



**THE COURT OF APPEAL**

**Neutral Citation: [2024] IECA 87  
Record Number: 245/2022**

**The President.  
Kennedy J.  
Burns J.**

**BETWEEN/**

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

**RESPONDENT**

**- AND -**

**J.L.**

**APPELLANT**

**JUDGMENT of the Court delivered on the 18<sup>th</sup> day of April 2024 by Ms. Justice Isobel Kennedy.**

- 1.** This is an appeal against severity of sentence. On the 14<sup>th</sup> December 2022, the appellant was sentenced in respect of two bill numbers: 68/2022 and 05/2022.
- 2.** The appellant pleaded guilty to counts 1 and 19 on bill number 68/2022 on a full facts basis, these were counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, and was sentenced to a term of five years' imprisonment.
- 3.** The appellant pleaded guilty to counts 6 and 7 on bill number 05/2022 on a full facts basis, these were counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990 as amended by s. 37 of the Sex Offenders Act, 2001 and the appellant was sentenced to a term of seven and a half years' imprisonment with the final two years suspended on count 6 with count 7 taken into consideration.

**Background**

***Bill No. 68/2022***

- 4.** This indictment contains 19 counts of sexual assault perpetrated against the appellant's niece at multiple locations when she was between the ages of 4 and 7. The sexual abuse consisted of the

touching of the injured party's vagina, digital penetration and the exposure of the appellant's penis to the injured party. A further incident was described by the injured party wherein she recalled that the appellant was on top of her and attempted to put his penis into her vagina. The appellant made an early plea of guilty in respect of this offending.

***Bill No. 05/2022***

5. This indictment contains 15 counts of sexual assault perpetrated against another of the appellant's nieces at multiple locations when she was between the ages of 8 and 11. The sexual abuse consisted of the appellant rubbing the injured party's leg, putting his hands down her pants and touching her vagina and one incident of digital penetration. The appellant would also make the injured party kiss him. The appellant pleaded guilty to this offending on the morning of the trial.

**Personal Circumstances of the Appellant**

6. The appellant is said to have grown up in a situation of some hardship. It is said that he was assessed as "*being slower than 99% of people in his age group category.*"

7. At the time of sentence, he was living alone. He had been living with his mother until her death in 2020.

**Sentencing Remarks**

8. The sentencing judge noted in respect of bill number 05/2022 that the maximum penalty was 14 years' imprisonment for all counts because of the change in the law in 2001 and that the maximum penalty in respect of the counts on bill number 68/2022 was five years' imprisonment.

9. In respect of 68/2022 the judge noted that there was an early plea and that there was also a plea, but at a later stage to 05/2022. He noted that the appellant had no record of conviction, that he was the carer for his mother and that he had some serious intellectual problems. However, the judge was satisfied that the appellant knew the difference between right and wrong and that he acted to avoid detection and so he was culpable for the offending against both injured parties.

10. The judge expressed the view that if there was only one injured party, the appellant's sentence would be somewhat less. He went on to sentence the appellant to a term of imprisonment of five years on bill number 68/2022 and seven and a half years on bill number 05/2022 with the final two years suspended for a period of two years, leading to an effective sentence of five and a half years for the offending.

**Grounds of Appeal**

11. The appellant appeals the severity of his sentence on the following grounds:-

*"Bill No. 68/2022*

*The learned sentencing judge erred in law and in fact and in principle in imposing a disproportionate sentence in that he:-*

- a) Failed to impose a sentence that had adequate regard to the mitigating factors in the case and in particular the defendant's intellectual deficits, his personal circumstances, the absence of previous convictions and his plea of guilty*
- b) Imposed the maximum sentence notwithstanding the defendant's plea of guilty and notwithstanding the mitigating factors in the case*
- c) Failed to have appropriate regard to the fact that the defendant, as someone with intellectual deficits, would find the prison environment more difficult than other defendants*
- d) Failed to nominate a headline sentence or nominate what allowance he was making for the mitigating factors in the case*

*Bill No. 05 /2022*

*The learned sentencing judge erred in law and in fact and in principle in imposing a disproportionate sentence in that he:-*

- e) Failed to impose a sentence that had adequate regard to the mitigating factors in the case and in particular the defendant's intellectual deficits, his personal circumstances, the absence of previous convictions and his plea of guilty*
- f) Failed to have appropriate regard to the fact that the defendant, as someone with intellectual deficits, would find the prison environment more difficult than other defendants*
- g) Failed to nominate a headline sentence or nominate what allowance he was making for the mitigating factors in the case"*

**Submissions of the Appellant**

**12.** Dealing first with bill number, 68/2022, the appellant submits that this Court is stymied in its analysis of the sentencing judge's decision on account of his failure to follow the guidance set out by this Court which requires him to indicate a headline sentence and then outline what reduction was being afforded for mitigation. It is argued that this in itself is an error in principle.

