UNAPPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

CRIMINAL

Court of Appeal Record No: 147/19

Neutral Citation No: [2022] IECA 72

McCarthy J.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN/

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

PROSECUTOR/RESPONDENT

-AND-

RICHARD O'MARA

APPELLANT

Judgment of the Court delivered by Ní Raifeartaigh J. on the 22 March 2022

1. This is an appeal against severity in respect of a sentence imposed by the Central Criminal Court (Burns J.) on the 6 June 2019.

2. The appellant had pleaded not guilty to two counts of rape. He was convicted following a trial which commenced on the 28 March 2019 and concluded on the 11 April 2019. The sentencing hearing took place on the 23 May 2019. The trial judge imposed a 12-year sentence and a 14-year sentence to run concurrently, with the final two years of the 14-year sentence suspended upon conditions.

3. An appeal against conviction was dismissed by this Court on the 27 September 2021 and the facts are more fully set out in that judgment ([2021] IECA 243). The following is a very brief outline for present purposes.

4. The offences took place on the 17/18 October 2015 at the family home of the appellant at an address in Co. Clare. The injured party was aged 17 at the time and the appellant was 27 years old.

5. The context for the offences was an 18th birthday party being held for the appellant's younger sister, at their family home. The injured party did not know the appellant or any member of his family but was asked to go along to the party by a friend of hers, who is a relative of the appellant. The party was held in a marquee located at the rear of the appellant's family home, which is in a rural location.

6. The details of each of the rapes are more fully set out in the Court's judgment concerning the appellant's unsuccessful appeal against conviction. Suffice to say here that the first rape took place when the injured party and the appellant walked down a road outside the house. The appellant pushed open a farm gate into a field and then pushed her to the ground and proceeded to rape her. They returned to the house after the rape. The injured party said that she was "*roaring crying*" but had been threatened by the appellant not to say anything to anyone.

7. When they returned to the house, a minibus taking guests away from the party had already left. The injured party was unable to find her handbag, and while she found her phone on a table in the marquee, it was out of power. She asked the appellant to call a taxi for her but he refused. She therefore had no means, in terms of the practical reality of the situation, of leaving the house and going home. Other members of the family, who were downstairs upon their return to the house, went off to bed. The injured party found herself in the sitting room of the house in the company of the appellant for the night. The second rape took place when the appellant approached her from behind, pushed her head down into the sofa and proceeded to have intercourse with her.

8. The injured party said she then moved over to a smaller two-seater and sat there, awake, for the remainder of the night (a period she estimated to be four or five hours), while the appellant fell asleep in the same room in a separate armchair. In the morning, his mother came into the room and a taxi was organised for the injured party. She went to her sister's house where she went upstairs for a shower and found that she was bleeding heavily from her vagina.

9. The injured party, who was still in school at the time, made a disclosure about the events to one of her former school teachers approximately two days later. However, the matter was not reported to the Gardaí for a period of approximately eight months.

10. The appellant was arrested by Gardaí on the 27 September 2016 and interviewed twice in connection with the allegations. He agreed that he met the injured party for the first time on the occasion of the party, and that they spoke and kissed. He also agreed that they spent a period of time away from the curtilage of the house, and that they both spent the night in

the small sitting room. He maintained that no sexual intercourse took place between them at any time. This was his defence at trial also.

11. In the course of the subsequent sentence hearing following upon his conviction, a victim impact report was put before the court in which the complainant described the adverse effects of the rapes on her school performance and her mental health. As well as suffering anxiety, nightmares, panic attacks and nervousness, the victim suffered from poor concentration, difficulty in trusting others and in her school performance. Physically, she said was bleeding for around a week after the incident, and that she was so sore that she did not want to go to the toilet because it hurt so much. She said that she did not want to shower because she would get flashbacks to when she was had blood on her from the rapes.

