



**THE COURT OF APPEAL**

**Record Number: 72/22**

**Birmingham P.**

**Kennedy J.**

**Burns 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 -**

**A.W.**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 10<sup>th</sup> day of July, 2023 by Ms. Justice Tara Burns.**

- 1.** This is an application pursuant to s. 2 of the Criminal Justice Act 1993 ("the 1993 Act") seeking a review of the sentence imposed on the Respondent on grounds of undue leniency.
- 2.** A trial took place before the Central Criminal Court between 21 October and 2 November 2021. The jury unanimously found the Respondent guilty of counts 1-8 and 10-17 on the indictment. They disagreed in respect of count 9 (a sexual assault allegation) and a nolle prosequi was subsequently entered in relation to it. This was the second trial which took place in relation to this matter, as the jury in the first trial disagreed on all 17 counts.
- 3.** Counts 1-8 related to sexual assault offences and counts 10-13 related to s. 4 oral rape offences perpetrated by the Respondent against MS. These offences were committed on a continual and regular basis between May 1995 and December 1998 when MS was 11 to 14 years old. The Respondent was 15 to 18 years old at the time of the offending behaviour which continued for nine months after he reached his majority.
- 4.** Counts 14-17 related to sexual assault offences perpetrated by the Respondent against TJS. These offences were committed between the summer of 1995 and December 1996 when TJS was 12 to 13 years old and the Respondent was 15 to 16 years old.

**5.** A sentencing hearing was held on 7 March 2022. On 28 March 2022, the sentencing judge pronounced the sentence imposed on the Respondent in the following terms:-

- i. 18 months imprisonment on counts 1-8, the sexual assault offences perpetrated against MS;
- ii. 4 years imprisonment on counts 10-13, the s. 4 rape offences perpetrated against MS; and
- iii. 18 months imprisonment on counts 14-17, the sexual assault offences perpetrated against TJS.

All sentences were ordered to run concurrently with the final 2 years and 6 months of the term of imprisonment suspended for a period of 2 years and 6 months on conditions that the Respondent keep the peace and remain of good behaviour; comply with all conditions as set out in the Probation report; and engage with all victim/offence orientated work as required.

**6.** Accordingly, the effective term of imprisonment imposed on the Respondent in respect of all of the offending behaviour perpetrated by him was 18 months imprisonment. The sentence was backdated to the 9 November 2021 when the Respondent had entered custody. On 22 December 2022, the Respondent was released from prison on the lawful expiration of his term of imprisonment having regard to remission.

### **Background**

**7.** The two victims, MS and TJS, and their younger brother, had been placed in foster care with the Respondent's parents in 1995. This was a professional foster care arrangement rather than one arising because of a familial bond or connection. The brothers were vulnerable children who had come from a difficult family background.

**8.** The sexual offending against MS started in the summer of 1995 when he was just 11 years old. It began with the Respondent playing a game of truth or dare with MS, the "dare" being to kiss the Respondent. "Dares" developed to intimate touching in future games. Wrestling games were also partaken in by the Respondent and MS, which ended with kissing and mutual intimate touching. The offending behaviour progressed during that summer to the Respondent asking MS to perform oral sex on him. This offending behaviour occurred on a monthly basis over a three and a half year period with the Respondent ejaculating into MS's mouth on an occasion. The offending behaviour ceased when MS was removed from the foster care of the Respondent's family in January 1999. MS asserts that he consensually engaged in these sexual acts. That assertion fails to take account of the fact that legally he could not consent to these sexual acts until he was 15 years of age and perhaps also fails to recognise his ability, as an 11 year old child, to fully understand the nature of the sexual acts he was engaged in. That said, MS saw himself in a relationship with the Respondent. The Respondent described himself as having a special bond with MS when he discussed these matters with the Probation Service and his consultant forensic psychologist, after he was convicted.

