event, or conviction on the event, as including the aggravating factor informs the seriousness of the offence. Where a separate crime is charged together with another crime, if the accused is acquitted of one offence, that verdict must be respected. The background and circumstances of the accused may be mitigating. So are the background and circumstances and consequences of the crime in determining its seriousness. In attempting to judge what is the event of the crime, that should be looked at with good sense.

28. Here, the example presents itself of a threat, a rape and of keeping a victim overnight. All of these are the event which the judge will sentence on whether false imprisonment and threat to kill are separately charged. Where separately charged and convictions entered,

all these offences inform the seriousness of each other crime. The threat occurred to facilitate rape, the rape occurred because of the threat, the rape was sought to be covered up by the captivity of the victim. Where time passes and the accused decides to commit another crime, such as threatening the wife in the supermarket or the horrible assault months later, these are separate crimes. The accused, after all, had a separate choice as to whether to pursue such crimes. It is of course relevant to sentencing that the accused was attempting to harm his wife so that no prosecution would take place, if that be the case, or that the threats and attacks were part of a violent disposition to dominate women. Where the events are later in time and not proximate to the main charge, these should be separately charged. Even where there is no separate charge, if an accused pleads good character in mitigation, his actions after an offence, but not part of the circumstances of the crime, may undermine that plea.

29. No comment is made on interpreting a verdict where two versions of the seriousness of the offence are put forward by prosecution and defence, and the judge needs to sentence on one or other of these. That was considered in this Court's judgment in *The People (DPP) v Mahon* [2019] IESC 24.

Concurrent and consecutive sentences

30. The Director of Public Prosecutions has argued that if the appeal against the reduction of the sentence by the Court of Appeal is not found to be wrong in law that the sentence, in any event, should be increased by making the events of the assault of 6 August through a consecutive sentence to the rape on 25 May. This would have the effect of increasing the time spent by the husband in jail, notwithstanding the adjustment made by the Court of Appeal. The husband asserts that a consecutive sentence in these circumstances would be wrong in principle; despite arguing that the assault on the wife and her mother are not part of the aggravating circumstances of the rape.

31. In many instances, but even still sensibly looked at, a criminal event may consist of several different offences. The accused could be a male burglar who breaks into a house in order to steal. In doing so he will be carrying housebreaking implements, he will criminally damage doors and windows to enter and make good his escape, he will steal, he may threaten to kill the householder if confronted, he may tie her up, thus assaulting and falsely imprisoning her. That may take half an hour. It is still one event. While separate charges may be sensible in case the jury are inclined to reject part of the narrative, such as the threat to kill, each crime informs the seriousness of the others in the set. It would be wrong in principle for a sentencing court faced with four convictions out of the same events to split these up for tariff purposes and make each term consecutive to the other. That would be to act artificially. The event of the crime was clearly very bad and deserves an appropriate sentence. It is not appropriate to treat the events as separate and requiring consecutive sentences. The overall sentence, usually on the most serious of the offences, which would be the imprisonment aggravated by the threat to kill, must fit the event with other smaller sentences running concurrently.

32. These issues are dealt with in the textbooks, including O'Malley on Sentencing Law and Practice at paragraphs 5.27–5.33. While there are some statutory provisions requiring a

consecutive sentence, such as offending while on bail contrary to s 22 of the Criminal Justice Act or crimes committed by serving prisoners s 13 of the Criminal Law Act 1976, the choice of concurrent or consecutive sentences is a matter for analysis by the trial judge. In principle, what is stated in Emmins on Sentencing (4th edition, 2001) at pages 150-1 remains accurate:

> It is wrong in principle to pass consecutive custodial terms for two or more offences if to do so would, in effect, punish the offender twice for what was really one crime. … Even where … The offender has committed two quite distinct offences, sentences imposed should still be concurrent where the offences arise out of the same set of facts: the 'same occasion' or the 'same transaction'.

33. Some jurisdictions have an approach to sentencing which may result in what the Director of Public Prosecutions refers to in submissions as a "crushing sentence". Hence, the final sentence should be appropriate for what the accused is guilty of. That can be achieved by reducing the term that is appropriate to consecutive sentences, thus reflecting the overall gravity in the main crime in a series of offences, or the court should arrive at a main sentence for the worst offence, with others concurrent, which reflects the overall gravity of the events. Hence, this following passage in Emmins (page 148-149) reflects current practice in this jurisdiction:

> It is well established that sentences must have regard to the total length of the sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour. This effect will not be achieved merely by adding the sentences of a multiple vendor together, for this will soon result in a total sentence out of all proportion to the kind of offending which has taken place. This principle, which has its clearest application in relation to custodial sentences has achieved a oblique recognition in the Criminal Justice Act 1991, s. 28(2)(b) which states that nothing shall prevent a court 'in the case of an offender who was convicted of one or more other offences from mitigating his sentence by applying any rule of law as to the totality of sentences'. … If offences are committed on different occasions, or are not part of the 'same transaction', there is no objection to imposing consecutive sentence but this approach should not be regarded as inevitable. … Bearing in mind the totality principle, it may be more convenient for the sentence, particularly when sentencing for a series of similar offences, to pass a proportionate sentence for the most serious offence, coupled with shorter, concurrent terms for the less serious matters. In that way the various terms reflect the relative seriousness of the offences for which they are imposed, but the overall punishment remains in proportion to the overall gravity of the offender's criminal conduct.

