



**THE COURT OF APPEAL**

**Record Number: 257/19**

**Edwards J.  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -  
A. M.**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 14th day of September 2020 by Ms. Justice Isobel Kennedy**

1. This is an appeal against sentence. The appellant pleaded guilty to five counts of indecent assault in Dublin Circuit Criminal Court and on the 11th November 2019 he received an aggregate sentence of nine years' imprisonment with the final twelve months suspended on terms.

**Background**

2. The offending in question relates to a period between the 1st of April 1985 and the 31st of December 1986 when the complainant, the daughter of the appellant, was aged between 9 and 10 years old. The appellant was 34 years old at the time of offending. The offending took place in the family home and began when the appellant would come into the complainant's room at night and get into the bed beside her and he would touch her vagina and touch her all over and kiss her face. The abuse escalated over time from touching her to penetrating her vagina with his fingers. The appellant would also rub his penis on her stomach and vagina. The appellant threatened the complainant that if she spoke out about the abuse it would break up the family.

**Timeline**

3. On April 2015, the complainant made a statement to Gardaí detailing the abuse in question and the appellant was arrested in July 2015. He initially denied the allegations and the case was listed for trial in February 2018. The trial did not proceed on that date and on the second trial date, which was the 8th July, with the trial due to commence on the 11th July 2019, he entered pleas of guilty. On the 30th July 2019, the matter was listed for sentence and evidence for the prosecution was called. The case was adjourned to the 5th November 2019 in order to allow for the preparation of a probation report, in which the appellant denied carrying out the offences to which he had pleaded guilty. The appellant's legal team came off record and the case was adjourned to allow the appellant to obtain new legal representation.

4. On the 11th November 2019, the sentencing matter was due to proceed. The appellant had still not obtained new legal representation and the matter was adjourned for several hours in order to allow the appellant to speak to a solicitor. Having spoken to a solicitor, the appellant indicated that he wished to be sentenced that day and he wrote a letter to the judge, *inter alia*, confirming his pleas of guilty and acknowledging the impact on the victim.

#### **The sentence**

5. The sentencing judge referred to the following aggravating and mitigating factors:-

“The aggravating factors in this case are: one, the seriousness of each of the offences in and of themselves; secondly, the serious breach of trust which took place between father and the abuse of his daughter; the ages of the accused at the time of this offence and the age of his daughter at the time of these offences.

The mitigation which the Court takes into account in this regard is: the accused's plea of guilty which was noted to have been on the date of the trial; his previous good character before the Court, his own experience of abuse as a child as set out in the contents of the probation report; his alcohol addiction; his work history and his achievements.”

6. In respect of Counts 1 and 4 relating to touching of the vagina, the sentencing judge identified a headline sentence of four years, in respect of Counts 6 and 8 relating to digital penetration a headline sentence of six years was identified and in respect of Count 11 relating to the forcing the complainant to touch his penis, a headline sentence of five years was identified. Taking into account mitigation, sentences for Counts 1 and 4 were reduced to three years, for Counts 6 and 8, the sentences were reduced to four and a half years and four years for Count 11. The sentences for Counts 1, 4, 6 and 11 were to run concurrently with Count 8 to run consecutively to Count 6, thus leaving an aggregate sentence of nine years' imprisonment.
7. The Court noted that it had to take into account proportionality and totality and the sentencing judge stated that the consecutive element of the sentence was required in this case to reflect the level of sustained and serious abuse perpetrated by the appellant against his vulnerable young daughter. In order to facilitate rehabilitation the sentencing judge suspended the final twelve months of the sentence, leaving a total sentence of eight years' imprisonment.

#### **Grounds of appeal**

8. The appellant puts forward the following grounds of appeal:-

- (1) The learned Sentencing Judge erred in proceeding to sentence the appellant in the absence of a plea in mitigation;
- (2) The overall sentence imposed on the appellant was disproportionate in light of the totality principle;

- (3) The Learned Sentencing Judge gave inadequate credit for the numerous mitigating factors in the case;
- (4) The comparators referred to do not demonstrate that the sentence imposed was within sentencing norms having regard to the particular circumstances of the offences and the appellant.