**9.** The abuse against TJS started in the summer of 1995 and ceased in December 1996. TJS also detailed wrestling games occurring between himself and the Respondent. He referred to an occasion

when the Respondent grabbed at his penis, a number of times, when he had TJS on the ground. Later that night, in TJS's bedroom, the Respondent told him to kneel and then began thrusting his penis against him while they were both dressed. That same evening, the Respondent kissed TJS after he emerged from the bathroom. When TJS made it clear that he did not want to engage in this behaviour, it stopped.

**10.** MS disclosed the abuse he had suffered to a HSE social worker in 2001. However, he was not believed and nothing was done. In 2014, the brothers made statements of complaint to An Garda Síochána.

**11.** Both victims provided Victim Impact Reports to the sentencing court which detailed the severe and long lasting effects of the sexual abuse they suffered as children. MS's victim impact report, which he read to the sentencing court, is particularly harrowing in terms of how his life has been significantly affected by the abuse.

#### **Personal Circumstances**

**12.** The Respondent was 42 when sentenced. He is a married man, with three children. He had a good history of work. He had three previous convictions, namely harassment contrary to section 10 of the Non-Fatal Offences Against the Person Act 1997 and unlawful possession of a forged prescription contrary to section 18 of the Misuse of Drugs Act 1977 together with a related offence of forging that prescription.

#### **Sentencing Determination**

**13.** The sentencing judge set out the following when determining the sentence:

"[T]he Court accepts that the Court must sentence [the Respondent] not as the adult he is now, but as the 15 to 18-year old who committed these offences. In DPP v. TD, a recent Court of Appeal decision, the Court of Appeal held that the effect of being a juvenile at the time of offending is to reduce culpability and it seems to the Court that culpability is also effected by the fact of [the Respondent's] intellectual functioning being in the low average range, such that his development...as an adolescent was likely a number of years younger than his chronological age. It is possible that [the Respondent] gravitated towards forming relationships with those younger than him for this reason so that taking both of those factors into account as effecting culpability, the Court considers that the headline sentence for these offences is four years for each count of rape and 18 months for each count of sexual assault.

The Court then must consider whether there's any mitigation in this case and the Court considers that there is. First of all, there is the acknowledgment of guilt. The Court enquired of [MS] whether that was any comfort to him and he considered that it wasn't. However, the Court is of the view that sexual offending, the acceptance of responsibility and acknowledgment of guilt in cases of sexual offending are of mitigatory value. Obviously the earlier the plea the greater the mitigation value. An acceptance of responsibility when first

charged with the offence carries the greatest weight. A plea of guilty before a trial carries significant weight because the complainant is spared the ordeal of a trial. However, even post conviction, as in this case, an admission of guilt and an acknowledgment of the damage done, together with a genuine expression of remorse, has mitigatory value. It has value because it confirms the correctness of the verdict of the jury and how ever belatedly, validates the victim. An acknowledgment of guilt means that there can be no whispering that the jury got it wrong or that there was some mistake made. The acknowledgment of guilt is an acceptance that the jury got it right.

A second mitigatory factor is that for the 22, 23 years since this offending ended [the Respondent] has led a productive and useful life, essentially offence free, since adolescence. He has indicated a willingness to engage with the probation services in any way that's required and that speaks to his willingness to engage in rehabilitation, such as may be required and as assessed by the probation services. In this particular case, the Court considers that there's one other mitigatory factor and that is the response of the authorities in 2001. This complaint should have been dealt with and addressed when the complaint was first made by [MS] in 2001. Had it been dealt with at that stage [MS] would have been spared an awful lot of psychological upset and distress, which he suffered and really still suffers today, which led him to be unable to make complaint until 2014 when he first went to the guards. As well as causing distress to [MS] -- the failure to address this complaint in 2001, not merely caused enormous distress to [MS], but it has caused enormous prejudice to [the Respondent]. Justice delayed is justice denied. Had this matter been approached or addressed by the authorities when they were first made aware of it in 2001, either by criminal complaint or by addressing it as inappropriate sexual behaviour, the matter would have been concluded many, many years ago and rather than that, [the Respondent] now has to face the consequences of his actions as a 42-year old man with a lot of family responsibilities. That seems to me to be an issue that...touches on being unjust, the matter should have been dealt with in 2001 when he was 21 and not now when he's 42."