34. Part of a decision in regarding a consecutive sentence as opposed to making all sentences concurrent will be the existence of a gap in time. In *The People (DPP) v McKenna (No. 2)* [2002] 2 IR 345 there were 31 offences of sexual violence against the accused's own daughter. On an appeal on leniency, the Court of Criminal Appeal regarded a three year

sentence as unduly lenient. A series of the offences had been committed on the return of the father from a six month stint abroad. This latter group were made consecutive to the first, thus doubling the sentence. Where, as in *The People (DPP) v Kenneally* [2018] IECA as a result of the recurrent problem of constant amendment of the law on sexual violence and the non-codification in one Act of the law on sexual violence a judge thought he was bound by a two year maximum sentence for sexual assault, 10 shorter sentences consecutive to each other, resulting in 170 months, was not regarded as wrong since the overall sentence reflected the gravity of the offending against 10 victims over a period of years. Indeed the principle that should be born in mind where there are several victims is that the courts should, if it is just, reflect the gravity of what happened to each. Were it to be that there was a more serious offence, such as rape or incest, the sentences of the other victims could be partly concurrent and partly consecutive.

35. While there is no obligation to impose consecutive sentences, it may be appropriate to do so by reason of a gap in offending, there being more than one victim, or where the facts are not related. All of this is a matter of good sense and it would not reflect good sense to consider a series of offences over years against the same victim of the same seriousness to each carry a sentence as if that crime were isolated from what came before or after. This might result in a series of offences against the same victim receiving an inappropriate sentence where the human reality was that each offence made recovery from the others increasingly difficult. The totality principle means that the judge should objectively consider the overall impact of the offence on the victim or victims and also the rehabilitative effect of the overall result in light of the final total, and the justice of retribution and the need to mark the harm to the victim or victims. Thus, Street CJ's description of the principle in *R v Holder* [1983] 3 NSWLR 245 and in *R v MMK* (2006) 164 A Crim R 481 at 12 is apposite:

> The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.

36. See also, in Canada *R v M* [1996] 1 SCR 500, paragraph 42 and *The People (DPP) v McC* [2003] 3 IR 609 at 618. Finally, what should not be lost sight of is that sentencing is about punishing the offender, protecting society and offering the possibility of rehabilitation within the penal system of a violent perpetrator. In prison, offenders have access to counselling, education, training and exercise. More might be wished for, but rehabilitation is up to the offender, starting with a clear self-analysis. While the courts act

for society, and while victims have an expectation of redress, this is not to be equated with engaging in retribution or in exacting revenge; *The People (DPP) v MS* [2000] 2 IR 592, and the approach of Roach JA in *R v Warner* [1946] OR 808 at 815. These principles were made clear by the Supreme Court in *The People (DPP) v M* [1994] 3 IR 306 through Denham J at pp 316-8. She pointed out that the "nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing". This approach she described as "the essence of the discretionary nature of sentencing".

37. But the function of counsel is also important. Here, it has been stated that because the Director of Public Prosecutions did not look for a consecutive sentence in respect of the vicious assault with the hammer about 10 weeks after the rape, that a court should not do so of its own motion. That is not correct.

Function of counsel in sentencing

38. What sentencing band the Director of Public Prosecutions considers an offender fits within should be the subject of a specific submission by counsel to the sentencing court. Precedents are decisions of law that at least influence subsequent decisions by courts. As a matter of logic, a court is left without a necessary analysis where a party does not reference a point of law but instead chooses to raise an argument based on it on appeal. This is the situation with s 2 of the Criminal Justice Act 1993 which enables an appeal by the prosecution if "it appears to the Director of Public Prosecutions that a sentence imposed by a court … on conviction of a person on indictment was unduly lenient" he or she "may apply to the Court of Appeal to review the sentence." There, the powers to be exercised on appeal are to refuse the application or "quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned". It may be that the interpretation of cases such as *The People (DPP) v FitzGibbon* [2014] IECCA 25 and *The People (DPP) v Husseyn* [2015] IECA 187 has led to a misunderstanding. Given the general wording of s 2 of the 1993 Act, an appellate court is not trammelled by an argument not being made before the sentencing court and on appeal. The duty of the court is more than as between the parties and involves finding the correct sentence as a matter of justice. Thus, while it is not a rule of law, it is a rule of good practice to mention if the view of the prosecution is that some conviction fits within the principle of a possible consecutive sentence. Further, the prosecution, while not demanding a sentence or suggesting it, should make a submission as a matter of law as to the appropriate band. That, after all, is what happens on appeal.

39. A substantial body of sentencing analysis has been conducted by the courts. The most serious crimes have been researched and explained in terms of the relevant sentencing precedents. For instance, this current decision deals with sentencing bands in rape and this Court's decision in *The People (DPP) v Mahon* [2019] 24 considered and set out all of the relevant sentencing bands for manslaughter. Both those decisions were based on research carried out internally by the courts through the judicial assistants. The courts have not set out rigid guidelines for sentencing but have clearly stated that reliance on

the courts' own research and on judgments on precedent are both useful and an aid to practice in the administration of justice; *The People (DPP) v Adam Keane* [2008] 3 IR 177. Internal research done by the Judicial Researchers' Office is available to the judiciary including: Rape Sentencing Analysis: The WD Case & Beyond; Analysis of Manslaughter Sentencing 2007-2012; Analysis of Sentencing in Robbery; and Analysis of Sentencing for Possession or Importation of Drugs for Sale or Supply. In *The People (DPP) v PH* [2007] IEHC 335 and *The People (DPP) v WD* [2008] 1 IR 308 there is an analysis of rape sentencing which has been updated. In *The People (DPP) v Fitzgibbon* [2014] 2 ILRM 116 and *The People (DPP) v Ryan* [2014] IECCA 11, the Court of Criminal Appeal produced indicative bands for assault causing serious harm and firearms offences respectively. In *The People (DPP) v Z* [2014] 1 IR 613, a clear statement was made on the role of counsel for the prosecution in sentencing since the passing of s 2 of the 1993 Act. Most importantly, in *The People (DPP) v Fitzgibbon (No 2)* [2014] 1 IR 627, Clarke J for the Court of Criminal Appeal emphasised the role of the prosecution in offering assistance as to an appropriate sentence, as opposed to demanding a particular sentence. In this regard precedent sentences are key, as are analyses of relevant bands within which it may be suggested a case might appropriately be placed. In the *Ryan* case, through Clarke J at paragraphs 3.1 and 3.2, the Court of Criminal Appeal offered the clearest guidance as to the proper approach of the parties at sentencing. This is good practice and of assistance to the sentencing and to the appellate court. Further, in light of such research and of those series of judgments it is not correct to regard the judiciary as acting in the absence of guidance.

