



**THE COURT OF APPEAL**

**Record Number: 18/2021**

**The President  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT/**

**- AND -**

**A.A.**

**APPELLANT**

**Record Number: 22/2021**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT/**

**- AND -**

**B.B.**

**APPELLANT**

**JUDGMENT of the Court delivered (ex tempore) on the 9th day of November 2021 by  
Ms. Justice Kennedy.**

1. These are two separate appeals against sentence. Both appellants pleaded guilty on the 11th October 2019 to separate offences of a sexual nature concerning their younger sister. As some facts are common to both appellants, it is appropriate to deal with both appeals in the same judgment. We have not referred to the appellants by their actual initials in order to preserve the complainant's anonymity.

**Background – A.A.**

2. On the 11th of October 2019, the appellant pleaded guilty to a charge of sexual assault on his younger sister contrary to s. 2 of the Sex Offenders Act 2001. The offence took place on some date between January 2007 and January 2008, when the complainant was aged six years and the appellant was aged approximately 19 or 20 years. The appellant coaxed the complainant on top of some haybales and removed her trousers. He was positioned behind her and he also removed his trousers. She believed she was kneeling at this stage and he placed his penis in between her thighs and began moving backwards and forwards until he ejaculated. She recalls that two of their brothers were also in the shed and were looking up at them and laughing. She also recalls that the appellant instructed her to wave down at them.
3. The appellant was arrested on the 15th February 2018. In the second of three interviews, he was presented with the complainant's statement; he accepted that the incident occurred. On the 11th October 2019, he pleaded guilty to one count of sexual assault of his younger sister contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001.
4. The matter proceeded to sentence before the Circuit Court on the 3rd July 2020.

**Personal circumstances of the appellant A.A.**

5. The appellant was born in 1987. He has no previous convictions. A psychological report completed for the assistance of the sentencing court detailed the appellant's sexual history. It is stated that A.A. gave descriptions of sexually inappropriate behaviour between him and his brothers. The report also describes the appellant's experience of grooming by a neighbour when he was between the ages of 12 and 21 years old. A.A. is placed at an 'average' risk of reoffending and a recommendation is made that he engage with specialised therapy to address his issues in this regard. An updated Probation Report prepared during the period in which sentencing was adjourned noted that he co-operated fully with the Safer Lives Programme.

**Background – B.B.**

6. On the 11th October 2019, the appellant, B.B., pleaded guilty to one count of sexual exploitation of a child, contrary to s. 3 of the Child Trafficking and Pornography Act 1998. The offence took place in Summer 2007, when the complainant was six years old and the appellant was 15 years old. At the sentencing hearing, the investigating Garda gave the following description of the facts,:

*"[The appellant] was urinating at the side of the family home while [the complainant] was walking around the house on the footpath. She started to walk away and [the appellant] asked her to come back. He asked her to touch his penis*

*and [the complainant] did touch it. He then asked her to move it back and over and [the complainant] did his as she was instructed. [The complainant] left after a while... . "*

**Personal circumstances of the appellant B.B.**

7. B.B. was 15 years old at the time the offending took place. He has no previous convictions. A psychological report prepared in advance of the sentencing hearing detailed the appellant's own experience of sexual misconduct with his brothers from the age of 7 years old. It is reported that having received sex education in school, the appellant realised that this conduct was not the norm. It is said that he spoke to his brothers about this and tried to avoid getting involved in the behaviours. It is reported that the behaviours eventually stopped when he was nearly 17 years old.

**The sentences imposed**

8. Matters in respect of both appellants proceeded to sentence before the Circuit Court Judge on the 3rd July 2020. At this hearing, facts were heard and counsel for both appellants made submissions in mitigation.
9. In respect of A.A., the Court nominated a headline sentence of five years, which was reduced in light of mitigating factors to a custodial sentence of three and a half years. In respect of B.B., the sentencing judge identified a headline sentence of three years, which sentence was reduced and to one of two years. However, the judge deferred the finalisation of sentence for a period of for six months to allow time for them to engage with the Probation Services.
10. The matters came before the Court again on the 26th January 2021. Further submissions were made on behalf of both appellants. Upon further consideration, the Court imposed a sentence of three and a half years on A.A., with the final twelve months suspended for a period of five years. An 18-month post-release supervision period was also imposed on A.A. In respect of B.B., the Court imposed a sentence of two years' imprisonment, with the final 9 months suspended for a period of five years. B.B. also entered into a bond for €100 to keep the peace and be of good behaviour for a period of five years after his release. He was also to remain under the supervision of the Probation Service for 18 months after his release.

