



**THE COURT OF APPEAL**

**Record No.: 242/18**

**Neutral Citation No: [2022] IECA 144**

**The President**

**Kennedy J.**

**Donnelly J.**

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

**RESPONDENT**

**-AND-**

**J.M.**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 27<sup>th</sup> day of June 2022 by Ms.  
Justice Donnelly**

**Introduction**

1. This is an appeal against a total sentence of eighteen years' imprisonment imposed upon the appellant, who pleaded guilty in the Central Criminal Court to various offences of rape and sexual assault that he had perpetrated on his daughter from the age of three to fifteen years during the years 1988 to 2000. There was then a gap of ten years before one final act of sexual assault was carried out.

2. The sentences were imposed by way of a number of consecutive but also concurrent sentences as follows:

- a) ten years in respect of Count 1, rape contrary to common law;
- b) ten years in respect of Count 2, rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, to run concurrently with Count 1;



- c) ten years in respect of Count 7, rape contrary to common law, to run concurrently with Count 1 and 2;
- d) five years in respect of Count 8 to run consecutively with Counts 1, 2 and 7;
- e) five years in respect of each of Counts 9, 10 11, and 12 to run concurrently with Count 8 and consecutively to Counts 1, 2 and 7;
- f) three years in respect of each of Count 39, to run concurrently with Counts 8, 9, 10, 11 and 12 and consecutively to Counts 1, 2 and 7;
- g) three years in respect of each of Counts 40, 41, 42 and 43 to run concurrently with Counts 8, 9, 10 11, and 12 and consecutively to Counts 1, 2 and 7;
- h) three years in respect of each of Counts 88, 89, 90 and 91 to run concurrently with Counts 8, 9, 10, 11 and 12 and consecutively to Counts 1, 2 and 7;
- i) one year in respect of Count 92 to run concurrently with Counts 8,9, 10, 11 and 12 and consecutively to Counts 1, 2 and 7.

### **Evidence**

3. The evidence of the offending was given by Garda Thomasina McHale. She stated that on the 23<sup>rd</sup> May, 2015, she was contacted by the victim. The victim disclosed that she was sexually abused by her father for years when she was a minor. Garda McHale stated that she made arrangements to meet with the victim and took contemporaneous notes and a statement of complaint from her, resulting in a comprehensive 110-page written statement of complaint from the victim. In that statement, she outlined in great detail the sexual abuses to which she was subjected at the hands of her father. The evidence encompassed sexual assaults which increased in intensity, and also progressed to s. 4 rapes over time. Some of the sexual assaults involved aspects of exceptional depravity over and above the depravity of committing such offences in relation to a child. There had been penetration of the victim with a vibrator. As



the sentencing judge correctly observed, both the summary to the Court and the victim impact evidence “[were] harrowing and exceptional in the length, intensity and depravity of the sexual abuse.”

4. Garda McHale said that an extensive investigation was launched in this case where HSE and Tusla records were sought and obtained which confirmed that the family were involved with social workers from 1987 and this involvement continued on and off until 2014. According to Garda McHale, doctors’ records were also obtained for the victim, with her permission, which confirmed that this victim suffered from many different injuries, and school records were also obtained which corroborated the victim’s timeline in her statement of complaint. Garda McHale also explained that a number of witnesses had made statements corroborating the injured party’s complaint.

5. An aspect of the case that was urged in mitigation was that the offence of rape at common law was an offence which was not outlined by the victim, but was admitted to in interview by the appellant. In her victim impact report the victim says that this revelation was even more shocking for her.

6. An element of note was that the appellant, at the time of the interview in which he admitted these matters, was in custody in relation to another offence of a sexual nature involving his niece. That offence was committed in July 2012 and he was prosecuted in the Circuit Court. In February 2016, he received a sentence of five years’ imprisonment with two years suspended, which was backdated to the time he went into custody in September 2015. He has remained in custody since that time.

7. Furthermore, at the time he admitted to the offences at issue in this appeal, he was also being investigated in respect of offences of a sexual nature involving his two other daughters and a friend of the family. He was prosecuted for those offences also in the Circuit Court. In total, the appellant had 73 previous convictions excluding these offences. The other offences



are all sexual assault offences. The offences in relation to his other two daughters, which ranged between 1993 and 2012, therefore largely overlapped with the offences at issue in this appeal. On the 16<sup>th</sup> February, 2018, a sentence of eight years' imprisonment was imposed on the appellant, to date from the date of imposition.