Rape sentencing analysis

40. As was affirmed by this Court in *The People (DPP) v Mahon* [2019] IESC 24, the starting point for a sentence was correctly stated by the Court of Appeal to be the headline tariff, the sentence before any mitigating factors might reduce the sentence or cause any portion of it to be suspended; *The People (DPP) v M* [1994] 3 IR at 315, *The People (Director of Public Prosecutions) v Farrell* [2010] IECCA 116, and *The People (DPP) v Flynn* [2015] IECA 290 where Edwards J stated this principle in emphatic terms. Turning thus to the current revision of 'Rape Sentencing Analysis: The WD Case & Beyond' and the case law on which it is based, guidance as to sentencing bands is appropriate. In referencing recent sentences, it should be noted that these are not hereby approved. This exercise is instead pursued in order to find broad patterns with a view to illustrating sentencing bands.

Suspended sentence for rape

41. Before any consideration should be given to any submission by defence counsel that any form of suspended sentence for rape may be appropriate in a given case, the culpability involved in the definitional elements of the crime should be foremost in the court's mind. In *The People (DPP) v CO'R* [2016] 3 IR 322 the accused, who was convicted of raping his mother, unsuccessfully appealed against his conviction in the Court of Appeal. On the appeal to this Court central to an appropriate consideration of the case was s 2(2) of the Criminal Law (Rape) Act 1981. This states:

> It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

42. Rape occurs where a woman is subjected to sexual intercourse by a man where she does not consent and the man knows or is reckless as to absence of that consent. While this is a subjective test, recklessness in the context of rape was "the taking of a serious and unjustified risk", where the possibility that a woman was not consenting to sexual intercourse "actually occurred in the mind of the accused". An accused acts recklessly, within the meaning of the mental element of recklessness under the 1981 Act, where he is aware of the possibility that a woman may not be consenting but decides to "proceed with or continue with intercourse in spite of adverting to that risk"; see paragraph 45. Consent is not present where the woman is so drunk as not to be able to consent, or is asleep. A deliberate turning away from the issue of consent is recklessness since it seems difficult to shut one's mind to a fact without adverting to the risk of the fact; *The People (DPP) v MC* [2018] IECA 137 and see now s 9 of the Criminal Law (Rape) (Amendment) Act 1990 as inserted by s 48 of the Criminal Law (Sexual Offences) Act 2017 which places consent on a statutory footing, replicating common law principles.

43. In awareness of the seriousness of the definitional elements of crimes of sexual violence, time and again, since *The People (DPP) v. Tiernan* [1988] 1 IR 250, it has been unequivocally declared by the courts that rape is a violation in the most serious way of the constitutionally protected rights of women to their bodily integrity and to their physical and mental independence. In *The People (DPP) v C* [2015] IECA 76 the Court of Appeal acknowledged the long-standing view of the courts that rape and other offences of sexual violence "cause suffering that is profound and long-lasting" impacting on family and children and which "often takes years" to overcome the trauma and to report offences.

44. Accordingly, the analysis in this case and in the work referenced here into precedents elucidates that while there is no absolute rule that a custodial sentence must be imposed regardless of the plea of guilty, a custodial sentence is all but inescapable; *The People (DPP) v R O'D* [2000] 4 IR 361 at p 363, *The People (DPP) v McCormack* [2000] 4 IR 356. Hence, rape merits a custodial sentence but the court "must not deprive itself of the possibility of identifying the exceptional case where a custodial sentence may not be warranted". A non-custodial sentence should be "wholly exceptional" on the Tiernan principles. Since the *WD* judgment in 2007, the research shows that the circumstances must be so completely exceptional as to "allow the court to approach sentencing for an offence of rape in a way that deviates so completely from the norm established by the case law." That might happen, perhaps, where a victim has particular and convincing reasons to take a forgiving attitude towards the perpetrator. While the attitude of the victim may be of assistance, it should always be remembered that it is not determinative: a crime is an attack on society, and not simply a private wrong. There is no acceptance in

this jurisdiction that any principle derived from the English case of *R v Greaves* [1999] 1 Cr App R (S) 319 that because "a good deal of sexual intimacy took place short of sexual intercourse" between the parties and the fact intercourse began by consent, could ever be an excuse. It should immediately stop once consent is withdrawn. What is stated in s 9(4) of the Criminal Law (Rape) Act 1990, as substituted by s 48 of the Criminal Law (Sexual Offences) Act 2019 is now, but was also always, the law: "Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place."