12. The trial judge passed sentence on the 6 June 2019. She imposed a sentence of 12 years' imprisonment in relation to count No. 1, and 14 years' imprisonment in relation to count No. 2 with the last two years suspended on condition that the accused engage in an appropriate counselling programme in relation to sexual offending as directed by the Probation Service together the further usual conditions. Both sentences were to run concurrently.

13. The trial judge included the following observations in her sentencing remarks:

"This was a vicious, horrifying attack by a mature man of 27 years of age on a young girl of 17 years of age. The circumstances of the rapes are particularly sinister. [The injured party] was an outsider at that party that night. She knew nobody except for her friend … who was amongst family. The accused preyed on this. [The injured party] was in a fairly intoxicated state. Whereas whilst he had been drinking, he was serving behind the bar. He used deceit, violence and force to rape her in the field and a greater level of force and violence to viciously

rape her for a second time in his family home. It is shocking to think that being inside that fine house where a number of people were, [the complainant] was exposed to as great a level of danger as she had been exposed to in the field resulting in her being subjected to an even more vicious rape." As to the mitigating factors, the Judge stated as follows :

> *"In relation to the mitigating factors in this case, there are practically none. The accused ran his case and that cannot be taken into account by me in relation to the sentence that I give. But had he not run his case, that obviously would have been a significant mitigating factor that would have lessoned the sentence of imprisonment that I must impose. That's obviously a matter for Richard O'Mara, but it's important to indicate that it is a matter that would have had a mitigating effect, but it isn't available to him in relation to the matter.*
>
> *Further, having run his case Richard O'Mara displays no remorse and it has been indicated to me that his instructions that this event did not occur will remain. That obviously has a significance in terms of what happens after I impose sentence. But again if remorse was expressed at this very late stage of the proceedings, it would have been a significant mitigating factor that Richard O'Mara had at last realised the significance of what he had done and had accepted responsibility as a man of 31 years of age at this stage. But he hasn't done so, so again there is no mitigating factor in relation to that.*

He is a man of no previous convictions and that's obviously something that I will have account to in terms of his personal circumstances. I'm also told that he is the father to a young child, as I understand the child is 18 months old and that's obviously something that I also will regard to in terms of his personal circumstances and creating a sentence that appropriately meets the vicious and horrendous crimes that were committed in relation to this case, but also having regard to the accused personal circumstances."

Submissions on behalf of the appellant

14. The appellant submits that the headline sentences chosen were too high. The appellant places considerable reliance upon *The People* (*DPP) v F.E.* [2019] IESC 85 in which Charleton J. considered sentencing in rape cases in detail. In the course of the judgment, he said that *"the precedents in sentencing clearly establish that conviction for rape ordinarily merits a substantial sentence and, further, that consideration should commence in terms of mitigation at a headline sentence of 7 years. These cases of their nature will be ones where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence."*

15. At paragraph 57 of the *F.E.* judgment, Charleton J. noted that the category of *"more serious cases"*, involving a headline sentence of between ten and fifteen years, were characterised by *"a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust."* The Court in *F.E.* proceeded to consider a number of examples which fell into this category, at paras. 58-59.

16. Also cited is *The People (DPP) v W.D.* [2008] 1 IR 308 at para. 36 where it was said that where there is no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years imprisonment. In *F.E.*, Charleton J. referred to the *W.D.* case and noted what the court said at paragraph 40, namely *"Leaving aside these factors of multiple counts, a number of victims and abuse of trust, there are clearly cases where a sentence of ten years imprisonment can be appropriate for an individual instance of rape. However, a sentence of ten or eleven years imprisonment appears to be unusual, even after a plea of not guilty to rape, unless there are circumstances of unusual violence or pre-meditation".*

17. Having regard to those authorities, the appellant submits that the trial judge erred in her starting point or headline sentence for each individual offence. He submits that the circumstances of the initial rape in the field did not merit a sentence outside the "*ordinary headline sentence"* range of 7 to 10 years. He submits that most rapes in and of themselves involve an element of force, and the level of force here would not take the case outside that initial category. It is accepted that an aggravating factor is that the injured party was of a young age and sexually inexperienced, together with the fact that there was an element of luring her to the location where the rape was perpetrated. Such factors, it is submitted, would take it up from the default starting point of 7 years as identified in *F.E.*, but, it is submitted, they would not raise the appropriate headline sentence to 12 years, the figure chosen by the trial judge.