### **Submissions of the Parties**

**14.** The Applicant's position is that, in the circumstances of the case, the sentences imposed constitute a substantial departure from the appropriate sentences, such that they are unduly lenient within the meaning of the 1993 Act and having regard to the principles set out in *The People (DPP) v. Stronge* [2011] IECCA 79. Particular emphasis is placed on the sentences imposed in respect of the s. 4 oral rape offences.

**15.** Counsel for the Applicant submits that the sentencing judge erred in fixing headline sentences that were too low considering the gravity of the offending and the significant aggravating factors which were present. It is also submitted that undue and excessive weight was given to the mitigating factors.

**16.** Counsel for the Respondent submits, whilst acknowledging the significant effect the offending has had on MS, that the headline sentence identified by the sentencing judge appropriately reflects the Respondent's moral culpability having regard to his age and level of maturity at the time of the offending. He also submits that there were significant mitigatory factors, including the Respondent's personal circumstances, which were correctly reflected in the sentence imposed.

#### **Discussion and Determination**

**17.** The principles for determining undue leniency are well established and are set out in *The People (DPP) v. Stronge* [2011] IECCA 79 which this Court adopts. In essence, the Applicant must prove that the sentence imposed constitutes a substantial or gross departure from the appropriate sentence such that an error of principle is established before this Court will intervene.

**18.** A number of comparator cases have been referred to by the Applicant. Of particular relevance are *The People (DPP) v. MH* [2014] IECA 19; *The People (DPP) v. JH* [2017] IECA 206; *The (People) DPP v. TD* [2021] IECA 289; and *The People (DPP) v. AO'F* [2022] IECA 122.

**19.** *The People (DPP) v. MH* [2014] IECA 19 involved a rape offence, four s. 4 oral rape offences and four sexual assault offences perpetrated over a three year period against a cousin who was five and a half years younger than the perpetrator. A guilty plea had been entered in the matter. The final offending behaviour occurred just after the perpetrator reached 18. The Court of Appeal found that a headline sentence of 7 years was appropriate in respect of the rape offences, to include the s. 4 oral rape offences, and suspended 3 years of that sentence. Accordingly, an effective sentence of 4 years was imposed.

**20.** *The People (DPP) v. JH* [2017] IECA 206 involved two s. 4 oral rape offences and two sexual assault offences perpetrated by a 15 year old on an 11 year old. The offending took place in the context of games. A guilty plea had been entered in the matter. The Court of Appeal found that a headline sentence of 2.5 years was appropriate which was reduced to 18 months having regard to mitigating factors. The final 6 months were also suspended. Accordingly, an effective sentence of 1 year was imposed.

**21.** *The People (DPP) v. TD* [2021] IECA 289 involved two counts of s. 4 oral rape and seven counts of sexual assault, perpetrated over a four year period against a cousin when the victim was between the ages of 8 and 12 and the perpetrator was between the ages of 14 and 18. A guilty plea had been entered in the matter, albeit late in the day. The perpetrator had turned 18, by just 11 days when the offending ended. The Court of Appeal determined that the guideline bands as set out by Charlton J. in *The People (DPP) v. FE* [2019] IESC 85 were specific to adult offenders and did not apply in cases involving a perpetrator who was a minor at the time of offending. Edwards J., delivering the judgment of the Court, referred with approval to the recommendations of the Sentencing Council for England and Wales to the effect that, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence should be applied for minors in the age bracket 15-17 to reflect the effect of the lack of maturity on their moral culpability. A sentence of 6 years imprisonment was indicated by the Court of Appeal as appropriate stating that

the headline of 9 years imprisonment was too high and a reduction of one year in respect of mitigatory factors was too low.

**22.** *The People (DPP) v. AO'F* [2022] IECA 122 involved seven s. 4 rapes and 10 sexual assaults. The perpetrator, who was the victim's uncle, was between the ages of 14-17 and the victim was 8 to 11 years old. The Court of Appeal found a headline sentence of 7.5 years was appropriate which was reduced to 5 years taking account of the mitigating factors present which included a guilty plea and a diagnosis of autism. A further 2.5 years was suspended, thereby leaving an effective sentence of 2.5 years.

