THE COURT OF APPEAL

Record Number: 235CJA/2021

Edwards J.
McCarthy J.
Kennedy J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/
THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

PMCL

RESPONDENT

JUDGMENT of the Court delivered (ex tempore) on the 13th day of October 2022 by Ms. Justice Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the 23rd November 2021. The respondent pleaded guilty to offences of; indecent assault, rape, sexual assault, s.4 rape, aggravated sexual assault and a sexual offence committed outside the State. A *nolle prosequi* was entered in respect of one further count of a sexual offence committed outside the State and all other counts were taken into consideration. The respondent received a sentence of 12 years' imprisonment with the final 18 months suspended.

2. Fifty-four counts were preferred on the indictment, concerning offending over a sixteen-year period between 1990 and 2006 when the injured party was aged between 6/7 and 25 years old. The respondent pleaded guilty on a representative basis.

Background

3. The offending came to light in July 2016, when the injured party attended at the Garda Station to make a complaint against her father, the respondent herein. In her account to the Gardaí, she gave specific details about the offences which commenced when she was

between 6 and 7 years old. Initially, the abuse occurred monthly and then increased in frequency thereafter. The offences concern a litany of sexual abuse; the following are some examples of the depraved nature of the offending.

4. The incident which is the subject of the first count on the indictment occurred on a date unknown in 1990 while the family were on holidays in Ireland. The respondent placed the injured party on a bed and masturbated himself while touching her vagina. The respondent undressed himself, but only pulled his trousers and underwear to above the knee, this was a feature of the offending as it progressed.

5. The abuse commenced with touching the injured party on her vagina until ejaculation with a constant feature being telling her that it was their little secret. The abuse escalated to oral rape and vaginal rape and increased in frequency.

6. The injured party recalled an incident where, before a disco in her first year of secondary school, the respondent told her to give him a pair of her underwear onto which he ejaculated. He then brought them back to her and told her that she had to wear them to the disco. The injured party outlined that this was a regular occurrence, commencing when she was around 12 years old. In respect of this type of conduct, the respondent required that the injured party put her underwear on while wet with his semen.

7. The injured party recalled another incident of this type when she was aged 16 or 17, before a first date. As she got older, she would buy three pairs of the same underwear so that she could put on a clean pair without him knowing.

8. The injured party recalled being made to perform oral intercourse on the respondent and being compelled to make sexual comments such as enquiring as to whether he enjoyed what she doing and other comments which we do not see the need to repeat here.

9. After one such occasion of oral intercourse during which the respondent ejaculated into her mouth, the injured party was washing her mouth out in the bathroom and when she came out of the bathroom, the respondent had a dictaphone in his hand and said "I'm going to fix this so it sounds like you're enjoying more than me. In years to come, it will be evidence."

10. When she was aged 18, the injured party recalled that the family were renovating a room in the house before her debs, either the kitchen or dining room, and the respondent made her lie down on the kitchen table and open her legs, the table was covered in a black sheet and had builders' lights shining onto it. The respondent then proceeded to take close up pictures of the injured party's vagina. He then showed the photographs to her. He claimed that the pictures were for a project.

11. A further incident outlined by the injured party occurred while the family were on holidays abroad in 1998. She recalled that the respondent told her she could not join her mother and sister at the pool and instead made her masturbate and perform oral intercourse on

him while he stood in front of a mirror. He ejaculated all over her body and into her vagina.

12. The injured party outlined that the abuse by the respondent progressed to vaginal rape when she was 12 years of age. She said that on her birthday she would get "a little bit more" in that, in general, the abuse consisted of either vaginal or oral rape but on her birthday, it would consist of both vaginal and oral rape.

13. The injured party further outlined two separate incidents of violence, one where the respondent punched her in the hip leaving a bruise and another where he wrapped a telephone cord around her neck, choking her.

14. The incident which is the subject of count 52 occurred when the injured party was aged 13 or younger. She outlined that the respondent called her in from playing outside to tell her that he was going to show her a trick with the electric sander. She knew that this meant that she was going to be abused in some way later. That night, the injured party recalled that the respondent had her lie down on the carpet and that he held the electric sander against her vagina while turning the speeds up and down.

