



THE COURT OF APPEAL

Record No: 233/2021

**Edwards J.
McCarthy J.
Ní Raifeartaigh J.**

Between/

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

Respondent

V

D.H.

Appellant

JUDGMENT of the Court (*ex tempore*) delivered by Mr. Justice Edwards on the 6th of July 2023.

Introduction

1. Before this Court is an appeal brought by D.H. (i.e. “the appellant”) against the severity of the sentence imposed on him by Dublin Circuit Criminal Court on the 13th of December 2021. The appellant had been convicted on the 5th of October 2021, following a jury trial, of one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (i.e. “the Act of 1990”), as amended by s. 37 of the Sex Offenders Act 2001. He was subsequently sentenced to 3 years and 6 months’ imprisonment, with the final 6 months thereof suspended on express conditions:

“1. that he will keep the peace and be of good behaviour towards all the People of Ireland from this date for the period of his imprisonment and for a further period of 6 months from the date of his release from custody on this sentence and 2. That he will engage in sexual offenders rehabilitation treatment as directed; AND FURTHER that he will come up if called on to do so at any time to serve the balance of the sentence imposed, such balance suspended on him entering into this Recognisance.”

2. The core complaint advanced by counsel on behalf of the appellant in the context of the herein severity of sentence appeal is that the sentencing judge erred in her assessment of the gravity of the offending, with the consequence being that she nominated a headline sentence that was excessive.

Factual Background

3. The Court has already summarised the facts of this case in its earlier judgment dismissing D.H.'s appeal against conviction – see *The People (DPP) v. D.H.* [2023] IECA 170 – and this judgment may be read in conjunction with that judgment, and with this in mind it should be stated that the sentencing judge had also presided over the trial of the appellant. For the purposes of the present judgment, this section will provide a precis of the evidence of Detective Garda David Smith (otherwise "D/Garda Smith") tendered to the sentencing court on the 13th of December 2021.

4. At the time of offending (on a date in or around late 2013), the appellant was residing with his then partner and her daughter, the complainant, at their house in a village in Leinster and was in effect *in loco parentis* to the complainant. The complainant was approximately 12 years of age, the appellant was aged 44 years. The complainant and the appellant were alone in the living room area of the dwelling at a time between 15:00 and 16:00. The complainant was home after school, and her mother and younger sibling had left the house to go to the shops. She was seated on a sofa against the wall of the living room and the appellant was seated on a sofa near the fireplace. The complainant went to sit beside him and asked for a foot massage, placing her calves on his lap. The appellant began by massaging her feet, before proceeding to move his hands up over her trousers to touch her vagina, then under her trousers and over her underwear, and then under her underwear where he rubbed her vagina. The complainant described how she did not move or say anything and tried to think of an excuse to move: "*She froze and looked at the clock. She used the excuse of homework and ran to her room.*" She recalled that she was crying, and that the appellant followed her to her room where he hugged her and asked, "*Did I touch your forky parts?*", which she took to mean her vagina.

5. The complainant did not make her complaint until approximately a year later in 2014. At this point, she was in her first year of secondary schooling. Following lessons in sexual education in which she was taught about sexual abuse, she realised that what had happened to her was wrong. When asked why she had waited a year before making the complaint, she responded by stating that she was "*scared*" that nobody would believe her. There was further a suggestion that she had a difficult relationship with her mother and that the complaint was motivated by her desire to live with her father. The complainant accepted that her relationship with her mother was difficult but denied that there was any such motivation behind the making of the complaint.

6. She initially made disclosures to two of her schoolfriends (referred to in the judgment in relation to the appeal against conviction as "W" and "S", respectively), which schoolfriends gave evidence at trial. The complainant also made disclosures to her school chaplain, following which the school notified her mother who came to collect her. Afterwards, the complainant recalled a confrontation between her mother and the appellant during which she overheard, while she was in the room next door, the appellant state that he "*didn't F-ing do it*". She averred that following this confrontation the appellant came into the room where she was, that he was angry, and that he grabbed her by the arm and pushed or pulled her across the room.

7. The complainant's paternal grandfather also gave evidence at trial. He recalled having been contacted by the complainant's mother at the time of the disclosure and he described how the complainant was dropped off outside his house alone, "*left on the road*" with a suitcase and black bags of belongings. The complainant moved in with her grandfather. Five days after this, the

complainant's grandfather contacted his son, the complainant's father, who lived in London, regarding the disclosures. Following this revelation, her father flew home to Ireland and brought the complainant to a Garda station in November 2014 for the purpose of making a complaint. Ultimately, the complainant moved to London to live with her father, and at the time of sentencing it was said that she continues to reside with him.