#### *Headline Sentence*

**23.** The offending behaviour in the instant case, particularly the s. 4 oral rape offences, was of a very serious kind. When it began to be perpetrated on MS, he was only an 11 year old child and was 4 years younger than the Respondent. Furthermore, the Respondent occupied a position of trust in relation to both MS and TJS as an older foster brother within the family they had been fostered into. In addition, MS and TJS were vulnerable children who obviously had lost their familial bond in light of them being required to be fostered.

**24.** With respect to the Respondent's moral culpability, whilst he was a child himself at the commencement of and during a significant period of the offending, he reached his majority and continued to offend against MS for a nine month period. During this period, the sentencing judge was no longer constrained to treat him as a child within the sentencing regime.

**25.** In addition, the offending behaviour came about and developed as a result of MS being groomed by the Respondent, a fact which the Respondent appears to acknowledge to the probation officer who prepared the Probation Report for the purpose of sentencing. This intentional planned behaviour is an additional aggravating feature to be considered when assessing the Respondent's moral culpability.

**26.** Furthermore, the offending behaviour against MS took place over a three and a half year period on a monthly basis. The length of time the offending behaviour extended over, and the regularity of it, are additional aggravating features which account must be taken of.

**27.** A further aggravating factor was that there were two complainants involved. In or around the same time as the Respondent commenced the offending behaviour against MS, he also perpetrated sexual assaults on MS's brother, TJS.

**28.** In light of these aggravating features, the Court is of the view that the headline sentence imposed by the sentencing judge on the s. 4 rape offences was a substantial departure from an appropriate headline sentence in the particular circumstances of the case.

### *Mitigatory Factors*

**29.** With respect to mitigation, the sentencing judge measured the mitigating factors in the case as entitling the Respondent to a reduction in the headline sentence of two and a half years.

**30.** The sentencing judge correctly identified the Respondent's acceptance of the jury verdict and his remorse as a mitigating factor. However, these factors must be considered in their factual context. They emerged after two jury trials took place and after a verdict of guilty was returned. While the sentencing judge is correct that a perpetrator acknowledging his guilt, even after a jury verdict, is of benefit to a victim, the credit that can be factored in for such a late acknowledgment is very limited.

**31.** The sentencing judge also indicated that a significant mitigating factor for the Respondent was the fact that the HSE had not acted on MS's complaint in 2001 when his allegations were made known to them. It is the case that MS was significantly psychologically affected by the social workers not believing him in 2001. Whilst the offending behaviour giving rise to the complaint to the HSE is attributable to the Respondent, the failure to act by the social workers is not. Accordingly, the significant effect on MS of not being believed must not weigh against the Respondent. Furthermore, the Respondent is entitled to have the delay in prosecuting him considered in assessing the mitigatory factors. However, the effect of not prosecuting the Respondent at the time of the initial complaint has meant that he has been in a position to show his life's worth to the Court. The sentencing judge did not err in taking the delay in prosecuting the Respondent into account, however the level of mitigation which it attracts must be properly measured.

**32.** In the instant case, the sentencing judge suspended 2 and a half years of a 4 year sentence. This is a case which did not have the benefit of the principle mitigating factor one can avail of, namely a guilty plea. Neither was an expression of remorse in existence until after a guilty verdict was returned following two trials. While there were mitigating features in the case, they were not of a nature which justified a reduction of 60% from the headline sentence. The Court is of the view that this level of reduction was excessive and was a substantial departure from what would be considered as appropriate in the circumstances

**33.** Accordingly, the Court is of the opinion that the sentence imposed in respect of the s. 4 oral rapes was unduly lenient within the meaning of the 1993 Act having regard to the headline sentence identified and the level of reduction provided for in respect of the mitigating factors identified. The Court will not interfere with the sentence imposed in relation to the sexual assault offences. In light of this determination, the Court will quash the sentence imposed and proceed to sentence the Respondent *de novo* as of today's date.

