APPROVED **REDACTED**

THE COURT OF APPEAL

[2024] IECA 284

Court of Appeal Record No. 257CJA/23

President
McCarthy J
Burns J

BETWEEN/

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

AG

RESPONDENT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 25th day of July 2024

1. On the 16th of October 2023, AG, the respondent herein, was sentenced in relation to 6 counts of oral rape contrary to section 4 of the Criminal Law Rape (Amendment) Act 1990. In sentencing the respondent, the judge in effect nominated headline sentences of ten years imprisonment for each of the offences which he reduced to six years imprisonment on the basis of the respondent's age. The judge imposed post-mitigation sentences of five years imprisonment on each thereafter. The sentences were made concurrent *inter se* and backdated to the 16th of May 2023, when the respondent first went into custody. The sentencing judge

also made an order for two years post-release supervision pursuant to the Sex Offenders Act 2001.

2. The offences here were committed against one complainant, the respondent's first cousin. The respondent was born in 1983. The complainant was born in 1990. The offences occurred over a four and a half year period from 30th of March 1998 to 31st of August 2002. The injured party was aged between 8 and 12 years of age at the time of the offences whilst the respondent was aged between 15 and 19 years old at the time of the offences.

3. The complainant lived with her family. The respondent's home was adjacent – where he lived with his parents who were the complainant's aunt and uncle. The offences occurred in the environs of the respondent's family home and farm. The complainant gave evidence that the offending occurred no less than six times (Ms Lacey referred to seven occasions upon which offending took place but since the counts do not appear to be sample counts, at least on the basis of what is before us, we proceed on the basis that the offences of which he was convicted cover all offending).

4. She said that the first offence took place on an occasion when she had been playing in the respondent's family home. The respondent asked her to go with him to a nearby turf shed. On arrival the respondent took down his trousers and underwear and told her to suck his penis which she did and after doing so she said that he called her a "*good girl*". The complainant was told not to tell anyone, and her evidence was that the offending happened in the same way on the other occasions thereafter. One of the offences occurred at the side of the house rather than in the turf shed and this was the last offence in time and described as having lasted longer than those previously committed.

5. A victim impact statement was furnished to the sentencing court and although we cannot refer to it in *extenso*, the extent of the long-term effects on the complainant's life are most apparent from her abuse of alcohol as a coping mechanism from the age of 12 to the anxiety

and depression she has suffered over the course of many years. The complainant made reference to the delay in making her complainant and the difficulty she found in doing so. In that regard the complainant said the following: -

> "*My life has changed unimaginably in the last seven years. I believe my dad died so that I could live. As hard as it is to believe that I have shaken something from the terrible tragedy that changed all our lives forever. My dad dying opened the door to me being able to come forward with my abuse. It was one of the hardest things I've ever done. Very quickly everyone had an opinion. The people that I thought would be behind me weren't and the people I thought would be against me shook my hand in the street. I learned a lot about people from that moment on. It caused a huge upset in my father's side of the family and I was blamed for even bringing up now after so many years. But there was never going to be a right time or place*."

6. In sentencing the respondent, the trial judge firstly outlined the aggravating factors. Reference was made here to *(DPP) v FE* [2021] 1 IR 217 as to the general principles and to *People (DPP) v AOF* [2022] IECA 122 and *People (DPP) v TD* [2021] IECA 289 as comparators in respect of sentences for similar offences offending committed, in part at least, whilst the offenders were minors. The judge noted the aggravating factors were the following: firstly, the offences comprised of a sequence of oral rapes; secondly, the vulnerability of victim given her young age and; thirdly, the profound impact on the victim as evidenced by her victim impact statement. The judge had regard to the respondent's age at the time of the offending and gave him the "*benefit of the doubt*" that he had not reached the age of majority for any of the offences. This is because having regard to the way in which the indictment was framed – each count covered a period of time "*straddling*", so to speak, the respondent's eighteenth birthday – the judge took the view that he could not conclude that even the last of the offences occurred

after the respondent had attained his majority. We think he was wrong in that approach; the evidence was such that he ought to have held and found that the respondent had attained his majority when the last offence had occurred. This is because the complainant's evidence was that the offending stopped when she was twelve when the respondent must have been over 19 on any view of the evidence Having regard to his conclusion, contrary to the evidence, we can say even at this stage that there was an error in principle.

7. He took the view that since (in his conception) all the offences had occurred, or must be regarded as having occurred, when the offender was a minor, the respondent had a degree of immaturity warranting lesser headline sentences than that in the case of an adult. This was why he nominated ultimate headline sentences of six years imprisonment on each of the offences.