8. In a Probation Report dated the 8th of December 2016 (i.e. "the 2016 Probation Report"), it is stated that D/Garda Smith informed the probation officer that the appellant was not co-operative at interview. At trial, the appellant gave evidence in his defence, denying that the sexual assault occurred.

Victim Impact Statement

9. The complainant prepared a poignant victim impact statement which was read into evidence by counsel for the prosecution. On account of its length, we do not intend to reproduce it in full, but will attempt to provide a precis instead.

10. The complainant started by describing how the appellant's question "*Did I touch your forky parts?*" plays like a "*broken record*" in her head. She described how following her disclosures she had to move schools which she found very difficult, and that her father was finally given full custody of her after "*many*" court dates. Moving to London in 2015 at the age of 15 years, the complainant described how she had experienced a "*massive culture shock*" and had to adjust to new surroundings. She stated that in her third year of secondary schooling she began "*to spiral out of control*": she was depressed; she felt numb and emotionless; she felt as though everything was her fault; she skipped school; she self-harmed and had suicidal thoughts. She described how her father enrolled her in weekly therapy sessions, and that following an attempt at suicide she was hospitalised for four days and was placed on suicide watch.

11. She detailed the impact on her relationship with her sibling. She described how due to her discussing the abuse she was not able to see her younger sibling, that all contact was blocked. She further described how returning to Ireland gives rise to increased anxiety and fear in her, on account of a concern on her part that she might encounter the appellant. She stated how at the age of 17 years she suffered repetitive nightmares in which she would be sexually abused by the appellant while passers-by would ignore her plight and these bad dreams would feature molestation on a reoccurring basis. She described such dreams as "*too real and vivid*" and that they caused her to struggle to sleep. She further averred that she had developed a certain aversion to bald men (i.e. men of a similar physical description to the appellant) and that seeing such men on the street cause her to experience flashbacks and give rise to panic attacks, the complainant fearing that it may be the appellant whom she is seeing on the street. She stated that she will forever be scarred and will not be able to live a perfectly normal life.

12. Her suffering had a manifest impact upon her schooling. She described how she had skipped classes and refused to attend school on account of her not caring about anything. She was enrolled at a pupil referral unit for teenagers suffering with behavioural problems. At the time of completing her GCSEs, she felt "*disassociated*" with her surroundings and was suffering with debilitating anxiety and was afflicted by a "*constant fear*" that something terrible would happen – feeling as though the ceiling would fall on her. She described how she mixed with a different group of friends and that she began abusing alcohol and drugs "*to escape [her] reality*". She would go

missing for days, and no longer recognised who she was. She stated that this was a stressful time for her father. She had to attend three colleges to complete her A-levels. The first expelled her on account of her absence, the second on account of her substance and alcohol abuse. At the third, she finally succeeded and described how she started to settle following a change in friend group and entering a relationship. She subsequently successfully applied for a policing position.

13. As regards her relationship with her partner, the complainant stated that the abuse she suffered at the hands of the appellant has affected her sexual relationship which she believes will never be "normal". In her victim impact statement, the complainant appeared to blame herself for her suffering, stating that the initial disclosures she made led her on "a path of self-destruction" and left her with a fear of not being capable of love or being loved. She stated that her attempted suicide was on account of feeling like a "bitter disappointment" to her father, and she further stated that she felt as though she had "abandoned" her sister. She stated that she had developed Crohn's disease on account of her stress.

14. The complainant alluded to the trial of the appellant exacting a toll on her. She stated: *"I cannot count how many times I have flown over to Ireland because of this, thinking that it would finally be over and done with and then being let down. I felt like my story was never listened to. I felt like nobody really cared. I felt no point at times. The system really let me down. I have a huge fear that people think I am lying when I am telling them a story."*

She nevertheless concluded by remarking that it was "extremely validating" that the verdict of guilty was unanimous.

Personal Circumstances of the Appellant

15. The appellant was 44 years of age at the time of offending and was aged 51 years when he appeared before the Circuit Criminal Court for sentencing.

