



THE COURT OF APPEAL

Record Number: 163CJA/23

**THE PRESIDENT.
KENNEDY J.
NÍ RAIFEARTAIGH 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 -

**D.M.
RESPONDENT**

JUDGMENT of the Court delivered (ex tempore) on the 15th day of April 2024 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency of an effective sentence of 1 year of imprisonment imposed on the respondent in respect of 1 count of defilement of a child under 15 years of age contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act, 2006 as substituted by s. 16 of the Criminal Law (Sexual Offences) Act 2017. A nolle prosequi was entered in respect of a second count contrary to the same provision.
2. A headline sentence of 4 years' imprisonment was nominated which was reduced to 3 years on account of the mitigating factors. The last 2 years of the 3-year sentence were suspended on the condition that the respondent have no contact of any kind with the injured party or her family, that he keep the peace and be of good behaviour and attend counselling.

Background

3. There was an age difference of just under 10 years between the injured party, who was 14 years of age at the time of the offending, and the respondent. It appears that the offending came to light after the injured party confided in her friends, who then informed the school guidance counsellor who alerted the injured party's mother. Subsequently, a formal complaint was made to An Garda Síochána.
4. The injured party came to know the respondent as he was friendly with her older brother and had been frequenting the family home since she was approximately 7 years of age. The first incident concerned oral intercourse on the respondent and the second, sexual intercourse. There was evidence of communications via Snapchat of a sexually explicit nature.
5. In her victim impact statement, the injured party outlined the effect of the offending on her education, family life and mental health. She said that she did not finish her leaving certificate, that she suffers from depression and began taking anti-depressants and that her relationship with her brother, who was a friend of the respondent, suffered greatly as a result of the proceedings.
6. The respondent was arrested and initially denied knowing the injured party but eventually accepted the phone contact between them.

Personal Circumstances of the Respondent

7. The respondent was 28 years of age at the time of sentencing. He is originally from the UK. He is a father of two children. He has a good employment history and no previous convictions.
8. A psychological report indicated that the respondent suffers from ADHD, ASD (Autism Spectrum Disorder) and had in the past engaged in self-harm. He was assessed at a low risk of reoffending.

Sentencing Remarks

9. The sentencing judge noted as a significant aggravating factor the age difference between the parties. In mitigation, the judge took into account the early plea and that an apology was made through counsel, that he suffered from psychological issues and was described as less mature than his peers during his formative years.

Grounds of Application

10. The Director relies on six grounds of appeal, however, the issues crystallised at the hearing of this review to that of the headline nominated and the suspension of 2 years of the final sentence. However, further concession was made by counsel for the Director to the effect that while the headline nominated was low at 4 years, this may well be within the margin of discretion afforded to a judge when imposing sentence. Thus, the real issue is that of the suspension period.

Submissions of the Director

11. The Director acknowledges the law relating to undue leniency appeals with reference to the jurisprudence.

12. Reliance is placed on the decision of this Court in *People (DPP) v JMcD* [2021] IECA 31. In that case, the appellant received a sentence of 8 years' imprisonment for two counts of defilement of a girl under 15. She was 12 and a half years of age at the time of the offence and the appellant was 16 and a half. The offending behaviour was attended by threats and the dissemination of intimate materials. The appellant had previous convictions.
13. While no issue of substance is made regarding the headline nominated, the facts of this case may be distinguished from those in *JMcD*. We are of the view that the nominated headline sentence is within the margin of appreciation, particularly when one considers the psychological issues of the respondent.

As stated, the focus of the Director's application is that an effective sentence of 12 months to be served is inadequate to reflect the seriousness of the offending in this case.

Submissions of the Respondent

14. It is the respondent's position that the sentence imposed could not be considered a departure from the norm to a significant extent and no clear error of principle has been outlined that would amount to such a deviation from the norm as would warrant this Court's intervention.
15. Reliance is placed on the following remarks of Edwards J in *People (DPP) v Clive Kavanagh* [2020] IECA 13; "*a sentence of imprisonment suspended in whole or in part is still a sentence of imprisonment.*" *It is submitted that the sentence imposed a significant penalty on this respondent in that it had "the effect of holding a Sword of Damocles over the offender for the duration of the suspended sentence."*
16. Further reliance is placed on *People (DPP) v Conroy* [2018] IECA 350 in which case this Court contrasted the maximum sentence of life imprisonment under s. 2 of the Act with the maximum sentence of five years under s. 3 of the Act. The Court stated that:-

"in a situation where the injured party was close to her 15th birthday, at which stage the maximum sentence available would have been reduced from life to five years, we believe that the Judge would have been wise to take a starting or pre-mitigation sentence of not more than five years, and indeed, might have chosen a pre-mitigation sentence as low as four years."

Discussion

17. This area of law is well-settled with the onus on the Director to establish that a sentence is unduly lenient. The sentence imposed must be a substantial or gross departure from what would be the appropriate sentence in the circumstances before this Court will intervene.
18. We have already noted that the headline nominated is within the margin of appreciation. The judge then deducted 1 year from that to reflect mitigation, but then went further and suspended the final two years of the sentence leaving a carceral term of one year

imprisonment which the respondent has now served. He was released on the 10th February 2024.

19. It is not sufficient for the DPP to demonstrate the sentence is lenient, instead the sentence must have been one which was outside the scope of the discretion of the sentencing judge. The question for us is whether the judge ought to have imposed a greater carceral element in the sentence.
20. It appears to us that the sentence imposed by the judge is certainly a lenient one, even a very lenient one. We observe that an option available to the judge might have been to afford a slightly greater reduction for the mitigation present; that of the plea of guilty, the absence of previous convictions and the psychological challenges faced by the respondent, as stated in the neuropsychological assessment and by suspending a lesser portion of the sentence. Indeed, if any member of this Court were sentencing in the first instance, a greater carceral element may well have been imposed. However, that is not the test.
21. We are of the view that the sentence is a very lenient one indeed and one where we may well have imposed a greater sentence, perhaps in the region of 2 years' imprisonment, if sentencing at first instance. However, this respondent has now served his term of imprisonment and was released in February of this year. We do not believe the justice of the situation would be met by sending him back to prison.
22. A suspended sentence is nonetheless a sentence, and the operational period of this sentence is that of a 2-year period.
23. We observe that where a sentence of this duration is imposed and the Director is minded to seek a review, this should be pursued with expedition. We appreciate that the notice of review was lodged within time, however, it is incumbent on the Director to make application before this Court for a priority hearing in these kinds of circumstances.
24. Accordingly, we dismiss the application.