



**THE COURT OF APPEAL
CRIMINAL**

Appeal Ref: CCACJ0159/2019

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

**Birmingham P.
McGovern J.
McCarthy J.**

BETWEEN/

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

APPLICANT

- AND-

D.F.

RESPONDENT

**JUDGMENT of the Court delivered on the 18th day of February 2020 by Mr. Justice
McGovern**

1. On 25 March 2019 the respondent pleaded guilty to one count of rape between 1 June 1979 and 1 September 1979. In respect of the rape the respondent was sentenced to a period of six years to commence on 19 June 2019 with the final four years of the sentence to be suspended for a period of four years' conditional upon the respondent entering into a bond to keep the peace and be of good behaviour for a period of four years from the date of his release. In imposing sentence, the Court took into account three counts of indecent assault.
2. In the application before the Court the Director of Public Prosecutions ("the applicant") applies to the Court to review the sentence on the grounds of undue leniency.
3. The legal principles applicable in such applications have been well settled since *DPP v. Byrne* [1995] 1 I.L.R.M. 279 and *The People (DPP) v. Stronge* [2011] IECCA 79. The onus of proving undue leniency is on the DPP, and the sentence in issue must amount to a substantial or gross departure from what would be the normal sentence in the circumstances.
4. There is no question that the offence to which the respondent pleaded guilty was of the gravest kind. It involved the vaginal and oral rape of a six-year old child by the respondent who was thirty-six years of age at the time. The offence was accompanied by

further degradation and humiliation of the victim. He spat into her face and said to her, "You're a dirty girl, you're a dirty girl". She was covered in blood and bruising after the event. Although these injuries were observed by certain adult family members and by an adult connected to the respondent, she was forced to go along with a charade that the injuries had been caused by a fall from a bicycle. In the words of the sentencing judge, "...it was essentially covered up...". This added to the hurt and injustice felt by the victim.

5. The victim was unable to talk about these events for many years and this resulted in a considerable delay before a complaint was made. At the time of the investigation of this crime in 2017, the respondent was seventy-four years old and suffering from Parkinson's Disease. He was residing in a nursing home and arrangements were made for him to be voluntarily interviewed. Although a psychiatrist was satisfied that he was capable of being interviewed, he chose not to engage in the interview process. The matter proceeded to trial and on the Friday prior to the trial date, it was confirmed that the respondent wished to enter a guilty plea. The respondent had no previous convictions.
6. At the time of the sentence the respondent was seventy-six years of age and a letter from his G.P. was furnished to the sentencing judge, recording the fact that he resided in a nursing home and had been diagnosed with Parkinson's Disease, anxiety and hypertension. The Court was also informed that he had limited mobility. The respondent proffered an apology through his counsel to the victim.
7. After sentence, the judge deferred the issuing of the warrant to allow the Prison Service to make arrangements to receive the respondent. The matter was adjourned to 19 June 2019 when the respondent formally entered into a bond as a term of the suspended portion of the sentence and the sentence commenced on that date.
8. In evidence before the sentencing judge, the victim described the rape and the effect that it had on her. She was so traumatised that when she returned to school, she could not pronounce words or do her sums and was sent back to Senior Infants. She was teased by other children on account of this and she described how this affected her. She had to attend special classes in English and Maths until she left primary school and suffered from other physical and health issues.
9. In the course of exchanges with counsel for the respondent, the sentencing judge asked whether the respondent had given any explanation about the "extreme cruelty" that he inflicted and said that this was "...an aspect of the offence that caused the Court some really serious concern". The judge stated that the offence was accompanied by what he described as "barbaric cruelty". In the course of his sentencing the judge said:-

"...it's difficult to imagine the actual brutality involved in raping a six-year old child".
10. The sentencing judge set out the aggravating circumstances in the case as being:-

“...the nature of the offence itself, the addition of gratuitous violence and cruelty of a thirty-six year old done on a six-year old child, the impact on [the victim] at that time.”