45. An example of an extreme case was *The People (DPP) v WC* [1994] 1 ILRM 321 where the accused pleaded guilty to a charge of raping his then girlfriend after a night of New Year's Eve celebrations. They had what was described as a consensual and intimate encounter, however when the accused sought to have sexual intercourse with the complainant, she did not consent to this and was raped by the accused. Flood J stated that while it "would appear that in the immediate aftermath" of the event that "the accused was neither fully aware, nor appreciated, the wrong he had done", he had admitted his guilt promptly thereafter and pleaded guilty to the charge of rape at his arraignment. In imposing a suspended sentence of nine years penal servitude on the accused, Flood J discussed the factors that a judge should take into account when sentencing in rape cases. It should be noted that this case occurred prior to the introduction of victim impact statements under s 5 of the Criminal Justice Act 1993, and the clarification of the fault element, emphasising its gravity, by the courts. On the facts of the case, the accused was younger than the complainant and was aged 17 at the time of the commission of the offence and had no previous convictions, Flood J stated that the evidence was that such conduct from the accused was "most unlikely to re-occur". The accused was described as having admitted his guilt "[f]rom the earliest stages of this incident" and "accepted the serious harm that was caused by his conduct", making a full written statement to gardaí expressing a "clear desire to plead guilty to any offence with which he might be charged", writing a letter to the complainant admitting his guilt, and expressing "real remorse".

46. It should be noted that Flood J's sentence was not approved on appeal, since there then was no appeal against leniency. The fault element of the offence might warrant a lower than usual custodial sentence, but it is difficult to see how a wholly suspended sentence would be warranted since what was involved was a deliberate violation. Even in *NY* [2002] 4 IR 309, another case where fault was analysed as being at a low level, a suspended sentence was only allowed where the accused had spent 7 months in custody. Fault might be at a low level, but that must mean a low level in the context of an offence that is very serious because of what it involves and of the fault of the accused.

47. Thus, while a suspended sentence for rape is possible, since the Oireachtas has enabled it, any such approach should be considered in the context of the gravity of the offence and the effect on the victim as both being very rare and requiring an especial justification. An analysis of the decisions indicates that in two cases the Court of Appeal has corrected what originally were suspended sentences imposed by the Central Criminal Court. In *The People (DPP) v Hustveit* [2016] IECA 271, there was a conviction on one count of rape

and one of sexual assault. The sexual violence happened while the victim was sleeping and in the context of a broken-down relationship. The original sentence of seven years suspended was corrected on appeal to 30 months with 15 months suspended. A wholly suspended sentence was wrong in principle but this was a case regarded as equivalent to a person surrendering to police where otherwise there would be no detection or prosecution. In *The People (DPP) v Counihan* [2015] IECA 59 and 76 an original sentence of 7 years suspended was corrected to a 10 year sentence on appeal with 7 years suspended; an effective sentence of 36 months. These were two counts of rape against a 13-year-old babysitter and the exceptional circumstances involved the care of two autistic children in the accused's care with no prior offending and the accused using the gap between offending and charge to rehabilitate his life. These circumstances must be regarded as wholly exceptional but as not meriting a total suspension of a term of imprisonment. In *The People (DPP) v JJK* (Central Criminal Court, 22 October 2018) a man of 86, clearly very ill, was given a suspended sentence for rape offences. This is the only case which research can uncover that involved a wholly suspended sentence in the last two decades. It will be noted that the accused had in fact served a sentence, albeit for a similar offence on another victim.

Below the norm

48. In the *WD* case, at paragraphs 18 to 24, about a dozen rape cases were analysed where the penalty fell below the 4 years imprisonment mark. Several of these cases were characterised by the fact that the accused was a young teenager, and so this and other strong mitigating factors pushed the ultimate sentence downwards. Thus in *The People (DPP) v JH*, noted below, the appellant was aged 15 at the time of the offences. In *The People (DPP) v Lukaszewicz* [2019] IECA 65, the accused was 16 and the victim was 15 when the offence of rape was committed. This was a, regrettably, not untypical case of partying with inappropriate drinking and the victim being violated while sleeping. Advantage was taken of the victim, who felt unwell and went fast asleep after consuming vodka. She awoke in consequence of the offence taking place. The accused claimed consent. Essentially, an effective sentence of 3 years imprisonment with 2 years suspended resulted from the youth of the offender and the hope of him continuing to rehabilitate in third level education. *The People (DPP) v Barry* [2017] IECA 171 involved an appellant who was aged between 12 and 14 years at the time of the offences, 2 of rape and 2 of s 4 penetrative rape and 2 of sexual assault, who had only pleaded guilty after the jury had been sworn in for his trial. He had initially pleaded guilty to only the sexual assaults, all the offences taking place in the home of a relative. Here, youth and the fact that the accused suffered from a major depressive illness lowered the sentence below the norm, resulting in an effective sentence of 15 months; 5 years with 3 years and 9 months suspended. In *The People (DPP) v MH* [2014] IECA 18, the victim and the accused were cousins. There were 9 offences, 1 count of rape and 4 of s 4 rape and 4 of sexual assault. The series of crimes began when both were children, the victim 6 years old and the accused 12. This involved a pattern of escalation from play to touching and escalating to the offences. He pleaded guilty. Originally, the sentence was 9 years with 3 years suspended but this became 4 years effectively, since the court ordered imprisonment for 7 years while continuing the 3 year suspension. While the facts are not

similar, the Court of Appeal identified a headline sentence of 8 years in *The People (DPP) v JH* [2017] IECA 206. This involved 2 counts of rape and 2 counts of sexual assault on an 11-year-old girl. This occurred in the context of games that were turned by the accused into sexual violence. The accused was 15 years old when he committed the offences and the ultimate sentence of 18 months with 6 months suspended was reasoned out on the basis of the accused's lack of maturity, despite the accused contesting the trial. While the report has the Court of Appeal changing the headline sentence to 2 years and 6 months because of the mitigating factors, the appropriate course is to consider the gravity of the original offence and to then discount, if appropriate, for mitigation.

