



THE COURT OF APPEAL

[291/2018]

**Birmingham P.
McCarthy J.
Ní Raifeartaigh J.**

BETWEEN

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

APPLICANT

AND

OLIVER BERRY

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 18th day of September 2020 by Mr Justice McCarthy

1. This is an application brought by the Director of Public Prosecutions seeking to review a sentence imposed on the respondent on grounds of undue leniency. The sentence was imposed in the Central Criminal Court (Murphy J.) on November 5th 2018 after the appellant was convicted by the jury on June 18th 2018 of 105 sexual offences. The offences were committed by the respondent over a twelve-year period between 1982-1994 against his daughter Ms Jennifer Berry, when she was aged 7-19 years old. The first 32 charges on the indictment against him relate to the offence of indecent assault, contrary to common law and s.10 of the Criminal Law (Rape) Act, 1981, Counts 33 to 44 included charges of sexual assault, contrary to s.2 of the Criminal Law (Rape) (Amendment) Act, 1990, and counts 45 to 105 inclusive were charges of rape, contrary to common law and s.2 of the Criminal Law (Rape) Act, 1981, as amended by s.21 of the Criminal Law (Rape) (Amendment) Act, 1990, which took place in the family home in Kinnegad, and at a site in Killaskillen, Co. Westmeath.
2. The respondent was sentenced to three years imprisonment in respect of the counts of indecent assault, to six years imprisonment in respect of the counts of sexual assault, and the ten years imprisonment in respect of the counts of rape, all sentences to run concurrently. The Director now seeks review of this sentence pursuant to s.2 of the Criminal Justice Act, 1993.
3. The complainant was born on the 29th December, 1995, and is the second child of the respondent and Susan Berry. Their family home was in Kinnegad, Co. Westmeath. The

complainant's mother worked outside the family home and the respondent would stay home with the children, and the children would return home at lunchtime during the school term. The complainant's relationship with the father was one of fear. She said *inter alia*: -

"We didn't have a good relationship. I was just always in fear of him to be honest"...."He was just -- it was the bulliness (sic) in the house and, like, he was -- it was the beatings and constant and just he was a very intimidating man".

4. The abuse commenced with the respondent touching the complainant's vagina progressing to the respondent showing her pornographic movies in the family sitting room and him making the complainant touch his penis up and down and the respondent putting his fingers inside of her vagina: *"He would ejaculate and would always have a tissue in his hand when he put the porn movie on. He told me that's what all dads did to their little girls"*. The respondent would force the complainant to remain back following the lunch hour break from school, sending her brothers and sisters back to school before her. She stated she was always kept back last. On occasion the complainant was made put on her mother's underwear and he would then take them off and rape her: *"He would make me put on my mother's underwear and he would then take them off me and he would rape me"*.
5. The constant sexual assaults progressed to rape when the complainant was nine years old. The bathroom in the family home was downstairs and having had a bath she came out with a towel wrapped around her and walked to her bedroom upstairs. The respondent followed her up to her bedroom and pushed her down on the bed. He pushed his leg between her legs and forced himself on her: *"I was after having a bath downstairs and I had put the towel around me and I walked upstairs to my bedroom and I opened my drawer to get my pyjamas. He came in behind me and he pushed me down on the bed and he pulled the towel from me. He told that I was old enough now, that he going to make a woman of me and he raped me"*. By virtue of her youth she did not understand precisely what had happened; she remembers that she was wet after the event and that he gave her a tissue to clean herself up: She confirmed that he had ejaculated on that occasion but stated as follows that as a child she did not know what had occurred. The accused warned her not to tell anyone, and, in particular, warning her that she and her sister and brothers would be taken away and that if that happened it would be her fault and that her mother would hate her. Thereafter the accused raped her on a regular basis in various locations in the house; following the first rape it occurred *"probably two times a week, sometimes it could be more extreme, it could be a lot more. Any chance really that he got, like, on his own"*. On occasions, he made her dress in her mother's underwear as a prelude to rape. The indecent assaults and sexual abuse took place mostly on the lunch breaks, and a number of times per week.
6. In addition, the complainant was subjected to physical as well as sexual abuse, and she was undermined by him telling her that she was ugly and that no one would ever want her. The complainant described fourth class in national school as a particularly bad year

because her father was unemployed and therefore was home constantly. The family home was very near the national school, and on occasion she attempted to avoid the sexually abusive behaviour by not going home for lunch. On such occasions she would receive a beating when ultimately she did come home. The complainant became more and more troubled and her schooling suffered. Ultimately, she was expelled from school.