**Grounds of Appeal**

11. Whilst each appellant has filed several grounds of appeal, each contend in essence that the judge erred in the nomination of the headline sentence and that the reduction afforded for mitigation was inadequate.

**Submissions of the Appellants**

12. In his submissions, senior counsel for both appellants Seamus Clarke stated that the headline sentences nominated in respect of both was too high and that the judge failed to give adequate consideration to the mitigating factors, specifically the admissions, the early plea of guilty, absence of previous convictions and their respective personal circumstances. Complaint is also made that insufficient consideration was given to the appellants' co-operation with the Probation Service. Moreover, that insufficient credit was

given to both appellants for the fact that they grew up in a toxic household environment in which sexual conduct between brothers was the norm.

13. It is submitted on behalf of the appellant A.A. that a total discount of 30% was too low in the circumstances. It is argued that the Courts have in the past suspended a sentence in relation to sexual assault offences. Reference is made to *DPP v McCormack* [2000] 4 IR 356, in which the Court of Appeal substituted a fully suspended sentence for a sentence of three years' imprisonment with the final two years suspended in a case involving one charge of aggravated sexual assault and one charge of attempted rape. In that case, the Court deemed as mitigating factors the appellant's blameless record, genuine remorse and the complainant's wish that he not receive a custodial sentence.
14. It is said on behalf of the appellant B.B. that at the time the offence was committed, s. 3 of the Child Trafficking and Pornography Act 1998 had not been amended by s.3(2) of the Criminal Law (Human Trafficking) Act 2008 which Act increased the penalty for child exploitation from 14 years' imprisonment to life imprisonment. Complaint is made that counsel for the Director of Public Prosecutions misspoke during the sentencing hearing and indicated to the sentencing judge that the maximum sentence for sexual exploitation was life imprisonment. It is argued that although this error was corrected by counsel for the appellant, the learned sentencing judge had the maximum sentence in mind when choosing the headline sentence and that therefore, insufficient consideration was given to where the offending lay on the range of penalty contemplated by the 1998 Act.
15. It is further submitted on behalf of the appellant B.B. that the sentencing judge gave insufficient consideration to the appellant's young age at the time of the offending. He was aged 15. Reference is made to *The People (DPP) v J.H.* [2017] IECA 206, a case in which the appellant, aged 23, was convicted of sexual offences committed when he was 15 years old. In that case, the Court of Appeal substituted a headline sentence of 2 years and 6 months for one of 4 years, with consideration given by the court to the age of the appellant at the time the offences were committed. The appellant notes that no mention was made by the sentencing judge of his youth, and that this failure represents an error of principle in the determination of B.B.'s moral culpability.
16. The appellant B.B. submits that an entirely non-custodial sentence would have been appropriate.

**Submissions of the respondent (A.A.)**

17. It is submitted by the Director that the headline sentence of five years is appropriate and properly reflects the gravity of the offending, the culpability of the appellant and the harm done. It is further submitted that the complainant's young age, the breach of trust she experienced and the additional degradation of allowing other brothers to watch the assault and then asking the complainant to wave down at them constitute aggravating factors.
18. The Director further submits that the sentencing judge gave sufficient consideration to the mitigating factors in structuring the sentence. Referring to the Court's judgment in *The*

*People (DPP) v Donal Lee* [2017] IECA 152, it is argued that partially suspended sentences have been used in the past to both reflect mitigation and incentivise mitigation. The Director also refers to the cases of *The People (DPP) v Eccles* [2003] 10 JIC 0804 and *The People (DPP) v Joseph McBride* [1999] 7 JIC 0502, to make the argument that partially suspended sentencing is justified to incentivise offenders to abstain from future crime, or to allow the offender to engage in rehabilitation. It is argued that the sentence handed down to A.A. incentivised the appellant not to re-offend, acted as a deterrent and recognised the appellant's co-operation with the Probation and Welfare Services.