49. Similar to this was an earlier case. In *The People (The Director of Public Prosecutions v O'D* [2000] 4 IR. 361, the accused pleaded guilty to several counts of sexual assault on his two sisters between two and three decades earlier. The accused was himself the victim of childhood abuse. Both victims pleaded for leniency. There were 2 counts of rape and 2 of s 4 rape to which he had pleaded guilty. A 5 year sentence with 4 years suspended was varied on appeal so that the accused was released.

50. In *The People (DPP) v PH* [2007] IEHC 335 the issue was sentencing older men for sexual offences reported after a gap of decades. This case was of a pattern with *People (DPP) v Counihan* [2015] IECA 59 and 76. It matters that in the interval between the crime and reporting, the accused has led a life of benefit to the community. While wider considerations of family and society can tend to suggest a lenient sentence, an appeal by victims for a suspended or lenient sentence cannot be definitive. A crime is an attack on particular victims but it also involves an attack on society in general. Where crime victims are able to show forgiveness or are able to maintain an offender as part of an extended family, that may help in the rehabilitation of the offender. If the victim had been badly traumatised by a crime, the precedents show that a sentence should take this into account too.

51. This pattern indicates that what was stated at paragraph 26 of the *WD* case remains correct as regards lenient sentences:

> This analysis also indicates that there is no reported case of the Court of Criminal Appeal ever indicating that it was wrong to have imposed a custodial sentence in the case of rape. At the most, the Court of Criminal Appeal has suspended the balance of a sentence after some time has been served in imprisonment, and then only in the most extraordinary circumstances.

Ordinary headline sentence

52. 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.

53. Thus in *The People (DPP) v TE* [2015] IECA 218, the accused inveigled a person from abroad into his car on a pretext of having cleaning work to offer. She had come here to improve her command of English. She was brought to a house and only there did she realise that the accused would rape her. She submitted, on her testimony as accepted by the jury, because of the intimidating situation and because of his physical bulk. Hence, she was afraid. Despite him running a defence of consent, the jury convicted the accused. The sentence was 7 years and 6 months but mitigation was reflected in 3 years and 6 months being suspended. In the course of things, mitigation factors will vary from case to case but great care should be exercised so that the original fault is not overlooked as would be the harm to the victim. Instead, that harm should be appropriately marked. A sentence of 8 years was imposed in *The People (DPP) v TV* [2016] IECA 320 where rape occurred after a night of drinking. As can happen, an evening in clubs continued in a private home where the victim fell asleep, awakening to find the accused touching her and penetrating her. Here, a more serious factor was the lack of sexual experience of intercourse by the victim in her 20s. Despite a claim of consent, the jury convicted. In *The People (DPP) v PG* [2017] IECA 42, the accused was convicted of a count of rape. The victim awoke to find the find the accused penetrating her as she lay asleep with a young child beside her, and assumed he was her husband. As it turned out, it was her uncle, and he was sentenced to 8 years with 1 year suspended.

54. Some circumstances will bring the headline sentence above the range of in or around 7 years. In *The People (DPP) v ED* [2018] IECA 200, the appellant was found guilty of one count of rape. He had forced entry into her flat, forcibly removed her from her residence and raped her in the street. Since there was an escalated form of violence and a violation of the home, a more serious approach was warranted. The court noted mitigating and aggravating factors. The latter being a prior conviction for assault causing harm on his former domestic partner and the former being a very difficult childhood and having two children. The accused was sentenced to 10 years. In The People (DPP) v Stafford [2008] IECCA 15, a prostitute was held against her will, threatened and raped. There, while there were found to be genuine efforts at rehabilitation, arguments based on drinking and substance abuse could not substantially lessen the accused's culpability notwithstanding a plea of guilty. The sentence was of 9 years imprisonment.

55. The pattern that emerges accords with the original analysis in *The People (DPP) v WD* [2008] 1 IR 308. There, 42 cases were considered as precedent in the range from 3 years to 8 years, with the majority concluding with sentences of 5 to 7 years. Variability occurred not only by reason of the accused pleading guilty, as opposed to being convicted after the victim was required to recount sexual violence in testimony, but also because of the inherent, but in this category, relatively small, differences in gravity. The large majority of the cases analysed in that judgment involved the offender admitting the offence. Hence, the headline sentence can be seen to be in the order of one quarter to one third, depending on the circumstances, more than the ultimate sentence publicly reported. Further, while the original analysis was conducted from such unreported judgments as were available and from newspaper reports, the updated analysis in 'The WD Case & Beyond' derived from either reported judgments on www.beta.courts.ie or the

researchers actually listened to an audio recording, on the courts' Digital Audio Recording system, of the hearing. What emerges is that a consistent pattern in rape sentencing has been maintained over the last decade, and remains as noted at paragraph 36 of *WD*:

> The reports tend to indicate that where a perpetrator pleads guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years imprisonment. The substantial mitigating factor of a guilty plea, present in such a case, suggests that such cases will attract around six to seven years imprisonment where the factors of early admission and remorse coupled with the early entry of a plea of guilty, are absent.

56. It is to be noted that many of the cases included in the analysis 'The WD Case & Beyond' also involve the kind of situation with which the courts are unfortunately familiar of the abuse of children or of multiple counts, perhaps over years. These tend to be more difficult to properly analyse and also are cases where the totality principle comes into play. These are considered in the more serious categories analysed below.

More serious cases

57. 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. The *Stafford* case, would be at the margin of this category.