#### **Submissions of the appellant**

9. The appellant submits that the sentencing judge erred in not affording the appellant an opportunity to offer a plea in mitigation after he signalled his intent to proceed without legal representation. The appellant submits that it is not necessary to speculate on the contents of a plea to consider whether its absence is significant as it forms an integral part of the sentencing process. Furthermore, it is submitted that it is not relevant that the sentencing judge carried out the sentence with scrupulous fairness to the appellant and that the omission was a mishap.
10. The appellant submits that the overall sentence in this case is excessive with regard to the totality principle. It is accepted that in circumstances where there was continued offending over a prolonged period of time, the sentencing judge had jurisdiction to impose consecutive sentences but the appellant argues that the overall period of imprisonment imposed is not proportionate to the offences committed in the present case
11. The appellant argues that the suspension of the final twelve months of the sentence was an inadequate discount having regard to the mitigation present
12. The appellant offers three comparator cases which, it is submitted, show that the sentence imposed was not within sentencing norms. The first of these cases is *The People (DPP) v. JM* [2018] IECA 84. The offending in *JM* related to six counts of indecent assault perpetrated against two of the appellant's nephews when they were between the ages of eight and twelve, over a five-year period. The offending involved acts of penetrative and oral sex and had a significant impact on the victims in the case. The appellant had no previous convictions, a good work history, pleaded guilty at an early stage, and was 64 years of age at the time of the appeal. An appeal against the net eight-year sentence was dismissed and the Court observed that "The range of custodial penalties reasonably within the learned sentencing judge's discretion in this case lay probably in the region of between six and nine years"
13. The second case offered as comparator is that of *The People (DPP) v. PR* [2019] IECA 150. This was an undue leniency appeal for indecent assault and sexual assault offences by a father on his son over a 13-year period and involving acts of masturbation, oral sex and attempted buggery. The respondent was sentenced to five years, four years and three months of which were suspended. On appeal this was increased to five years with the final three years suspended. Although there were certain factors present such as the public apology and remorse this does not justify the considerable disparity between the sentence imposed in *PR* and the present case.

14. The appellant further refers to *The People (DPP) v. MM* [2016] IECA 282. Here the appellant appealed against sentences imposed in respect of twenty-five counts of sexual assault, one count of attempted buggery of a person under seventeen years and one count of buggery of a person under seventeen years. The offending occurred over two separate three-year periods, when the victim was between seven and fifteen years old and the appellant was between sixteen and twenty-four years old. The appellant successfully appealed against his net custodial sentence of eight years and the Court re-sentenced the appellant to three- and four-year consecutive sentences in respect of each period of offending with the final twelve months suspended on terms. The appellant emphasises that MM was not entitled to credit for a guilty plea, and the offending was of a more serious nature. The appellant submits that the sentence in the present case is disproportionate in light of the decision in *MM*.

#### **Submissions of the respondent**

15. The respondent submits that it is not fair to say that there was no plea in mitigation advanced on behalf of the appellant but rather a plea in mitigation was commenced and the matter was adjourned to allow for the preparation of a probation report. There were unusual circumstances present in this case in that the appellant's legal team came off record on the 5th November 2019 but the sentencing judge was clear in giving the appellant ample time and opportunity to obtain legal representation and further it is submitted that the letter handed in to the sentencing judge by the appellant was mitigation made by the applicant which she considered before imposing her sentence.
16. The respondent argues that the sentencing judge had regard to totality and in doing so provided discount for mitigation and then then went on to further suspend the final twelve months of the sentence allowing for deterrence and rehabilitation, which it is submitted reflected the mitigating factors that were taken into consideration by the sentencing judge.
17. In terms of the comparators offered by the appellant, the respondent argues that *The People (DPP) v. JM* [2018] IECA 84 can be differentiated from the instant case in that there was an early plea of guilty and there were limited admissions made. While there was only one victim in the instant case, the conduct was pre-mediated, systematic and prolonged in nature, there were no admissions until the plea of guilty was entered and this offending had a very detrimental effect with long term consequences for the complainant. As such, the sentence imposed for this offending was proportionate taking account of how this appellant met the case.
18. The respondent submits that the present case can be distinguished from *The People (DPP) v. PR* [2019] IECA 150 on the facts and further, the basis of the sentence at hand, which involved a late plea and qualified remorse, was reasoned and explained and while the sentence imposed was high, it was still within the legitimate discretion of the sentencing judge.
19. In terms of *The People (DPP) v. MM* [2016] IECA 282 the respondent underlines that *MM* concerned an accused who was relatively young himself and the abuse did not arise in

circumstances where a victim had been threatened or physically harmed in any way, save for the abuse itself unlike the present case where the complainant was threatened during the abuse that if she told her mother, it would break up the family and her brothers would not have a father.