16. He has no previous convictions.

17. The appellant is one of ten children, his parents are deceased. As evidenced in the 2016 Probation Report, the appellant advised that he had a relatively stable upbringing and that he maintains contact with many of his siblings. Letters from a number of these siblings were tendered to the sentencing court and have been provided to this Court. In a Probation Report dated the 13th of December 2021 (i.e. "the 2021 Probation Report"), it was said that the appellant's relationship with his former partner, the complainant's mother, ended on account of her suffering a breakdown associated with the stress of the present case. At the time of sentencing, he was single and had moved into social housing. In the course of the plea in mitigation, counsel for the defence alluded to periods of homelessness spent by the appellant over the years and that he had recently spent time in a hostel.

18. The appellant attended school until his 3rd year of secondary schooling. It was said that he had no academic or behavioural issues. Upon leaving school, he found employment at a garden centre and then worked a period in construction, employed by various firms. The appellant experienced several periods of unemployment on account of construction work waning and because of the impact of the Covid-19 pandemic. At the time of sentencing, he was working for a distillery and had completed training in relation to stonework. Copy of his employment contract,

and certificates confirming training, were furnished to the court below and have been made available to this Court.

19. At the time of the 2021 Probation Report's compilation, the appellant advised that he was under the care of a consultant psychiatrist, and had been prescribed a course of medication to treat his depression diagnosis.

20. While the 2016 and 2021 Probation Reports repeat that application of the RM 2000 risk assessment tool indicated that the appellant posed a low risk of sexual reoffending, a common theme in both reports is that the appellant is an unsuitable candidate for supervision. The problematic factor going to this conclusion in both reports is the appellant's steadfast and continued denial. The 2016 Probation Report stated:

"In exploring victim issues with [the appellant], he tells me that he believes the victim was an attention seeker. He suggested the victim made something up without realising the seriousness of it and that matters have escalated from there. He did not display any victim empathy as he does not accept there was any offence committed. Neither did he display any hostility or anger toward the victim during interview".

The 2016 Probation Report went on to conclude:

"[The appellant] does not accept culpability for this sexual assault. He refuses to acknowledge any wrongdoing and insists he will be appealing this conviction. [The appellant] did participate in the preparation of this report nonetheless. [...] However, as [the appellant] is unwilling to accept the verdict of the court or acknowledge any risk factors associated with his behaviour it is not possible to recommend a course of treatment for his behaviour. Therefore, [the appellant] is not considered suitable for probation supervision at this juncture."

Similar conclusions were reached five years later in the 2021 Probation Report:

"[The appellant] continues to deny he is guilty of this offence. He has maintained this position over the last 5 years and is unwilling to take any responsibility for this offence.

[The appellant] co-operated in the process of assessment with this service. He spent much of the time castigating various aspects of the criminal justice system, as he sees it, and describes how he feels he has been unfairly treated and wrongly convicted. His level of denial mean (sic) he is not considered suitable for probation supervision, as any rehabilitation pathway, would focus on managing risk (sic), addressing behaviour change and would require an acknowledgement on his part of some level of culpability in order for the process to be meaningful".

Sentencing Judge's Remarks

21. The sentencing judge began her remarks by noting the factual background of the case and acknowledging the impact on the complainant. With respect to the victim impact evidence, she stated:

"[...] the Court has considered this evidence [...] and I have fully considered that and take it into account, in particular the emotional and psychological distress which the

complainant has suffered as a result. As is the case with so many people who are sexually assaulted as children, her victim impact statement bears testimony to the fact that sexual assault of a young person, even in a case where it occurs once or is of short duration or is on the lower scale in terms of the nature of the abuse, can result in severe psychological harm. This is the most pervasive aspect of the harm caused by the accused's actions".

22. The sentencing judge also made express reference to having regard to the sentencing objectives of general and specific/personal deterrence, and further acknowledged the appellant's low risk of recidivism.

23. In respect of the gravity of the appellant's offending, the following aggravating factors were identified by the sentencing judge who stated the following:

"The aggravating factors are as follows; firstly the youth of the complainant, she was 12 years old at the time. Secondly, the offence involved a very significant breach of trust in circumstances where the accused lived with the family and was her mother's partner and effectively in loco parentis and at a time when there were access difficulties with regard to the complainant seeing her father. So, it was at a time when she was particularly vulnerable. While there was no physical violence or threats of violence used in the actual assault itself, the actions of the accused man amounted to an exploitation of the innocence of a young girl of 12 who did not fully appreciate at the time the full nature or impropriety of the conduct until she had sex education lessons sometime later in secondary school.