8. The judge had regard to what he considered to be the mitigating factors. He noted that there was no credit for a guilty plea as the respondent contested the charges against him and that this also removed the availability of remorse where the verdicts were not accepted, and no apologies or remorse were demonstrable. He had regard to a probation report dated the 21st of July 2023. He considered the respondent's consistent work record, his entry into priestly training in 2008 and the fact that he had postponed his ordination to the priesthood on the hearing of a complaint having been made against him. The judge took into account the assessment from the Probation Service that placed the respondent at a moderate risk of re-offending within a 12-month period. The judge accepted that the respondent was somebody of otherwise good character, that there were positive testimonials, and that he had no previous convictions.

9. The judge dealt with a somewhat unusual aspect of the respondent's circumstances going to mitigation. The respondent's co-accused, and brother had found himself diagnosed with an aggressive form of Motor Neurone Disease in November 2022 which ultimately led to the respondent acting as a care giver to him within the prison system once they both entered into

custody for their respective convictions. We think it appropriate to quote that portion of the judge's remarks as follows: -

> "*Of note, he is further supported by his brother, who is also in custody, with whom he shares a cell. This is only possible due to the fact that [the respondent] and his brother are both comfortable with and willing to participate in this arrangement. It is likely that this is a time-limited option, as with [the respondent's brother's] disease progression, it will become untenable for [the respondent's] brother to support him in all of his personal requirements*."

10. Because of these factors going to mitigation, the judge reduced by one year the headline sentences leading to final sentences of five years imprisonment. The judge did not suspend any part of the sentences since there was no realistic prospect of promoting or encouraging rehabilitation.

Grounds of Appeal

11. The grounds upon which the Director of Public Prosecutions seeks to review the sentences imposed are as follows: -

I. *In setting the individual headline sentences of 6 years, failed to fully appreciate the gravity of the repeated offences as committed by the offender;*

II. *In setting the individual headline sentences of 6 years, failed to afford sufficient weight to the aggravating circumstances present;*

III. *Applied excessive discount to reflect youth and immaturity;*

IV. *Attached excessive weight to the limited mitigating factors;*

V. *Failed to adequately reflect both the personal and general deterrence aspect, and retributive element of the sentence;*

VI. Departed in a significant way from the norm that would be reasonably be expected in a case of this nature;

We will deal with all aspects together.

12. In submissions in both the trial court and here, counsel for the applicant said that the appropriate headline sentence for an adult offender was in the range of ten to fifteen years. Counsel for the respondent contended that each offence would have attracted an "*adult headline sentence*" of between ten and twelve years and that the identification of a headline sentence of ten years by the judge was within his margin of discretion.

13. Furthermore, counsel for the applicant said that not only were the "*adult headline sentences*" too low to the point of an error in principle, but also the discount for the minority of the respondent was excessive. Particular weight was placed on the fact that the judge, it is said, fell into error in concluding that all of the offending occurred within the respondent's minority. We have already indicated that the judge's conclusion in this respect was an error in principle having regard to the state of the evidence. Counsel for the respondent submitted that there was no such error since the judge had reached a conclusion of fact which could not be upset by this Court but we reject this argument. Counsel for the respondent said that, in fact, the reduction in the "*adult headline sentences*" was not inappropriate, indeed that it could have been more. No one disputes the legitimacy of the attribution of one year in mitigation to the other factors in the case.

14. We are of the view that the nomination of headline sentences of ten years was within the judge's discretion though we might ourselves have identified a higher starting point. That, however, is not the test for intervention when we are dealing with an undue leniency appeal. We think, nevertheless, that the judge's nomination of headline sentences of six years for a minor was an error in principle, having regard to the fact that the respondent was over 19 years

old when he committed at least one of the offences. We accordingly quash the sentences and proceed to resentence.

15. We do so not only on the basis of the material before the trial court but also having regard to up-to-date material including a prison governor's report which is favourable to the respondent and what we are told of the deteriorating health of his brother whom he still cares for in prison. Accordingly, we nominate a term of twelve years imprisonment as the appropriate headline sentences here in the case of an adult offender. We think that the ultimate headline sentences, allowing for reduction on the grounds of age, should be eight years imprisonment and the relevant mitigation should attract a further year. We accordingly impose post-mitigation sentences of seven years imprisonment on each count. We also make orders to the same effect as the Central Criminal Court in respect of post-release supervision.