15. On another occasion when the injured party was aged between 13 and 15, she recalled that she awoke to the respondent rubbing his semen into her face, lips, mouth and in her hair, having ejaculated on her. He then held the door of the bedroom closed, preventing her from getting to the bathroom.

16. The injured party outlined that the respondent came to talk to her about how to masturbate at an age when she was still playing with barbie dolls. She recalled that he showed her how to masturbate and told her that she had to practice doing it every day.

17. The injured party further recalled an incident during which the respondent inserted one of his toes into her vagina while they were both sitting on the sofa watching a movie.

18. The injured party said that the respondent told her that this was happening to all her friends and that she was not to talk about it and that further, all of her friends had a special relationship with their fathers.

19. When the injured party was aged 13, she became ill and was bed bound. She recalled that at this time the respondent produced a homemade dildo made from insulation piping and black tape and suggested that she could use it to pleasure herself.

The sentence imposed

20. The sentencing judge identified a headline sentence of 16 years' imprisonment in respect of each of the counts of rape, 10 years' imprisonment in respect of the aggravated sexual assault count and 7 years' imprisonment in respect of each count of indecent and sexual assault.

21. The judge identified the aggravating factors as the intensive intentional grooming of a very young child, the prolonged period of abuse spanning over 16 years, the humiliation

and degradation of the child, the continuous and persistent manipulation of the child and the distortion and destruction of her childhood and growth and development, the complete and total breach of trust and the commission of the offences against his own child in what should have been the security of her family and home.

22. In terms of mitigation, the judge had regard to the respondent's plea of guilty, his absence of previous convictions, his expression of remorse and apology, the difficulties in his childhood, his very good work record, that he was said to be at a low risk of reoffending and his age.

23. The judge then reduced the sentences in respect of the rape offences to 12 years, the aggravated sexual assault offence to 8 years and the indecent and sexual assault offences to 5 and a half years. All sentences to run concurrently. In order to encourage the respondent's engagement in rehabilitative counselling or other programmes, the last 18 months of each sentence was suspended.

Grounds of application

24. The Director relies on three grounds of application as follows:

> *"1. The learned sentencing judge erred in law and in fact in determining a headline sentence in relation to each of the counts which did not reflect the gravity of the offences including the period of the offending behaviour.*
>
> *2. The learned sentencing judge erred in law and in fact in failing to impose a sentence which reflected the gravity of the offending in question and the depraved and controlling nature of that offending and by imposing a sentence which was over-mitigated having regard to the accused's entry of a late plea of guilty, limited acceptance of his wrongdoing and his limited insight into the offending*
>
> *3. The learned judge erred in according undue and excessive weight to the mitigating factors in the case and in particular to the personal factors relating to the respondent and the guilty plea."*

Headline Sentence

The applicant

25. In reality, this Court is concerned with the sentences imposed for the rape and s.4 rape offences. The applicant makes the case that the sentencing judge properly placed the offending within the highest range as identified by the Supreme Court in *The People (DPP) v FE* [2019] IESC 85 but fell into error by placing the offending too low on that range. It is the applicant's position that having regard to the uniquely depraved and controlling nature of the offending in the instant case, a headline sentence of 16 years was simply too low. As such, it is submitted that the headline figure nominated did not adequately reflect the gravity of the offending.

26. The applicant relies on *The People (DPP) v X* [2021] IECA 168 wherein this Court considered appropriate the headline sentence of life imprisonment nominated by the judge in the Central Criminal Court stating:

"We are satisfied that the cumulative effect of these aggravating factors and the harm done, coupled with the intrinsic depravity of the offending conduct at issue, uplifted the overall culpability of the appellant's conduct and brought it within the sentencing judge's scope for action to nominate a headline sentence of life imprisonment. This was particularly so in circumstances where he was considering imposing concurrent sentences, rather than consecutive sentences, and was seeking to ensure that the sentences that he would impose for the most serious of the offences, i.e., the numerous rapes of different types, would reflect the totality of the offending behaviour."

The respondent

27. The respondent outlines examples of cases which were held by the Court in *FE* to fall within the highest range. These include *inter alia*, cases involving gang rape, false imprisonment of the victim in an isolate location and violence. It is submitted that the cases which have attracted the highest headline sentences involve a combination of these aggravating factors. Reliance is placed on *The People (DPP) v Piotrowski* [2014] IECCA 41 in this regard.