While many of the more egregious features, such as the continuum of behaviour, digital penetration and/or exposure or ejaculation were absent and the touching was over and then under the underwear, the nature of the touching involved intimate touching and it was nonetheless a significant violation of the person of a young girl. The Court has also had regard to the impact on the victim which the Court has heard about and outlined and his conduct gave rise to severe emotional and psychological upset to the victim."

Having regard to the above, the sentencing judge held that the offending fell within the lower moderate end of seriousness and thus warranted a headline sentence of 4 years and 6 months' imprisonment.

24. As regards mitigation, the sentencing judge identified the following factors as enuring to the appellant's benefit:

"The mitigating factors are as follows; firstly the accused is a person with no previous convictions. He has led a prosocial life and until this offence he was assessed as a person of good character. [...] The accused has expressed no remorse and does not express the verdict of the jury. The Court notes that the accused man will now be placed on the sex offenders' register and the Court weighs this into the balance in determining the appropriate sentence, although it does not serve to reduce the sentence in any significant way. I take into account the accused's personal circumstances, the obvious support of his family and the regard and esteem within which he is held by his sisters which is clear from the references they have given to the Court and indeed his friend. He has lived a prosocial life up to now and indeed has worked in various employments and currently has obtained employment. He has had periods of homelessness and he's had particular difficulties in

that regard. I take all of those matters into account.

I am imposing a sentence of three and a half years in prison. I will suspend the final six months on condition that the accused under goes sex offenders' rehabilitation as advised by the Probation Service and that he keeps the peace and be of good behaviour for that period of six months. It's three and a half years, six months suspended."

Notice of Appeal

25. By Notice of Appeal lodged on the 14th of December 2021, the appellant appeals against both his conviction and the severity of his sentence. His grounds were enumerated under his written submissions. In the light of this Court's judgment dismissing the appellant's conviction appeal, the remaining grounds for determination – i.e. the severity of sentence appeal grounds – are described:

Ground no. VI – that the sentencing judge erred in assessing the gravity of the offence and in determining the headline sentence to be one of 4 years and 6 months' imprisonment, in circumstances where the offence was identified as being on the lower moderate scale of offending and where the appellant had previously been tried in a court of summary jurisdiction.

Ground no. VII – that the sentencing judge failed to consider, or adequately consider, the personal circumstances of the appellant in assessing mitigating factors and in particular failed to give adequate weight to the absence of previous convictions; the once off nature of the offence; the lapse of time since the commission of the offence; the appellant's record of employment; his psychiatric condition, and; his standing in the community.

Submissions to the Court of Appeal

Submissions on behalf of the appellant

26. In respect of Ground no. VI, counsel for the appellant argues that the headline sentence nominated by the judge at first instance was excessive. It is said that offences in the mid-range of gravity vary enormously in nature and severity, and that the gravity of a sexual offence will be assessed at a higher scale where there are features of home invasion, false imprisonment, use of a weapon, and the infliction of violence above that which is inherent to the assault itself. It is further said that other characteristic aggravating factors of such sexual offending as perpetrated against a child may relate to the intensity, persistence and reach of the offence, and that these are key considerations in determining the culpability of the individual offender.

27. Referencing Prof. Tom O'Malley S.C.'s treatise, *Sexual Offences* (2nd edn, Round Hall 2013), the appellant notes that O'Malley, at para. 25-30 of his aforementioned work, states that "sexual assaults of a medium level of gravity, without any significant aggravating factors, sometimes attract sentences in the region of 18 months to 2 years". On this point, it is observed by counsel that this Court in *The People (DPP) v. F.M.* [2022] IECA 40 did not regard a headline sentence of 2 years as unduly lenient in a case involving sexual assaults perpetrated on a 14-year-old girl by a 19-year-old accused, which case involved elements of digital penetration. It is said that this authority featured aggravating factors which are not present in the facts of the herein

appeal, and it is observed that the sentence upheld by this Court in *F.M.* was a fully suspended sentence.

28. Counsel submits that the sentencing judge erred in her assessment of the gravity of the appellant's offending in the following circumstances:

- "(i) *The complaint related to a single, brief incident. A continuum of offending behaviour, often seen in cases such as this, was not a feature;*
- (ii) *The nature of the touching involved touching of the vagina and legs. It did not extend to digital penetration and did not involve exposure or ejaculation;*
- (iii) *There was no element of force, threat of force and / or violence during the commission of the offence. The offence stopped upon the complainant leaving the room in which the offence occurred;*
- (iv) *The offence is one in which the Director of Public Prosecutions had previously tried summarily"*

29. We were also asked to take account of the fact that the appellant was proceeded against initially in the District Court, and that all concerned had been of the view that it was a proper case for summary disposal. There was then a judicial review in circumstances where a question arose as to whether he had been proceeded against in the correct District Court area, leading to the proceedings being quashed and recommenced. When the proceedings were recommenced, it was the appellant himself who then opted, as was his entitlement, for trial on indictment. However, counsel submitted, there is nothing to suggest that the DPP had changed her view as to the gravity of the offence.