18. While it is accepted on behalf of the appellant that the Court was entitled to take a more serious view in relation to the second rape, the appellant submits that, given that it occurred in quick succession to the first, the circumstances of this offence did not merit a headline

sentence at the upper end of the "*more serious cases"* range as identified in the authorities. The main aggravating factor, it is submitted, is the fact that it was a second rape. It is not accepted that the injured party was *"trapped"* in the house, although, when pressed, counsel is accepted that her options in terms of leaving were *"limited"*. It is submitted that the incidents of the second rape did not merit a headline sentence of 14 years, which falls at the upper end of the mid-range category identified in *F.E.*

19. The appellant also submits that the sentencing judge failed to give sufficient weight to the mitigating factors, and in particular that she entirely ignored the medical evidence concerning the appellant's heart condition, which was an unusual condition for a man of that age. He was a 31-year old man with no previous convictions who was married with an 18-month old child. It was accepted that he had responded well to the medical procedure he had received for his heart condition. It was not accepted that a two-year suspension adequately reflected the mitigating factors, particularly as the reduction was not an unconditional suspension.

20. In the submissions on behalf of the appellant against severity of sentence, attention is drawn to the following observation of the trial judge in relation to the trial:

> "*There has been a sense of class in this case, a sense that [the injured party] came from a good for nothing family and that the accused came from good stock. That [the injured party] couldn't be believed against the likes of Richard O'Mara. Even [the injured party] had a sense of this herself. Well, that is not how it works before these courts".*

21. The appellant submits that the transcript does not bear out the notion that any suggestion was made to the jury that the complainant was not to be believed over the appellant because

of a difference in class. He submits that there must be a concern that this erroneous view of the case wrongly influenced the trial judge's approach to sentence.

Submissions on behalf of the respondent

22. The respondent submits that on a fair reading of the judgment, the "class issue" was not treated as an aggravating factor on the question of sentence. It is also submitted that even where the conduct of the defence at trial is treated as an aggravating factor, that may not necessarily require intervention on appeal having regard to all of the circumstances. Reference is made to *The People (DPP) v S.A.* [2020] IECA 311, where the sentencing court had specifically noted that during the trial it was alleged that the complainant had conspired to make false allegations and that her motive was that she did not wish to return to her mother's care. On appeal, the Court held that while this constituted an error on the part of the sentencing court, it was not an error of substance justifying intervention on appeal.

23. With regard to the submissions based upon the *F.E.* case, and particularly the submission that the case did not fall within the more serious category of offence, the respondent submits that there were disturbing factors in the case which warranted the headline sentence of 12 years for the first rape; the injured party was a child who was a guest in the appellant's family home, he had served her drink, he lured her out of the house and away from other people on pretext of more drink, and then raped her. He had pushed her to the ground, put his hand over her mouth, taken off her clothes, and held her down in an isolated place. The respondent submits that, as regards the second rape, it is a significant factor that it took

place in the accused's family home in circumstances where she was effectively stranded. Between the first and second rape, she had asked for a taxi to be called and this was refused by the appellant. As the sentencing judge put it, she was "*effectively a prisoner in the O'Mara house*". The respondent submits that while a violation in the victim's home is an aggravating factor, it must be equally the case, if not more so, that being stranded in the home of one's rapist, far from one's own home, is an aggravating feature. The respondent points out that she was intoxicated during both rapes and particularly vulnerable for that reason.