28. The respondent takes no issue with the sentencing judge's decision to place the offending in the instant case within the highest range of FE but equally submits that it was within the judge's discretion to place the offending at the lower end of that range. Further, it is submitted, that by doing so the judge did not substantially depart from sentencing norms.

29. The respondent notes that in the context of undue leniency appeals, deference must be given to the sentencing judge's assessment of the appropriate headline sentence. In this regard, it is submitted that the judge conducted a thorough analysis of the case with a full enumeration of the aggravating factors before nominating the headline sentence. Further, it is emphasised that the instant case lacks a combination of the aggravating factors, which, as outlined above, would have placed it more firmly within the highest range of *FE*.

30. Additionally, it is pointed out that while the applicant during the sentence hearing submitted that the case lay within the highest range of *FE*, she did not give an indication that it was her view that the headline sentence properly lay in the medium or high end of that range.

31. The respondent distinguishes *X* from the instant case, first noting that it was a severity appeal. It is submitted that *X* is authority for the argument that a headline sentence of life imprisonment could legitimately fall within a sentencing judge's range of discretion for a factually similar case but not for the argument that such a headline sentence *must* be imposed for a factually similar case. In this regard, the respondent draws attention to the cautionary comments of this Court in *X* and quotes from the judgment, as follows:

"We have on several occasions sought to emphasise that the correct use of comparators is not to directly compare the circumstances of one case with another. No two cases are the same and such comparisons are of little value. The correct use of comparators involves surveying a meaningful sample of cases to discern a

trend or trends in sentencing (which is what the Supreme Court did in F.E.), understanding and accepting that this will yield no single correct sentence for a particular instance of offending but that it may suggest the range within which a potentially appropriate sentence may be found, and assist the sentencing judge in the case at hand by indicating to him / her the scope for action within which he/she may operate. It is also the case that there will rarely be clear blue water between ranges, a point made by Birmingham J in this court's guideline judgement in The People (Director of Public Prosecutions) v. Casey [2018] IECA 121, so that sometimes a case might fall to be assessed as belonging at the high end of one range, alternatively the low end of the next range up, such that a judge in the exercise of his/her discretion, and depending on the sentencing objectives being prioritised, might legitimately locate it in either. As Charleton J. said in F.E. (No 2) [2020] IESC 5, it is a matter of analysis into which sentencing band culpability for a particular crime properly fits."

32. It is submitted that these comments apply full force in respect of the applicant's use of *X* as a comparator case. The respondent contends that singling out one case and asserting that the instant case has to be approached in the same manner is not a sustainable proposition.

33. The comments of Birmingham P in *The People (DPP) v RK* [2016] IECA 208 are similarly relied on, as follows:

> *"Cases vary significantly, and even in those cases of offending behaviour which at first sight appear very similar in character, on closer examination, significant differences will often emerge. For that reason, a degree of caution is required when comparing sentences in one case with sentences in another."*

34. The respondent further distinguishes *X* from the instant case on its facts; *X* involved the anal rape of the victim and the pressuring the victim into consuming alcohol and watching pornography in order to facilitate the abuse. It is submitted that *X* turned on its own facts.

35. Mr Fitzgerald SC for the respondent urges the Court to keep firmly in mind that it is for the Director in a review of sentence to demonstrate an error in principle and it is not for this Court to impose the sentence any one of the judges would have considered appropriate in the Court below; deference must be given to the sentencing judge's discretion in imposing the sentences he imposed. He says the legal principle is of even greater significance in the present case given the serious nature of the offending.

Discussion

36. As can be seen from the above, the conduct of the respondent towards his daughter was humiliating, degrading, and depraved. It cannot be gainsaid that the offending was egregious and fell within the upper range of sentencing as identified in *FE*; that is the offending is of such seriousness that it falls within the range of 15 years to life imprisonment. The Director argues that while the judge placed the headline sentence

within that band, he ought to have nominated a greater headline sentence in view of the nature of the offending and the circumstances surrounding the offences.

37. It is without doubt that these are shocking offences; the respondent inflicted himself upon his young daughter in a most egregious manner; using her for his own sexual pleasure. However, his reprehensible behaviour does not end with sexual abuse of a most serious kind but included grooming from an early age, depraved sexual acts, such as using a sander on her vagina and inserting his toe into her vagina. Her entire childhood, adolescence and young adulthood were taken over by this man and his sexual perversions.