### Re-Sentence

**34.** In terms of the s. 4 rape offences, the Court agrees with the characterisation by the DPP, that having regard to the principles set out in *DPP v. FE* [2019] IESC 85, had the Court been sentencing an adult offender, the nature of the offending conduct together with the aggravating features outlined, in addition to the severe effect the offending had on MS, attracted a headline sentence of 10 years imprisonment.

**35.** However, the Respondent was a child for a substantial portion of the offending behaviour. In accordance with constitutional principles, the sentence imposed must have regard not only to the circumstances of the crime but also to the circumstances of the offender. As a substantial amount of the offending occurred when the Respondent was a minor, due regard must be had to his age and level of maturity when assessing his moral culpability. The Court has had full regard to the Probation Report and the Psychological Assessment Report, which were prepared for the purpose of the original sentence hearing. The Court notes that the Respondent has been assessed as having a low average range of intellectual functioning and that accordingly the Respondent's "*developmental age as an adolescent was likely a number of years younger than his chronological age*".

**36.** In *DPP v. TD* [2021] IECA 289, the Court of Appeal indicated that in appropriate cases, a reduction of one half to one third of the appropriate adult sentence should be applied for minors in the age bracket 15-17 to reflect their age and the lack of maturity in determining their moral culpability.

**37.** It appears to the Court that having regard to the Respondent's age and immaturity at the time of the offending but whilst also having regard to the fact that 9 months of the offending behaviour occurred while the Respondent was an adult, the appropriate headline sentence in this matter is one of 6 years.

**38.** With respect to the mitigating factors, the Court acknowledges the personal circumstances of the Respondent to include his familial circumstances and his good work history as mitigatory factors. The Respondent does not come before the Court without any previous convictions but rather has three convictions, one of which, namely harassment is somewhat concerning. However, the Court notes that he comes before the Court without any further sexual offending having been recorded against him. The Respondent now acknowledges his guilt after the jury verdict and expresses remorse. He is entitled to some very limited credit for this. There also was a substantial delay in a complaint being made to An Garda Síochána arising from the inaction of the HSE when a complaint was initially made to them, which the Court will also have regard to. The Court is of the view that the mitigating factors identified merit a reduction in the headline sentence of 2 years.

**39.** However, that is not the end of the matter. The Respondent was released from prison in December 2022. He has undertaken courses since his release and is attempting to regain employment. Counsel on his behalf indicated that he is attending counselling arising from his time in prison. The question which arises for this Court is whether he should be returned to prison after



he has already served the term of imprisonment initially imposed. This is an extremely difficult question for this Court. It would have been preferable that this matter came on for hearing before the Respondent's release. Expedited transcripts and an early hearing date should have been sought in this matter.

**40.** The Court is of the view that it would be an additional punishment and unjust to return the Respondent to prison. Six months have elapsed since his release from prison and he is in the process of attempting to reintegrate into society. While the Court is of the view that the original sentence was unduly lenient, it is also of the view that it would be unjust to return the Respondent to prison at this stage.

**41.** Accordingly, we will impose an 18 month term of imprisonment on Counts 1-8 and Counts 14-17 and impose a 4 year term of imprisonment on Counts 10-13, but we will suspend the remainder of time to be served for a period of two and a half years on the same terms and conditions which were imposed on the original sentence, namely that the Respondent enter his own bond of €100 to:-

- a) keep the peace and be of good behaviour for the period of suspension;
- b) remain under the supervision of the Probation Service for the period of suspension;
- c) comply with all lawful directions of his Probation Officer, including that he:
  - (i) co-operate with any assessment for offence related needs or other therapeutic programme he is suitable for, as directed by the Probation Service and engage with the Probation Service for offence focused work;
  - (ii) engage with the Probation Service, keep all appointments, completing offence and victim focused work as directed by the Probation Service;
  - (iii) notify the Probation Service of any change in personal circumstances while under supervision, including any change of address, employment or contact details.

The Respondent remains subject to the requirements of the Sex Offenders Act 2001 for the period mandated by law.