19. It is further submitted that having in mind the margin of appreciation afforded to sentencing judges, the sentence imposed was within the available range for the judge in light of the specific circumstances of the case.

**Submissions of the respondent (B.B.)**

20. It is submitted by the Director that the imposition of a three year headline sentence by the sentencing judge places the offence within the low sentencing range for this type of offending. It is argued that a headline sentence of three years was not excessive given the admitted fact that the child was induced by the appellant to participate in the sexual activity, and the fact that the complainant was a younger sister and was therefore vulnerable.
21. The Director further submits that the learned sentencing judge is afforded a margin of appreciation in exercising sentencing discretion, and that this principle has continuously been protected by this honourable Court.
22. It is submitted by the Director that the learned sentencing judge gave sufficient consideration to the mitigating factors, including the appellant's early guilty plea and the absence of previous convictions. The headline sentence was reduced by one year, and further suspended by 9 months at the January 2021 sentencing hearing. It is argued that the reduction amounted to over one third from the pre-mitigation sentence. It is submitted that the sentence imposed by the sentencing judge appropriately balanced the objectives of punishment, deterrence and rehabilitation.

**Discussion**

**B.B.**

Mr. Clarke first addressed the appeal concerning B.B. and contended that the judge erred in his nomination of the headline sentence of three years' imprisonment when one considers this appellant's young age, the opportunistic nature of the offence and the sexualised environment in the home. These matters, he says, serve to mitigate the moral culpability of this appellant. Moreover, it is said that the judge was misinformed of the maximum sentence available and thus erred in nominating the headline sentence.

Insofar as the mitigation is concerned, it is true that these were significant and justified a significant reduction in the pre-mitigation sentence.

The real issue insofar as this court is concerned is whether the overall sentence imposed by the judge was too severe. This particular offence may be committed in a vast number

of ways, and in the present circumstances, it seems to us that the judge did not err in indicating that the impugned conduct fell within the low range of offending. It must be recalled that this offender was aged 15 years at the time of the offending and was sentenced some 13 years later; he was a minor at the time of the commission of this offence. This is a matter which properly goes to extenuating the appellant's culpability together with the opportunistic nature of the offending and the toxic sexualised environment in the family home.

In the circumstances pertaining to this appellant, it appears to us that the sentence of two years with 9 months suspended is somewhat severe and severe to the extent that an intervention is warranted. The appellant has been in custody since the 26th January 2021; his expected release date is the 1st January 2022. We are minded in his situation to suspend the balance of the remaining sentence on the same terms and conditions as imposed by the court below. However, we will do so from the 19th November 2021 and not from today's date. Our reasoning in deferring to that date is to enable the probation services to organise matters for his release, to give effect to the terms of the suspended portion of the sentence.

**A.A.**

Insofar as A.A is concerned, Mr. Clarke takes issue with the headline nominated and the reduction afforded for mitigation leading to the ultimate sentence of 3 ½ years imprisonment with the final year suspended on terms. Mr. Clarke properly accepted that a custodial sanction was warranted in the case of this appellant but argues that the duration of that sentence is excessive. He says that insufficient regard was had to this appellant's youth at the time of offending and the sexualised environment in the home. It is said that this appellant was abused by a neighbour from the ages of 12 years old to 21 years old. Mr. Clarke further says that insufficient account was taken of the mitigating factors present.

There is no doubt that this offence is more serious in character than the offending of B.B. The appellant was older and the offence itself involved aspects which were humiliating for the very young victim. The nature of the inappropriate activity, as described earlier in this judgment, was of a kind which warranted the headline sentence nominated by the judge. Whilst such a sentence could arguably be said to fall on the upper end of the range, it is one within the margin of appreciation afforded to a trial judge.

Insofar as mitigation is concerned, again, as with the other appellant, there was significant mitigation, not least the plea of guilty and other factors already identified. However, the mitigation did not necessarily require a reduction greater than that allowed by the sentencing judge. Again we look at the overall actual sentence of imprisonment, being one of 2 ½ years with a final 12 months suspended on terms and conclude that no error has been identified in this sentence or in the approach taken by the judge.

Accordingly, we will allow the appeal against severity of sentence concerning B.B. as set out above and we refuse the appeal by A.A..