38. A further aggravating factor is the recording of some of the incidents and taking graphic photographs of her. The latter, and the incidents involving ejaculation onto her underwear took place before important events in her life, such as her first disco, a first date and on the occasion her debs were clearly designed to ruin any pleasure she might take from these events. This man and his sexual desires were to be front and centre of the injured party's life. The rubbing of semen into her face, mouth, lips, and hair and holding the bedroom door closed to prevent access to the bathroom were acts designed to further degrade and humiliate her and to demonstrate his control over her. The production of a homemade dildo made from insulation piping when she was an ill with gastroenteritis at the age of about 13 years with the exhortation to please herself, beggars' belief. These acts on his part served to humiliate and degrade her and underline the respondent's controlling nature. The depth of the respondent's cruelty to his daughter is quite extraordinary.

39. It goes without saying that the fact the offending was prolonged, started at a young age with the sexual abuse of a vulnerable child and continued for 16 years, the abject breach of trust and impact on the injured party, the frequent and persistent abuse and choking her with a cord on an occasion, all serve to aggravate the offending.

40. We also consider the fact that the respondent kept his underwear on to below his knees and his comments regarding the use of the dictaphone as the injured party emerged from the bathroom as set out at para. 8 *supra* of this judgment as evidence that he clearly knew what he was doing was wrong.

41. We are urged to consider whether the judge erred in principle in nominating a headline sentence of 16 years where the maximum penalty is one of life imprisonment. The facts of this case disclose sexual abuse of such appalling depravity, with humiliating and degrading acts, the effort to destroy the injured party's coming of age moments, and the other factors mentioned in this judgment which lead us to the conclusion that the judge erred in principle in nominating a headline sentence which was simply too low. We find that this case is one of those cases where the level of depravity, the humiliation, the cruel acts on the part of the respondent mean that this case falls within the higher band and at a greater level than that determined by the judge in the court below.

Overall Sentence

The applicant

42. The applicant submits that having regard to the prolonged length and depravity of the offending herein, the effective sentence of 10 and a half years, considering the suspended element of 18 months, represents a substantial departure from sentencing norm for cases of this nature.

The respondent

43. While the respondent says that it is not appropriate to use a single case as a comparator and that *X* turned on its facts, it is submitted that if this Court is inclined to view *X* as a comparator, it should also consider *The People (DPP) v B* [2020] IECA 329. The respondent in that case was convicted of 105 sexual offences committed against his daughter over a 12-year period. The mitigating factors were said to be "marginal." Mr B was sentenced to 10 years' imprisonment which was increased to 13 years following a review on the basis of undue leniency. The respondent submits that the outcome of *B* supports the sentence imposed in the instant case, noting that the offender herein has the benefit of a far great number of mitigating factors, in particular, his guilty plea.

Excessive Weight Afforded to Mitigation

The applicant

44. The applicant notes that the error in nominating a headline sentence of 16 years' imprisonment was exacerbated by the sentencing judge's reduction of this to 12 years and further suspension of 18 months thereof leading to an effective sentence of 10 and a half years.

45. It is submitted that this amounted to an over-mitigation of the respondent's sentence. In this regard, the applicant points out that the respondent, while having made a guilty plea, did so at a very late stage, leading the injured party to believe she would have to go through a trial process and recount the details of her abuse in open court. It is submitted that this could not be regarded as an early plea by any means and therefore could not have warranted the reduction in sentence from 16 to 12 years.

46. Further in support of this ground, the applicant points to the psychological and probation reports which she says indicate that the respondent sought to qualify or minimise his acceptance of guilt. In particular, it is pointed out that the respondent maintained to the probation officer that the offending had not involved penetration and that the abuse had only lasted for six years rather than sixteen. It is submitted that such a defendant is certainly less deserving of mitigation than one whose plea comes without equivocation.

The respondent

47. In response to the above, the respondent quotes from the case of *The People (DPP) v AD* [2020] IECA 258 as follows: a "plea of guilty must be given credit in its own right however, regardless of the circumstances in which it arises."