58. An example is *The People (DPP) v Hearn* [2019] IECA 137. The appellant pleaded guilty to rape, s 4 rape, false imprisonment, and sexual assault. The victim was volunteering at a convention in a hotel. Whilst setting up for the event the appellant locked the victim into the room, threw her on the grown, tied up her hands, removed her clothes, threatened her with having a knife in his bag, and raped her and only stopped when a third party managed to enter the room and tackle the appellant. The offender suffered from psychiatric disorders, including autism and bipolar disorder. This enabled mitigation of 3 years but the headline sentence was set at 15 years imprisonment. Similar to this is *The People (DPP) v Keogh* [2017] IECA 210 where the appellant had pleaded not guilty and was convicted of 2 counts of rape, 2 counts of s 4 rape and 1 count of assault causing harm. There, the offender had invited the victim back to his house to do some painting in exchange for money. He dragged her upstairs, raped her, manhandled her across to the bathroom where he showered her, and then raped her again before returning her to the shower. The Court of Appeal acknowledged that the 13 year sentence was significant. However, it was satisfied that this was a case which warranted a significant and severe sentence. The *ED* case was quite similar but this one involved heightened violence. Another such case was *The People (DPP) v MK* [2016] IECA 260 where the victim was the accused's sister who had called to help tidy his residence. There was no plea of guilty and a piece of broken glass was used as a threat. His appeal of a sentence of 12 years was dismissed. *The People (DPP) v O'R* [2016] IESC is another example. While the appeal was not on sentence, but the mental element in rape, the accused raped his mother after she blacked out and the sentencing court had imposed 12 years and 6 months.

59. Some of these cases may be a sequence of offences. For example in *The People (DPP) v BV* [2018] IECA 253, the appellant was convicted of 1 count of rape, 1 count of s 4 rape and 27 counts of sexual assault. The victim was the appellant's stepdaughter, and the offences took place when the victim was between the ages of 10 and 16. The abuse, which culminated in the rape, was progressive and frequent and took place in the family home. The sentencing judge indicated that the offences should be placed at the highest point of the medium scale, or the lowest end of the highest scale. There was no plea of guilty, no expression of remorse nor any effort at rehabilitation. The headline sentence was 14 years, reduced to 12. However, the Court of Appeal thought that the starting sentence was out of line with sentences in comparable cases. There was only one instance of rape and the assaults did not occur again after that offence. Thus the Court of Appeal substituted the starting sentence to 12, to be reduced to 10 years. Another such case was *The People (DPP) v FR* [2018] IECA 259 where the appellant, granduncle of the victims and living with them, had been convicted of counts of rape and sexual assault against 2 girls who were children and had pleaded guilty to 3 counts of sexual assault relating to the first victim. At trial, the appellant was convicted of 2 counts of rape of the first victim and 3 counts of sexual assault of the second victim. His appeal of a 10 year sentence was dismissed notwithstanding his illiteracy and troubled childhood. In *The People (DPP) v PS* [2009] IECCA there had been a plea to 11 sample counts, 2 of rape. This attracted a 15 year sentence and 2 years and 6 months were suspended but a 10 year post release order of supervision was made. Another series of cases was involved in *The People (DPP) v O'Brien* [2015] IECA 1, where the accused was old, had ill-health but had abused his daughter over a 9 year timeframe from when she was 7 until she was 16. He pleaded guilty and had no convictions prior. On appeal, the sentence was 12 years with 3 years suspended. In *The People (DPP) v FG* [2018] IECA 32, the series of 15 counts of rape and 5 of sexual assault were committed against the daughter of a neighbour. These were repeated offences and gross circumstances. The Court of Appeal regarded the original sentence on a plea of guilty of 8 years to be wrong. Despite a troubled childhood, the grave and gratuitous nature of the crimes required the sentence to be doubled. Overall, the sentence became 14 years. *The People (DPP) v MAF* [2016] IECA 14 involved another series of offences where the accused was in a relationship with the victims' mother but exploited her two daughters from the ages of 8 and 11 years. There the original sentence of 15 years, 3 suspended, was reduced to effectively 10 years by suspending 3 out of 13. The mitigation involved the accused being dysfunctional psychologically, indeed he had been convicted of terrorist offences before.

60. Another such case was *The People (DPP) v RK* [2016] IECA 208, involving a s 4 rape and sexual assault on a girl from age 6 to when she was 9. The guilty plea caused a re-evaluation of the sentence from 18 years, with 5 suspended, to 12 years with 2 suspended.

61. In the original *WD* case, the High Court had examined about a dozen cases in the 9 to 14 year category. A consistent pattern has been maintained since then. At paragraph 40 this comment was made: "Leaving aside these factors of multiple counts, a number of victims and abuse of trust, there are clearly cases where a sentence of ten years imprisonment

can be appropriate for an individual instance of rape. However, a sentence of ten or eleven years imprisonment appears to be unusual, even after a plea of not guilty to rape, unless there are circumstances of unusual violence or pre-meditation." Examples were given which more recent analysis confirms. At the upper end of this band, thus in or around 14 years, are those cases where, as paragraph 41 states, the "degree to which the perpetrator chooses to violate and humiliate the victim can bring the appropriate sentence into the upper end of the band of nine to fourteen years."

62. There are many more cases in this category but it is not helpful, in an exercise such as this, to cite every one. It remains the situation, on the run of precedents since the WD analysis, that a series of offences is not an ordinary rape and, on the headline sentence, is not to be punished as if such offences were in that lower band of seriousness. Where there is unusual violence or humiliation or cynical planning, the ordinary category of rape cases is passed and consideration of this higher band should be where the sentencing court starts.