11. He went on to describe the significant physical injury which the victim suffered at the time and how it affected her life ever since, including physical discomfort, mental trauma and the sundering of a relationship with members of her family due to the manner in which the incident was covered up. As a result, she could no longer live in the area where she had grown up.
12. Turning to mitigation, the sentencing judge said that there had been a full and frank plea by the respondent although it was delivered very late in the day. The judge was of the view that the plea provided significant assistance and therefore substantial mitigation should be given in respect of the plea as it prevented the victim having to go through the trauma of giving evidence. He also noted that the respondent had no previous convictions. Finally, he referred to the respondent’s serious physical and medical condition over the last six years. The Court considered an extract from O’Malley on *Sentencing Law and Practice*, 3rd Ed., (Dublin, 2016) at para. 6.53 dealing with the question of sentencing persons who are old and infirm. The judge quoted the following passage from O’Malley:-

“... a court must have regard, not only to age, but also to other relevant circumstances, including the offender’s state of health and the nature of the offences of conviction. Where those offences are of a high level of gravity, it would take exceptional offender-related circumstances to justify a non-custodial penalty. In any event, a court may always hear evidence as to the availability of suitable prison accommodation for an elderly offender, just as in the case of an offender suffering from serious health problems.”

13. The judge then referred to *The People (Director of Public Prosecutions) v. J.M.* [2002] 1 I.R. 363 where the Court held that the age of an accused is not a sufficient consideration of itself which would justify a trial judge in fully suspending the sentence imposed. Nor would the delay between the commission and trial of the offence be a sufficient consideration of itself which would justify suspending in total the sentence. These are factors to be considered in sentencing by the Court.
14. The sentencing judge also considered the case of *DPP v. K (Ex tempore*, High Court, White J., 22 October 2018) where a fully suspended sentence was handed down on a man of eighty-six years of age with chronic health problems in relation to two quite serious sexual assaults on two siblings. The sentencing judge distinguished that case from the present one because the Court in *DPP v. K* took into consideration that Mr. K. had served a sentence of five years’ imprisonment in his late sixties for other offences on family members and he was ten years older than the respondent in this case at the time of sentence. In the end the sentencing judge decided that, having considered both aggravating and mitigating circumstances, there had to be a custodial sentence despite the age and ill-health of the respondent.

15. In pronouncing sentence, the judge said:-

"The Court takes the view that the headline sentence in this matter is one of nine years' imprisonment. Taking into consideration the pleas of guilty and his no previous convictions, the Court considers that an appropriate proportionate sentence is one of six years, but because of the serious challenges for [the respondent], and obviously for the Prison Service, I am very conscious of the difficulties that confront the authorities in dealing with serious physically ill people. The Court takes the view that there has to be a custodial element to the sentence because of the seriousness of it and obviously for the factors which I have outlined, but is going to suspend, for the purpose of the issue of his chronic ill-health, a very substantial portion of the six years of (sic) four years'. So the sentence which the Court will pronounce on the rape charges, six years' imprisonment with four years' suspended on condition that [the respondent] is of good behaviour during the period of the suspended sentence and the Court obviously formally takes into consideration the other counts in the Indictment."

16. *DPP v. Stronge* requires this Court to have due and proper regard for the trial judge's reasons for imposing the sentence which was handed down. This Court also has regard to the fact that the sentencing judge is very experienced on the criminal side. In those circumstances, the Court must be cautious in its review of the sentence. However, allowing all due deference to the sentencing judge on that account, it is the view of this Court that the headline sentence of nine years' imprisonment nominated by the judge is unduly lenient applying the relevant legal criteria. It therefore amounts to an error of principle.

17. In *The People (DPP) v. F.E.* [2019] IESC 85 Charleton J. discussed the issue of headline sentences in rape cases, dealing with what he described as "more serious cases", he said at para. 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..."

18. At para. 60 he referred to the case of *The People (DPP) v. R.K.* [2016] IECA 208:

"...involving a s. 4 [of the Criminal Law Rape (Amendment) Act 1990] 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."

19. At para. 61 he said:

"In the [*The People (Director of Public Prosecutions) v. W.D.* [2007] IEHC 310, [2008] 1 I.R. 308], 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.'"

20. In the case before us a number of such factors are present: the offence involved the rape of a very young child both vaginally and orally; gratuitous violence was associated with the offence; and there was the degradation of the victim during and after the offence, and the injuries and life-long impact on the complainant. It is the view of this Court that, having regard to all the features of this case, an appropriate headline sentence is twelve years with a reduction to nine years on account of the guilty plea, albeit late in the day. The Court is of the view that the sentence should be further reduced to five years taking into account the age and health issues of the respondent and the hardship to him in having to face, at a late stage in his life, an increase in the effective sentence already imposed on him. In arriving at this sentence the Court has regard to the evidence that his medical and nursing needs are being well managed in the prison environment which has the resources to deal with dependant elderly prisoners. Having regard to all the circumstances of this case the Court does not consider it appropriate to suspend any portion of the adjusted sentence.