30. With respect to Ground no. VII, counsel submitted in written submissions that the sentencing judge did not attach adequate weight to certain mitigating factors and that a greater degree of credit should have been afforded to the appellant. However, at the oral hearing it was indicated that this complaint was no longer being pressed.

Submissions on behalf of the Director

31. Counsel for the Director centrally submits that the sentence imposed by the Circuit Criminal Court judge was correct in law and in principle, that it was proportionate to the severity of the appellant's offending, and that it was within her considerable discretion and margin of appreciation. It is noted by counsel that it is evident in the transcript that the sentencing judge gave a detailed and considered sentencing ruling in which she properly fixed the headline sentence that was nominated and weighed up both aggravating and mitigating factors before reaching the final sentence that was imposed on the appellant. Counsel draws particular emphasis to the fact that the appellant had "*subjected*" the complainant to three trials and that he exhibited no remorse. It is further submitted that the case law relied upon by the appellant is readily distinguishable from the facts of the present case. She urges this Court to dismiss the appeal against severity of sentence.

Discussion and Decision

32. The appellant's main point is that the headline sentence that was nominated by the sentencing judge took, namely one of 4 ½ years' imprisonment, was too high having regard to the circumstances of the case. That submission was made notwithstanding an acknowledgement by counsel for the appellant that in recent years there has been something of a recalibration by this

Court in terms of how it deals with sentences for indecent and sexual assaults of children, resulting in a general increase in such sentences.

33. Every indecent assault of a child is serious, but circumstances vary enormously. This was a single incident of sexual assault, and it was of a non-penetrative kind. It extended to touching of the child's vaginal area both over her underwear and then under her underwear. The incident occurred in the family home in a situation where the injured party was entitled to feel safe and secure. The appellant was in a relationship with the complainant's mother, and living in the family home, and was minding the complainant at the time in circumstances where her mother was out, and there was therefore a substantial breach of trust. There was also a significant age difference between the parties (she was 12 years at the time, and he was 44 years at the time), and the appellant exploited the vulnerability of the complainant. There is no doubt that the complainant was profoundly affected by the abuse perpetrated on her and, notwithstanding that the nature of the abusive conduct was not of the most egregious variety, it is the situation that serious harm was done.

34. Be all of that as it may, we agree with counsel for the appellant that the headline sentence nominated by the court below was too high. That was an error of principle and accordingly we must quash the sentence imposed by the court below and proceed to re-sentence the appellant.

35. In re-sentencing the appellant we intend to do so without reference to the fact that he was proceeded against initially in the District Court. There may have been many reasons why the DPP may have been disposed to acquiesce in that, and it does not follow that her reasons would necessarily have been confined to our view of the gravity of the case. The fact that the case was ultimately prosecuted on indictment in the Circuit Court was because the appellant opted for trial on indictment in the Circuit Court. One consequence of doing so is that he faced a higher range of potential penalties in the event of being convicted.

36. The point was made to counsel in the course of the appeal hearing that this court hears very many sexual assault and indecent assault cases. Based on the court's extensive experience in that regard we have concluded that the appropriate headline sentence in this case was more properly one of 2 years and 6 months' imprisonment.

37. The most substantial potential mitigating factor to be discounted from the headline sentence was not available to this appellant in circumstances where he contested his trial and did not plead guilty. However, as the sentencing judge at first instance pointed out he had no previous convictions, and had otherwise lead a prosocial life. He had worked in various employments and had suffered a number of adversities in life, including being homeless for some periods. He is also entitled to have taken into account the fact that he would be on the Sex Offenders Register in consequence of his conviction. To take account of these factors and we will discount from the headline sentence by 6 months, leaving a net sentence to be served of 2 years' imprisonment.

38. In circumstances where the appellant does not accept the verdict of the jury, and perhaps consistent with that has not indicated a willingness to engage with the Probation Service for the purposes of undergoing a sex offenders rehabilitation programme, we do not think it is appropriate to suspend any portion of the sentence we have imposed to incentivise rehabilitation.