Cases requiring up to life imprisonment

63. On a consideration of recent cases, the comment made at paragraph 49 of the *WD* case is shown to continue to accord with recent practice:

> Reading the reports of these cases indicates that a number of factors are regarded by the courts as aggravating the offence of rape. The courts have placed particular emphasis on the harm that rape does to the victim and where there is a special violence, more than usual humiliation, or where the victim is subjected to additional and gratuitous sexual perversions, these will have a serious effect on the eventual sentence. Abusing a position of trust, as with a person in authority, misusing a dominant position within a family, tricking a victim into a position of vulnerability or abusing a disparity in ages as between perpetrator or victims also emerge as aggravating factors. Abusing a particularly young or vulnerable victim increases the already serious nature of the offence of rape. Coldly engaging in a campaign of rape, shows a particularly remorseless attitude which is not necessarily mitigated by later claims of repentance. Participating in a gang rape involves a terrifying experience for the victim and using death threats and implements of violence for the purpose of wielding authority or sexual perversion are also serious aggravating factors. Attacking the very young or the very old also emerges as an important aggravating factor from these cases.

64. Regrettably, there continue to be very serious examples. These also illustrate how a crime can be an event over time, and how several separate offences should not be isolated from each other but inform the seriousness of the overall circumstances. Two older examples indicate the kind of circumstances which attract headline sentences between 15 years and life imprisonment. The earliest that continues to be relevant is *The People (Director of Public Prosecutions) v. Tiernan* [1988] 1 IR 250. There, a young man and woman were in the back of a car and intimate. Three men came upon them and attacked the couple. The car was driven to a more solitary place and the boyfriend was shut up in the boot. She was subjected to a vicious rape by two of the men and subjected to sexual assaults.

There was a plea of guilty. Neylon J imposed 21 years. While he did not state a headline sentence, allowing for the plea and whatever ordinary mitigation might be involved, that might be calculated at around 25 years. The Court of Criminal Appeal reduced the 21 year sentence to 17 years in order to hold out the prospect of rehabilitation. A similar case was *The People (Director of Public Prosecutions) v Barry*, (Unreported, Court of Criminal Appeal, 16th October, 2006, trial finishing on 28 June 2005). This was another courting couple apparently discovered in a car in an isolated location. Once again, the young man was locked in the boot. The accused Barry had thirty six previous convictions and the men were armed. The charges to which he pleaded guilty included rape, assault causing harm, the false imprisonment of two persons, and theft. This was not a case where there could have been much mitigation. Upholding a 20 year prison term, Kearns J stated:

> From the victim impact reports it is quite clear that the victims of this crime will never get over what happened to them and it is difficult to see hw such barbaric behaviour could do anything other than leave an indelible imprint on the victims of those crimes who have to live for the rest of their lives with the memory of how they were so humiliated, so frightened and so horribly treated on the night in question. The court has to bear those circumstances in mind when dealing with this case.

65. Clearly, these kinds of offences can be a series. An example of where a life sentence was upheld by the Court of Criminal Appeal is *The People (Director of Public Prosecutions) v. John Adams,* (Unreported, Court of Criminal Appeal, 21 December, 2004). The trial court, Carney J, had described the offences as constituting "one of the gravest cases to come before the courts in recent times". At a late stage, pre-trial, the accused pleaded guilty to 6 counts of unlawful carnal knowledge in relation to two victims, and 2 counts of sexual assault on a third victim. The appellant was described as having "a history of sexual offending of a quite alarming type". Under the pretext of friendship with their family he planned the abuse of young pre-teen girls. His planning involved photography of intercourse. Kearns J upheld a life sentence in the Court of Criminal Appeal, stating:

> Here there is a significant and extremely alarming history of sexual offences. Three incredibly young lives were damaged in a very significant way by what happened and the plea of guilty, when it came, came only some seven years down the road, when eventually this matter came before Carney J. in the Central Criminal Court on 28th July, 2003… We would also take the view that a life sentence should only be imposed in these sort of cases in exceptional circumstances, but the factors to which I have adverted and the previous history of the accused and the modus operandi of deceiving and gradually embroiling these young girls in systematic and depraved abuse shows that there are quite exceptional circumstances operating in this case. We are conscious of the age of the appellant but it does not seem to us that we can rule out the possibility that, insofar as any determinate sentence is concerned, that at least for the foreseeable future, that the risk of re-offending might not be present having regard to the past history. … The taking of the photographs has to be seen as an aggravating feature and it is distressing for the

court to note … the humiliation and degradation to which [these young children] were subjected.

66. Another case of planning was the original sentencing bands judgment in the English case *R v Billam* [1986] 1 WLR 349, where the offender embarked on a plan of raping women and thus represented more than the ordinary danger. There the Court of Criminal Appeal indicated that a sentence of 15 years or more may be appropriate. There was a similar case in this jurisdiction, *The People (Director of Public Prosecutions) v. King* (Unreported, Court of Criminal Appeal, 7th April, 2005), where a plea of insanity failed and a life sentence was imposed and upheld by the Court of Criminal Appeal. The accused had said that he was "empowered by God" to rape not only this victim but all "bad women".