### **Discussion**

20. The appellant was charged with eleven offences of indecent assault where the maximum penalty under the Criminal Law Rape Act 1981 is one of ten years. In imposing sentence, a court must consider the seriousness of an offence with reference to the available penalty and the moral culpability and harm done.
21. In this assessment, a court must consider the aggravating factors. Aggravating factors are distinct from the ingredients of an offence and can increase moral culpability. The nature or the manner of the commission of an offence can aggravate the offence. It is important to note the aggravating features present in this case which include the following:
  - a) The tender years of the victim,
  - b) The significant breach of trust,
  - c) The prolonged nature of the offending conduct,
  - d) The severe impact on the victim,
  - e) The methodology employed by the appellant which included an entreaty to the victim not to tell her mother which would cause the family to break up.

### **The plea of guilty**

22. There is no doubt that there are mitigating factors present, the strongest of which is the plea of guilty, however, the strength of this factor is tempered by the fact that the plea was entered at a late stage, which is evident from the timeline set out above. Moreover, the appellant denied his offending to the probation officer and was of the view that he had erred in entering a plea of guilty and felt his situation to be unfair. This naturally impacts on the genuine nature of his remorse, however, Mr McGrath SC who now acts for the appellant, submits that the negative attitude expressed to the probation officer, is improved by the letter furnished to the judge on the final date of sentence. However, the situation remains that the behaviour of the appellant in resiling from his pleas reduces the benefit of those pleas, which was somewhat remedied by the appellant ultimately accepting his guilt.
23. The sentencing judge acknowledged the appellant's plea of guilty, and expressly acknowledged that he maintained his guilt by letter to the Court. She noted his previous good character, although it must be said that such carries less weight where there is prolonged offending, she noted his alcohol difficulty, and the appellant's background.

### **The absence of a plea in mitigation**

24. The respondent contends that a plea in mitigation was, in effect heard by the Court. This Court does not accept this submission. It is however, crystal clear that the Judge acted with scrupulous fairness to the appellant. Once it was apparent that he denied the offences to the probation officer which resulted in his legal team coming off record, the judge afforded him time to obtain a new legal team. This, he failed to do, and the judge again gave him time to arrange for legal representation. He had the benefit of consulting with a solicitor who advised him of his options and ultimately the matter proceeded absent legal representation, opting to proceed with the sentence hearing on the 11th November 2019.
25. Moreover, the judge had the benefit of a probation report and properly identified the mitigating factors. Furthermore, the judge had material before her concerning the appellant, which included a short submission by his then counsel when seeking an adjournment for the purpose of the preparation of reports on the 30th July 2019 as follows:-

“Well Mr M, judge, has made it clear, albeit it late in the day that his daughter was correct in what she had said about him and he deeply regrets the injuries that he caused her and the stress and the anxiety, the untold stress and anxiety that he has caused her as summarised or set out in the very moving and compassionate victim impact report.”

26. Nonetheless, it is the position that there was no formal plea in mitigation tendered on his behalf. It is readily understandable in the circumstances that prevailed on the date of sentence, where the judge made every possible effort to assist the appellant, that an enquiry was not made as to whether he wished to make a submission in mitigation. This enquiry would have ensured that optimum fair procedures were met. Due to this absence we find an error in principle, however, in light of the manner in which the case was addressed by the sentencing judge, where she properly identified the mitigating factors, we do not find this to be an error of substance justifying intervention by the Court on that basis.

### **Totality**

27. It is said that the sentence imposed was disproportionate in light of the totality principle. No issue is taken with the imposition of sentences on a consecutive basis, but Mr McGrath contends that the ultimate sentence is disproportionate and out of kilter with comparator cases.
28. The sentence imposed in any given case must fairly reflect the offending conduct and the personal circumstances of the offender. Proportionality ensures a just sentence reflecting both the offence and the offender. In the present case, the offending conduct is of a serious nature, and the judge properly identified the aggravating factors and the mitigating factors. It is said on the hearing of appeal that the court may consider the lapse of time as a mitigating factor, however, Mr McGrath quite properly did not seek to emphasise this point, as there is no material suggesting any efforts on the part of the appellant to rehabilitate himself since the offending conduct.

**Conclusion**

29. Having carefully examined the material before this Court, we are of the view that the sentence is somewhat disproportionate in terms of the totality principle. In those circumstances, we will intervene to a limited extent and will quash the sentence imposed and substitute a total sentence of eight years, we will suspend the final year of that sentence on the same terms as in the Circuit Court.
30. Thus, the sentence imposed on Counts 1 and 4 will remain, the sentence on Count 6 will be reduced by six months, the sentence on Count 11 will remain, and the sentence on Count 8 will be reduced by six months. The sentence imposed on Count 8 is imposed on a consecutive basis, as in the Circuit Court.
31. The bond to be entered before the Governor or the Assistant Governor of the prison. Liberty to re-enter should any issue arise with the taking of the bond.