24. The respondent also refers to the fact that the victim was threatened verbally after the first rape; and that in the context of the second rape, the appellant grabbed her by her hair, pushed her head into the cushion on the couch and proceeded to rape her from behind.

25. As to the mitigating factors and the absence of reference by the trial judge to the medical report proffered on behalf of the appellant, the respondent submits that there was no error of substance, particularly having regard to the fact that there was no suggestion that his condition was such as to impact upon his incarceration by rendering it more difficult to endure. It was submitted that the suspension of two years was adequate to reflect the limited mitigation that was available.

The court's decision

26. The nub of the issue in the present case is whether the sentencing judge selected headline sentences that were too high in light of the categories described in *F.E.* The question is whether either or both rapes fell into the middle category described as involving "*a more*

than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust".

27. We are not persuaded that the sentencing judge was influenced by the issue of class in the case. Whether or not it was indeed 'in the case' in a way that is not apparent from the transcript, the reference to class in the course of her sentencing remarks was no more than a passing reference and we do not think that the totality of her sentencing remarks suggest that she was influenced by this factor in choosing sentence. Rather, her focus appears to have been on the circumstances of the rapes themselves, which she described in trenchant terms.

28. Nor are we persuaded that the sentencing judge's failure to explicitly mention the appellant's heart condition constituted a significant error in circumstances where he appears to have recovered well and there is no evidence that this would in any way disadvantage him within the prison setting.

29. In terms of mitigation, the reality is that the appellant had, and has, very few mitigating factors. There was no guilty plea and no remorse or apology and therefore he cannot benefit from anything in that line. He is a perfectly ordinary person who does not appear to have had any particular adversities in life other than the above-mentioned heart condition at a young age. The most important factor is that he had no previous convictions and appears to have led a blameless life before the evening in question. For that he is of course entitled to some credit. We are of the view that the suspension of two years of the sentence was entirely adequate to take into account those circumstances.

30. The real question in the case is, therefore, as already identified, whether the headline sentences identified by the judge were unduly high. We are of the view that while they

would be at the outer limit of what was within the sentencing judge's discretion in this case, they do not go beyond that and should be upheld. The entirety of the appellant's course of conduct involved two very serious offences. Concerning the first rape, the aggravating factors were: (i) that there was a 10-year age gap between the appellant and the injured party, and that she was a minor (aged 17 at the time); (ii) that she was intoxicated and therefore vulnerable; (iii) that she was a guest in his family home and therefore the offending involved a serious breach of trust; (iv) that he lured her outside on a deceitful pretext; (v) that he used violence to effect the rape; and (vi) that he threatened her after it. Concerning the second rape, the aggravating factors were: (i) that it was the second rape in time; (ii) that she was, in practical terms, stranded in a house in a rural location, being without a working phone and without her purse, and did not know the family, together with the fact that he had refused to call her a taxi; (iii) that there was violence involved. Again, it involved a serious breach of trust; there was violence; and she had no practical means of escape. Further, the victim impact report leaves no doubt that the rapes had a significant impact on the injured party.

31. The entire episode involved two separate incidents of serious sexual violence by a 27-year old man in respect of an intoxicated 17-year old girl who was vulnerable by reason of her age and intoxicated state and in circumstances where she had no practical means of leaving and making her own way home after the first rape. This left her at the mercy of the appellant at a time when she had already been subjected to a rape, and he exploited this situation by raping her violently a second time. As the trial judge said, it was a vicious attack and one for which no remorse at all has ever been expressed. We do not understand the *F.E.* decision to impose a rigid classification and there was a combination of factors in this case,

as outlined above, which in our view brought it well within the middle range for sentencing in respect of rape offences. As we have said, the sentences were undoubtedly high, and we would consider them to be at the outer limit of the judge's discretion, but we do not think they went beyond that outer limit on the facts of the case.

32. In all of the circumstances we propose to uphold the sentence and dismiss the appeal against severity.