7. In or about 1993 the complainant met and began a relationship with a man, a Mr Fahy. Notwithstanding this, her father continued to rape her. The complainant became pregnant in approximately April 1994 and the rapes continued during the pregnancy, the last rape occurring a month before she gave birth: *"A month before I gave birth he stopped raping me, about four weeks before I gave birth"*. In addition, the last occasion when the complainant was raped by the respondent took place some two weeks after giving birth to her child Joseph: *"Yes. I was two weeks after having Joseph when he came into my bedroom and he raped me again. He pushed me down on the bed, I had the child in the cot beside me, he was asleep and he pushed me on the bed and he raped me again"...* *"I was crying and I was begging him to stop because I was stitches and I was very sore and I knew that there was a good chance after having a baby, because I was told in the hospital that I could get pregnant easily enough again and I was really scared, I thought he was going to get me pregnant again straight after having another baby"*.
8. The complainant believed that the defendant was the father of her first child. Whilst she had a physical relationship with her boyfriend, the frequency of the rapes perpetrated by her father led her to believe that he was father of her child. Fortunately, later DNA testing revealed that Mr Fahy is in fact the father of her first child.
9. She confirmed that the last rape took place in December of 1994. A number of rapes took place at a location outside of the family home at an unofficial dump site in Killaskillen, Co. Westmeath. The respondent would drive her to the location and assault her in the back of his vehicle – this occurred when he did not have the opportunity to do so at the family home.
10. In approximately 2004/2005, the complainant had become aware that her father had entered into a new relationship with a woman who had a young daughter. The complainant became concerned for the girls welfare. The complainant made a complaint to the Gardaí in 2009 in relation to the respondent. The matter was investigated and the respondent was arrested in January 2010. We are informed that it was some time before the respondent was charged this is one of the reasons why the matter was all was disposed of in the trial court on 5th November 2018. We are further informed that the matter was listed for trial in the Central Criminal Court on a number of locations after the return and add the jury disagreed at an earlier trial. Whilst no doubt the latter caused some delay counsel could not assist us as to why it had occurred, notwithstanding the sequence of events outlined to us. In the ordinary way, after return for trial, cases are heard the Central Criminal Court within a year approximately of the return, at least this was so until relatively recently.

11. The adverse effect on the victim are grave. In her Victim Impact Statement, she pointed out that she grieves for her lost innocence at the hands of the respondent, and her childhood. She grieves for the person she might have been become not for the continuous abuse. Her life was, as must be obvious, in constant turmoil between the ages of seven and nineteen. She was not only in fear of her father but if everyone who was in a position to help: she knew, for example, that if she told her teachers about it they would tell the social workers, or indeed anyone else would do so. She told the trial court that the fear that her brothers and sisters would be taken away was one of the worst elements and one of the most poignant statement she made was that "*I had nowhere to go.*"
12. The respondent is 61 years of age and a number of medical reports were before the trial court and are before us. These date from 2015 and it seems that Mr Berry suffers from what the trial judge described as "considerable degenerative changes in his spine for which he has undergone two surgical procedures. Given the extent of the degenerative change in it in his spine it appears that he is likely to have ongoing pain and restriction. He also suffers from hypertension, from Type II diabetes and he suffers from depression."
13. The respondent was described in the trial court as having a good work history and in effect he has no previous (no previous or no relevant convictions to the offences, which is virtually always the case in respect of secret crimes which take place over a long period; many persons who commit such crimes, indeed, are the very epitome of respectability in society), but perhaps of more relevance is the fact that since the commission of these offences he has no relevant conviction.
14. The respondent relied upon the latter as mitigating factors. It was also stressed in the trial court, and before us, that since at the time of trial some 36 years had elapsed from the commission of the first offence and 24 years since the commission of the last, regard should be had on the authorities to the fact that he is now a different person, so to speak, what was characterised by his counsel here as a rehabilitation has occurred. We reject the latter since of course there can be no rehabilitation without an admission of guilt, in any true sense. This does not impinge upon the fact that he has been of good character for a number of years subsequent to the offences.

Grounds of Appeal

15. The grounds of appeal put forward by the appellant are as follows:-

- i) The learned trial Judge erred in failing to attach appropriate weight to the aggravating factors in the case;
- ii) The learned trial Judge erred in according undue and excessive weight to the mitigating factors in the case and in particular the personal factors relating to the respondent;
- iii) The sentence imposed fails to reflect the nature and gravity of the offences committed by the respondent.

