



THE COURT OF APPEAL

Record Number: 206/2021

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

L.C.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 2nd Day of February 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against severity of sentence. On the 21st October 2021, the appellant was sentenced to four years' imprisonment on a count of engaging in a sexual act with a child under the age of 17 years contrary to s. 3(1) of the Criminal Law (Sexual Offences) Act 2006, as amended, and three and a half years' imprisonment with the final eighteen months suspended for a second count of the same offence, imposed on a consecutive basis. Two further counts of the same offence were taken into consideration. Whilst five grounds of appeal were filed, this appeal now focuses on the consecutive sentence element.

Background

2. At the time of the offending, the appellant was 32 years of age and the injured party, 16 years of age. She was friends with the appellant's daughter and, accordingly frequented the appellant's house. The evidence established that when she was 16 years of age, the appellant began paying compliments to her, which progressed to him seeking massages from her, which progressed to intimate touching and then to the incidents the subject of the counts on the indictment.

3. The counts on the indictment reflect incidents occurring on two separate occasions, some weeks apart. In July 2016, the injured party and the appellant's daughter travelled by bus together to the appellant's house. The appellant invited both girls on a walk but only the injured

party went. During this walk, the appellant and the injured party had sexual intercourse in a secluded area of a public park. No condom was worn.

4. On the 24th August 2016, the injured party visited the appellant on her own, travelling to his apartment by bus, they watched a movie, she stayed overnight and sexual intercourse took place that evening and the following morning. The incidents the following morning were the subject of the counts which were taken into consideration. The injured party received 120 phone calls from the appellant over a period between July 2016 and August 2016.

5. The injured party had told her mother that she was staying the night at a friend's house. However, her mother discovered a bus ticket and photographs on Facebook of the appellant and her daughter. She spoke with her daughter who confirmed that sexual intercourse had taken place between her and the appellant and a complaint was made to An Garda Síochána.

6. The appellant denied the offending and was convicted. We have now been informed that he accepts his guilt.

Personal Circumstances of the Appellant

7. The appellant was 37 years of age at the time of sentencing. He has 41 previous convictions, including convictions for possession of firearms/ammunition, possession of drugs, criminal damage, theft and road traffic matters.

Sentencing Remarks

8. The sentencing judge noted the aggravating factors as the age disparity, the breach of trust, factors which he classed as grooming leading up to the first offence, the absence of the use of a condom, and the impact on the injured party.

9. Whilst it is somewhat unclear, it seems that the judge may have considered the absence of remorse and the appellant's previous convictions as aggravating factors. The absence of remorse is not an aggravating factor, its presence is a mitigating factor. In the present case, the appellant did not have any relevant previous conviction which would serve to aggravate the offending.

10. In terms of mitigation, the judge had regard to the fact there was no violence against the injured party, that the appellant has no convictions for sexual or physical violence and further that he did not deny the injured party's age.

11. The judge imposed a sentence of four years on the first count and noting the continued phone contact from the appellant to the injured party, a sentence of three and a half years was imposed on the second count on a consecutive basis. The final 18 months of the sentence was suspended on terms.

12. It is argued on behalf of the appellant that the judge erred in imposing sentences on a consecutive basis. Mr McInerney SC for the appellant relies on *The People (DPP) v MJ* [2022] IESC 50 and *The People (DPP) v MU* [2021] IECA 357 and contends that a consecutive sentence was not required in the circumstances. In response, the Director argues that the offending was separate in terms of time and points to the aggravating factors.

Discussion

13. The range of penalty for this offence extends from that of a suspended sentence to one of 5 years imprisonment. There are undoubtedly aggravating factors, including the disparity in age between the parties, the injured party being 16 years old and the appellant, 32 years old. The injured party was the appellant's daughter's friend, and he was aware of her age. As observed by Edwards J. in *J McD*:

"A significant age disparity is a matter which can represent an aggravating circumstance, not because of the disparity per se but because it may be indicative of dominion by the older party over the younger party or abuse of a power relationship; or of the exploitation by the older party of a vulnerability in the case of the younger party; or in some circumstances represent a breach of a relationship of trust or of a duty owed to protect the younger party."

Moreover, there is no doubt but that the offending had a severe impact on the injured party.

14. Whilst consent is not a defence to the offence of defilement, the issue of consent and the age of an injured party may be factors to be considered in determining culpability whether an aggravating or extenuating factor. Obviously, where both parties are proximate in age and the charge is one of defilement, this may reduce culpability, but in the present case, there was a significant disparity in age. The fact of the matter is that the appellant took advantage of a young girl half his age, albeit that she was approximately 6 months shy of her 17th birthday at the time of the offending.

15. However, insofar as consecutive sentences are concerned, in our view, this was not one of those cases which merited consecutive sentencing. As stated in *MU*, consecutive sentences should be imposed sparingly. There are certainly cases where consecutive sentences are merited, but it appears that the judge imposed a consecutive sentence on the basis of the 120 messages to the injured party between the first and second series of sexual intercourse. This was not a case of multiple injured parties, nor was it a case where the offending was over a long period of time. The time period between the offences was limited, occurring during the months of July and August 2016. On a consideration of the overall offending conduct, we are satisfied that concurrent sentences would properly reflect the gravity of the offending conduct and the harm done. In those circumstances, we will quash the sentences imposed and proceed to re-sentence the appellant as of today's date.

Re-Sentence

16. We now proceed to re-sentence the appellant *de novo*. The appellant took advantage of a young girl, 16 years old. He was in a position of trust, and he accepted that he knew her age. The law is there for a reason to protect young persons from this type of conduct and consequently, sanction must follow. We believe the appropriate notional sentence to be three years' imprisonment.

17. The appellant has limited if any mitigation open to him. We have considered the material furnished to us on today's date and we have also considered that he now accepts his guilt which is of little or no weight for obvious reasons. He has many previous convictions and whilst he has

none for sexual offending, some of his convictions are serious and all serve to lead to a progressive loss in mitigation.

18. Consequently, we find the appropriate sentence on each count is one of three years' imprisonment. He remains by law on the sex offenders register.