*The victim impact report*

8. The victim read her own victim impact statement and the impact it had on the sentencing judge has been noted above. She suffered from physical effects at the time and from severe trauma. She eloquently summed up the effect on her. When addressing the appellant, she said:

*“Dad, you stripped me of every human right, my worth, my privacy, my energy, my time, my confidence, my innocence, my childhood, my education, my teenage years, a normal life.”*

**Plea in mitigation**

9. At the sentence hearing, counsel for the appellant referred to the manner in which the appellant dealt with the prosecution. Counsel focused on the early plea as referred to above. Furthermore, there were two periods when the appellant could have sought bail, but he never took up bail. No attempt was ever made, or application ever countenanced, to apply for counselling records in relation to this victim or anybody else. It was indicated by counsel that the prosecution knew this case was coming before the Central Criminal Court and that he would be pleading guilty.

10. The appellant suffers from Wilson's disease and has had a liver transplant in 2009 and his life expectancy is curtailed. Referring to a psychiatric report, counsel submitted that the appellant's psychiatric problems were significant. He also outlined that the appellant apologised to his daughter and submitted that the manner in which he had dealt with the



prosecution proved that his remorse and apology were genuine. He further argued that, based on the governor's reports, the appellant is an enhanced prisoner and is at low risk of reoffending.

**11.** Counsel also referred to the appellant's role in the defence forces where he worked all his life and submitted that the appellant has been previously a contributing member of society and noted that the appellant had no other convictions for any other anti-social behaviour or any other offences. He also stated that should the survivor waive her right to anonymity, then publicity is a factor that will accrue to the appellant which is something the Court ought to take into consideration.

**12.** He called for the sentence to be mitigated on the basis that the appellant is an ill man who is assessed at low risk or no risk of reoffending in the future.

### **The sentencing remarks**

**13.** Having noted the nature of the abuse as set out above, the sentencing judge noted the legal duty to impose a proportionate sentence having taken into account aggravating and mitigating circumstances. The Court had to decide if it was appropriate to sentence concurrently or consecutively. If consecutive, the Court had to respect the totality principle to ensure proportionality. The sentence could not be cruel or unusual. The Court also had to indicate a headline sentence.

**14.** The Court noted the aggravating circumstances. In truth, there has been no dispute on this aspect of his ruling in this appeal. He took into account the severe effect of the abuse on his daughter, the breach of trust and the serious nature of the abuse over a long period of time. He also held that the abuse of the other children was an aggravating factor. He said that the Court ought not sentence consecutively because these offences were contemporaneous to a certain extent.



15. The Court viewed the headline sentence before mitigation as one of life imprisonment. There was some issue in the appeal as to whether this was indicated for the rape or the totality of the abuse. It appears that it was for the totality of the abuse. He held that he must sentence consecutively to an extent.

16. The sentencing judge fully acknowledged that the appellant had acknowledged his guilt, had entered a plea of guilty and has expressed genuine remorse. He also accepted that the plea was entered at the earliest possible juncture and an intention to plead in this case was indicated before the prosecution into the charges while the said investigation was ongoing.

17. He also said that, in view of the circumstances of his plea, his remorse and his health, that he would *“back date the sentence to the time that [the appellant] went into custody originally, [he thought] before in fact he pleaded guilty to the other offences in February”*.

18. The sentencing judge noted that there were a total of 92 counts in this case. While he gave the sentences as set out above, he expressly stated that he was not sentencing consecutively in respect of certain of the offences because he was of the view that this would breach the totality principle.

### **The grounds of appeal and submissions**

19. The appellant appeals the sentence on the following grounds:

- a) that the sentence imposed was excessive, disproportionate and unfair in all the circumstances;
- b) that the sentencing judge erred in failing to take into account adequately or at all the mitigating circumstances.

20. The appellant filed written submissions which addressed the above matters in detail and they have been considered. At the oral hearing, counsel for the appellant submitted that in essence the sentence imposed of eighteen years was excessive. In identifying an error of



principle, counsel said that in particular, the early plea, including an early indication given to the prosecution of the intention to plead guilty, had not been recognised. Counsel referred to all the aspects surrounding this, such as the fact that this appellant had not sought counselling reports. As a matter of practice in the courts, these types of requests were delaying trials and counsel submitted that the attitude of the appellant in this case had not only assisted this victim but also the overall functioning of the courts. This was a matter to which greater weight should have been given.

**21.** Counsel also referred in detail to the particular circumstances of this appellant. His remorse was accepted as genuine. He had a good probation report, albeit that this had been obtained in respect of the single offence against his niece, but reference had been made to these matters. In particular, however, counsel referred to the appellant's exceptional medical situation which, although he was not an elderly man, meant that he had a significantly lower life expectancy because he had Wilson's disease. The appellant's siblings had died from this disease and he had had a liver transplant in 2009. He also had significant psychiatric issues which had been outlined in a psychiatric report and ought to have been taken into consideration.