48. It is submitted that the timing of the respondent's plea must be viewed in light of his "still evolving" acceptance and understanding of what he had done as described by the psychological report. Moreover, the respondent emphasises that, although it was entered

at a late stage, the guilty plea attached to it all the usual benefits of such a plea, in that it spared the injured party and other witnesses from having to give evidence at trial and it spared the costs and court time associated with the running of a trial. Further, it is submitted that the plea indicated a level of facing up by the respondent to his wrongdoing and a taking up of responsibility for his actions.

49. The respondent also draws attention to the various other mitigating factors in the instant case which it is submitted entitled the respondent to a discount on his sentence. These are listed as; the respondent's age, his absence of previous convictions, the abuse he suffered in his own childhood, his medical history, the role he played in the lives of his wife and children, his strong work record, his voluntary admissions to the Gardaí, his expressions of remorse, shame and guilt, his efforts to rehabilitate himself and his "very low risk of future sexual offending."

50. It is noted that the sentencing judge suspended 18 months of the respondent's sentence in order to encourage his engagement with counselling or rehabilitative programmes and further that he had benefitted from engagement with these services in the past and that the relevant reports indicated he should continue this engagement. In this regard, it is submitted that it was entirely appropriate for the sentencing judge to suspend a portion of the respondent's sentence as he did.

51. The respondent submits that in imposing an effective custodial sentence of 10 and a half years, a discount in mitigation of just over one third was afforded to the respondent. It is said that this was justified by the cumulative effect of the mitigating factors. The B case is cited in support of this submission: "Ordinarily, the headline sentence might be reduced by up to 1/3 (or thereabouts) if the principal mitigating factor of a plea of guilty was present."

    The respondent further emphasises that a suspended sentence represents a real penalty as the suspended portion is open to reactivation.

Conclusion

52. Whilst we have set out the submissions made by the parties in relation to mitigation and the reduction in light thereof, we are satisfied that the real error in principle in this case arises in the nomination of the headline sentence. Insofar as the reduction for mitigation is concerned, whilst it was generous in light of the fact that this was a very late plea of guilty and one which was diluted by the respondent resiling from an indication of a plea at an earlier stage, we find that such reduction was within the margin of appreciation afforded to a sentencing judge.

53. As we have found an error in principle, we will quash the sentence imposed and now proceed to re-sentence the respondent as of today's date.

Re-Sentence

54. The offending in the present case was of a most grave order. The respondent's actions were appalling; depraved sexual offending, humiliating, and degrading to the injured party, his level of control and how he exerted that control was nothing short of horrific.

This man in effect took away at a minimum 16 years of the injured party's life. Given the aggravating factors we find the appropriate headline sentence to be one of 22 years' imprisonment on each of the counts of rape and s.4 rape.

55. We take account of the mitigating factors as identified, we bear in mind that the plea was a late one and that the value of the plea is diluted by virtue of the respondent resiling from the indication of that plea at an earlier stage. Nonetheless, we acknowledge that the plea had value.

56. We take account of his expressed remorse although and as observed by the sentencing judge, that must be assessed in terms of the paucity of insight on the part of the respondent. To gain full credit for the expression of remorse, the expression must be genuine, moreover, if the respondent was fully remorseful, one would have expected a plea at an earlier stage.

57. The respondent offered an apology to the injured party. He is a man with no previous convictions, but again the absence of convictions is tempered by the fact that his offending was over a protracted period of time and so attracts lesser weight than might otherwise be the case. His difficulties as a child and his age provide mitigation. His work record and family support are factors in mitigation, but of limited value in a case such as this.

58. We are of the view that the mitigation reduces the headline sentence to one of 17 years' imprisonment representing a reduction somewhat greater than 20%.

The sentences imposed on the remaining counts remain as imposed by the sentencing judge save that the suspended element in each is removed.

59. We consider that post release supervision is appropriate in the present case and impose such for a period of 5 years following the respondent's release from custody on the following conditions: -

1. That he provide his address to The Probation Service;
2. That he provide any change of address to The Probation Service;
3. That he comply with all directions of The Probation Service including directions regarding rehabilitation programs;
4. That he have no unsupervised access to or contact with any child under the age of 18 years;
5. That he have no contact directly or indirectly in any manner or through any medium whatsoever with the injured party.

60. The respondent remains subject to the sex offenders register.