16. The aggravating factors identified in this particular case are as follows: -
 - i. The continual and unrelenting sexual abuse perpetrated by the respondent;
 - ii. The relationship of the respondent and the complainant and the significant breach of trust;
 - iii. The protracted and opportunistic nature of the offending over a period of 12 years;
 - iv. Threats and violence perpetrated together with the undermining of the complainant and in particular attacking her confidence;
 - v. The absence of an acknowledgement of his guilt following the verdicts, and his lack of remorse;
 - vi. The effects of the sexual abuse upon the complainant and her confusion throughout her formative years.

17. The following factors were identified by way of mitigation:
 - i. The respondent's age: he was born on the 14th July, 1957 making him a 61 year old man at the time of sentence;
 - ii. His work ethic;
 - iii. His medical complaints were identified as considerable degenerative changes in his spine, hypertension, type II Diabetes, and depression;
 - iv. The he would be subject to a Sex Offenders Notification Order (lifetime requirement);
 - v. That he has no previous convictions.

18. The Director says that the headline sentence of 15 years for rape is not being represented to the court as an error and the judge was within her right to set the headline sentence at fifteen years given the most serious nature of the conduct on the part of the respondent. The appellant submits however that Judge was in error in providing a 25% reduction for the indecent and sexual assaults, and then with consideration of the same mitigating factors, imposed a 33.33% reduction in respect of the counts of rape. Given the gravity of the respondent's actions, and the fact that same were aggravated by the very significant breach of trust, the restriction of the complainant during her childhood by the respondent, the humiliation and degrading treatment afforded to her, constituted the most serious form of breach of trust.

19. The finding as a fact that the respondent had been convicted of a number of offences representing a history of continual, unrelenting sexual abuse of his daughter over a period of twelve years, and while sexually assaulting her at the same time undermining her telling her that she was ugly and that no one would ever want her, together with bullying

and beatings which she received, rendered the case one of the most serious and placed same at the end range of "*more serious cases*", and "*bordering upon cases requiring up to life imprisonment*". The complete absence of mitigating factors and in particular the after verdict acknowledgement of his guilt and remorse been completely absent, renders the effects of the abuse more pronounced upon the complainant. The court gave due regard to all mitigating factors.

20. The respondent submits that judge gave appropriate weight to the aggravating factors in the case, causing her to conclude that the offences were on the upper scale of offending and required headline sentences of fifteen, eight and six years respectively; headline sentences which the Director concedes were appropriate to the case. The respondent submits that the reductions made were arrived at on the basis of appropriate and individually identified factors and no error in principle occurred. It is quite clear that very careful consideration was given to each of the mitigating features put forward and it is not the case that the judge simply adopted all of the submissions made to the court by defence counsel in an indiscriminate way and reduced the sentence accordingly.
21. The respondent also submits that the evidence shows that the learned sentencing judge demonstrated a very clear weighing of each of the mitigating factors in the case individually and it is submitted that in so doing the Court arrived at a sentence which is squarely within the discretion of a sentencing judge and not in any way a clear divergence from sentencing practice. Having heard evidence and the plea in mitigation on October 22nd 2018, the trial judge adjourned the matter for a fortnight in order to fully consider the evidence and material placed before her. Each mitigating feature was considered and indeed comment passed on those features of mitigation which were unavailable to the respondent by reason of his maintaining his innocence or mitigating factors which the learned trial judge found unpersuasive. It is submitted that such careful consideration is evidence of exemplary sentencing practice.
22. The prosecutor makes no criticism of the headline sentence of 15 years in respect of the rape offences and accordingly, even though, given the fact that the offences lie at or near the top at the highest or nearly are near the highest level of culpability for offences of this kind and hence might well justify a sentence substantially in excess of the headline sentence identified here, we are confined by that concession. We think that there are two only mitigating factors and both of them are very marginal, namely, the respondent's ill-health and his good character since the offences ceased and the fact that he has no convictions recorded against him since the offences ceased.
23. Ordinarily, the headline sentence might be reduced by up to 1/3 (or thereabouts) if the principal mitigating factor of a plea of guilty was present. No such factor is present here and its absence is of particular significance in respect of an offence of this kind, viz - prolonged sexual abuse by a father of his daughter. Furthermore, the mitigating factors referred to above were minimal. We think accordingly that the learned trial judge fell into an error of principle. We proceed accordingly to quash the sentence and proceed to resentence.

24. There has been no material change in the respondent's circumstances since the matter was addressed in the trial court. Having regard to the headline sentence of 15 years and the absence of a plea of guilty, we think that the greatest level of mitigation which should be afforded renders a sentence of 13 years appropriate in this case. In imposing that sentence we have regard also to the fact that it has now been increased although that factor was of little consequence in the present case since the conviction is under appeal.