**22.** Counsel submitted that no matter how the eighteen years might have been structured, that is to say whether consecutive for this victim or an element of consecutive sentence *vis-à-vis* the other sentence imposed in respect of the other victims, the eighteen-year imprisonment was excessive. Counsel did not accept that the headline sentence ought to have been life imprisonment, and in any event, based upon the totality principle the eighteen years was too long especially in light of the very significant mitigating factors in the case.

**23.** Counsel for the DPP submitted that in the case of *DPP v. FE* [2019] IESC 85, the Supreme Court stated that very serious cases can attract headline sentences of between fifteen years and life imprisonment. The aggravating factors of this case included a particularly young and vulnerable victim, the abuse of a position of trust, the particular nature of the abuse over



such a long period, the effect of the offending on the victim and a significant number of previous convictions for similar offences. The DPP submitted that it is clear to see that the sentencing judge felt that life imprisonment was the appropriate headline sentence and that he did temper this by reducing the headline sentence to ten years on Counts 1, 2 and 7. The DPP also submitted that the setting of life imprisonment as a headline sentence in relation to Counts 1, 2 and 7 did not represent an error in principle and was within the sentencing judge's margin of appreciation.

**24.** Responding to the argument on consecutive sentences, the DPP submitted that these could have been made consecutive to the Circuit Court sentence and this was proportionate to the overall offending. He relied upon the judge's ruling in submitting that the judge had regard to the totality principle.

#### **The evidence as to previous sentences**

**25.** In the course of the appeal, on enquiry from the Court, it became clear that the sentencing judge had been told that the first sentence imposed in February 2016 had been a fully suspended one. The appellant had in fact been sentenced to one of five years with two years suspended. This was backdated to the 11<sup>th</sup> September, 2015, which was the date he went into custody in relation to the offences for which he has been convicted. He has not been out of custody since that time.

**26.** Counsel for the DPP quite properly accepted that there was confusion in respect of the sentence at the sentence hearing.

**27.** On the 20<sup>th</sup> October, 2016, the appellant was arrested while in custody and made admissions in this case.



**28.** The judge appears to have been told however that the first sentence was finished in December 2017, and this is the date to which the sentencing judge backdated the sentences. We are satisfied that it appears there was an element of confusion.

### **Decision and analysis**

**29.** We are satisfied that the sentencing judge did in fact and was quite entitled to indicate that a headline sentence of life imprisonment was appropriate in this case. He was entitled to take that view in respect of the rape offences, given their nature and the aggravating features outlined above, including the fact that this offending had taken place amid offending against five other children, most of whom were related to him, being either his daughters or his niece. This was the ultimate breach of trust as a parent. The length and nature of the offences were correctly described by the judge as harrowing and exceptional in the length, intensity and depravity of the abuse.

**30.** A sentence of life imprisonment may be imposed even where a plea of guilty has been entered. That is reserved for an exceptional situation and the sentencing judge did not hold that this was such a case. He was however entitled to have regard to that headline offence when considering the plea in mitigation that was made. The early nature and circumstances of the plea were taken into account, as were the particular medical circumstances of the appellant in mitigation. Indeed, this was not a factor that the sentencing judge alluded to, but we think it is not entirely insignificant that, despite his liver transplant, the appellant continued to commit sexual offences. The sentencing judge had express regard to matters such as totality and expressly did not impose a further consecutive sentence to which he was entitled in respect of some of the matters.

**31.** We are satisfied therefore that there was no error in principle by the judge in imposing the sentence he did. He took all appropriate matters into consideration and gave a sentence



that was within the range of sentences open to him. Not only was there no error in principle, but on the facts of this case it could not be said that the sentence of eighteen years' imprisonment was excessive in light of the nature of offending and in light of the appellant's circumstances.

**32.** We remain concerned however that the evidence before the sentencing judge created confusion as to the sentence that had been imposed in respect of the first in time sentence that had been imposed on the appellant. The impression appeared to be created that this was a fully suspended sentence of five years whereas he, in fact, had served in custody a three-year sentence; it was a five-year sentence with two years suspended that had been imposed. When the sentencing judge came to sentence, he may have been under the impression that he was backdating the sentence to when he went into custody for the first time, although it appears he was also told that it was the time he had finished the first sentence.

**33.** We are satisfied that any confusion may properly be dealt with by backdating this sentence. The sentencing judge was clearly alive to the full nature of this appellant's early plea. A significant event in that early plea was the confession he made to the Garda when he was arrested during the course of his time in custody for the other offences. We therefore consider that the sentence ought to be backdated to the 20<sup>th</sup> October, 2016, when he first confessed to these offences.

**34.** We therefore dismiss the appeal but vary the sentence by backdating it to the 20<sup>th</sup> October, 2016.