67. Other cases illustrate that gang rape need not be involved to move sentencing into this highest band. It just may be that the circumstances are really bad. One such case, involving planning, was *The People (DPP) v Piotrowski* [2014] IECCA 41 where the accused was the former boyfriend of the victim. Acting out of jealousy at a new relationship, he disguised himself, incompetently, planned an attack of a grossly humiliating kind, carried it out and then, pleading not guilty to various forms of rape, would only accept at trial that he had tied up the new boyfriend and assaulted the victim physically. He burst into the house of the couple armed with a knife, overcame the new boyfriend in his sleep using some kind of self-defence spray, trussed him up in a professional way, and proceeded to penetrate the victim in front of him. He then moved to another room, dragging the victim with him, uttering savage threats, and raped her there. With considerable emotional intelligence, the victim persuaded him to leave, promising not to report him. The trial judge set the headline sentences for the rapes at life imprisonment and on appeal, the ultimate sentence was fixed at 18 years with mitigation taken into account. Since he was a Polish national, it was a factor that he expressed the wish to return to his country of origin. This would be facilitated with a determinate sentence under the Transfer of Sentenced Persons Act 1995. In *The People (DPP) v O'Neill* [2015] IECA 327, the victims, aged 9 and 6, were lured from a playground into the accused's flat. A life sentence was upheld. Other egregious cases were: *The People (DPP) v Anon* (2 May 2016, Central Criminal Court), a life sentence for a rape and humiliation of the accused's girlfriend and then her mother in gross circumstances; *The People (DPP) v O'Brien* (12 December 2016, Central Criminal Court), the rape of a grandmother having lured her into a caravan, 15 years; *The People (DPP) v Kelly* (29 July 2011, Central Criminal Court), a sentence of 15 years for the accused raping his aunt in her home with clear breach of trust and using a knife; *The People (DPP) v Murray* (20 October 2013, Central Criminal Court), a sentence of 15 years on conviction for 2 rapes and other sexual violence with threats to kill the victim's young son and where the judge could not find any mitigation; and *The People (DPP) v Power* [2009] IECCA, a life sentence on a late plea of guilty where the facts of two extremely serious sexual assault convictions in the toilet of a fast-food chain led the Court of Criminal Appeal to state that life sentences do not have to be reserved for the worst imaginable cases.

68. Many such sentences in the uppermost band were for a series of offences. In *The People (DPP) v McCarton* [2010] IECCA 50 the accused pleaded guilty to two attacks on different women in their own homes. He received 20 years with 2 suspended. Clearly, a planned series of offences aggravates the circumstances. As in the *WD* case, many sentences for a series of offences involve the exploitation of children over time. One such was *The People (DPP) v EC* [2016] IECA 150 where there were dozens of guilty findings for rape, oral rape and sexual assault over a five year timescale. The victims were the accused's three daughters and a life sentence was upheld. A sentence of 20 years was upheld in *The People (DPP) v Farrell* [2010] IECAA 68 which consisted of more than thirty offences against three young victims. Another life sentence was *The People (DPP) v R McC* [2008] IR 92 upheld for a series of offences against the accused's daughters and nieces. Use of the victims for child pornography aggravates a sentence; as in *The People (DPP) v Anon* (Central Criminal Court, 12 December 2016) where the sentence was 20 years and the victim was the accused's son, who was disabled, but was used for thousands of obscene photographs. In *The People (DPP) v Anon* (Central Criminal Court, 8 December 2011) the accused's four daughters were raped and otherwise abused over a span of 18 years. The plea of guilty was entered on the empanelment of the jury. A life sentence was imposed.

Admission as mitigation

69. These cases illustrate that despite a plea of guilty at an early stage, the normal mitigating effect of relieving the victims of being part of a trial may not be enough to reduce the sentence from life imprisonment. These cases are exceptional. A common factor in mitigating offences of rape and serious sexual assault is an early admission of guilt. But this depends on the circumstances. An early admission of guilt may be evidence of a contrite approach to wrongdoing. The later that admission comes, on arraignment, on the day of the trial, or during the trial and after the cross-examination of the victim of the offence, the less effect it ought to have on a sentence. Where an offender is very young, is mentally ill or has been subjected to sexual indignities which leave him with a disorder, these factors can be taken into account while bearing in mind that the purpose of the criminal law is to protect the community through the rehabilitation and punishment of offenders. It is not proposed to attempt to set out a series of indications of what can be mitigation. In the 1996 Law Reform Commission consultation paper on Sentencing, from para. 5.51, several general mitigating factors are set out. But not all such factors are applicable to every offence. How would provocation, for instance, ever fit with an offence of sexual violence since the factor which makes sexual intercourse lawful is consent? Thus, it would be wrong to ever consider that kissing a man, wearing revealing clothing, taking a lift in a car, or accepting an invitation to a flat for refreshments are invitations to rape. They cannot be. The entitlement of a woman to refuse to consent to any or all sexual contact is absolute since her bodily and mental autonomy are fully protected by the definition of the offence of rape and kindred offences. Although the Law Reform Commission have usefully set out mitigating factors, what has been seen as relevant in rape cases includes voluntary attempts to alleviate the effects of the crime, where an offender is very young or very old, or where the offender had reduced mental capacity. Finally, of course the offender's background and previous convictions have to be taken

into account as well as the foregoing factors in aggravation of sentence or in mitigation of guilt.

Ruling in this case

70. On the authorities, there were a number of separate events in this series of crimes. The threats in the kitchen on 25 May 2014 led to the rape and informed the circumstances of this sexual violence. The threats with the knife and rape incident only ended when the victim left the house the next morning. Aggravating that rape offence is the threat of violence, the domestic domination overnight and the presence of a small child nearby and the breach of matrimonial trust. The Court of Appeal was wrong in considering the rape alone and the prior offence of threat alone. The subsequent threats were separate. The violent attack on 6 August can give rise to a consecutive sentence as can the threats after the rape, but the totality principle should be observed as to the justice and rehabilitative effect of the overall sentence.

Remaining issue

71. The Court has agreed to hear final submissions subsequent to this judgment; which hereby clarifies the law and the relevant sentencing precedents. The sentence will be finalised and approved when the final decision as to sentence is come to upon hearing those submissions.