**13.** The appellant submits that it is axiomatic that the maximum sentence should only be imposed in a case involving a plea of guilty in the most exceptional cases. Section 29(2) of the Criminal

Justice Act, 1999 is cited to the effect that the court is required to be "*satisfied that there are exceptional circumstances relating to the offence which warrant the maximum sentence.*"

**14.** The appellant posits that the maximum sentence is only upheld where a guilty plea has been entered in cases concerning extremely serious offending against the backdrop of previous convictions for similar offending.

**15.** Reliance is placed on a case note of *People (DPP) v Begley* [2013] 2 IR 188 which summarises the judgment of the court as follows:-

*"That the correct approach to sentencing required a systematic analysis of the facts of the case and an assessment of the gravity of the offence, the point on the spectrum at which the particular offence or offences may lie, the circumstances and character of the offender and the mitigating factors to be taken into account. The aim of this approach was to arrive at a sentence that was both fair and proportionate."*

*"That the maximum sentence allowable for an offence was intended by the Oireachtas only to reflect the highest level of seriousness capable of being envisaged for that offence, both as to its intrinsic quality and as to the circumstances in which it was committed. Before a maximum sentence could be imposed, the sentencing court must satisfy itself that this threshold had been met."*

*"That, when imposing a maximum sentence against a backdrop of a guilty plea, the sentencing court must identify the 'exceptional circumstances', as required by s. 29(2) of the Criminal Justice Act 1999, in such a way that would make it absolutely clear why the maximum sentence was warranted when there had been mitigating circumstances in the case."*

**16.** It is submitted that no such identification took place nor did the facts of the present case warrant such an approach.

**17.** It is submitted that there was unequivocal and strong mitigation in this case including the appellant's plea of guilty, his previous good character, his difficult personal background and his limited intellectual functioning.

**18.** Emphasis is placed on the appellant's impaired intellectual functioning, leaving him behind 99% of the general population. It is submitted that same warranted a reduction in sentence and

that allowance should have been given for the fact that the appellant would find the prison environment more difficult than someone without such deficits.

**19.** It is submitted that the cumulative effect of the above errors is that the appellant is serving a maximum sentence for the offending in question with no allowance whatsoever for the strong mitigation in his case. It is submitted that any one of the above errors in principle could have justified the intervention of this Court but cumulatively, they make a strong case for the intervention of this Court.

**20.** In respect of bill number 05/2022, the appellant repeats the above submissions and submits that the effect of the failure to take into account the appellant's mitigation is more severe in this case on account of the more significant sentence imposed.

**21.** It is again noted that this Court is stymied on account of the sentencing judge's failure to indicate a headline sentence. It is submitted that whatever headline sentence the court may have had in mind, it was too high. It is further submitted that the offending in this case ought to have been regarded as being in the lower or mid-range for such offending, involving persistent touching and one incident of digital penetration.

**22.** Reliance is placed on *People (DPP) v MC* [2022] IECA 252 in which this Court dealt with a sentence appeal in a case where the appellant sexually abused his granddaughter who was aged 9-10 at the time of the abuse. The appellant did not plead guilty. The following portion of that judgment is cited:-

*"23. While all sexual assaults are serious, nonetheless a differentiation must be made for the nature of the conduct involved. The maximum sentence here was 14 years; the offence of sexual assault covers a multitude of acts varying in seriousness (whether by reason of the acts involved, which cover the entire spectrum up as far as the most serious form of sexual assault falling just short of "s.4 rape" under the 1990 Act or "rape" under the 1981 Act), or by reason of other circumstances connected with the offence.*

*24. Here the victim was touched and rubbed on her private parts inside and outside her clothes, and on one occasion was asked to touch the appellant's penis. We are of the view that a headline sentence of 7 years was too severe, even having regard to the aggravating factors outlined above.*

25. *In view of this error, we will proceed to re-sentence the appellant. We will nominate a figure of 5 ½ years as the headline sentence; and reduce that figure to 4 years to take account of the mitigating factors recited above. Given the nature of the offending, we are of the view that it is also appropriate to order post-release supervision for a period of 2 years.*”

23. It is submitted that the offending in that case was similar to that in this bill number. Yet notwithstanding that in *MC* the case was contested, the appellant in this case received a significantly longer sentence.

### **Submissions of the Respondent**

24. The respondent asserts that the fact that the sentencing judge did not nominate a headline sentence is not in and of itself an error in principle. It is said that the court approached sentencing in a global way.

25. The respondent emphasises that it was open to the court to impose consecutive sentences in this case. Reliance in this regard is placed on *People (DPP) v GMcD* [2023] IECA 94 and *People (DPP) v MJ* [2023] IESC 4.

26. It is submitted that in light of the gravity of the offences, the number of them, the breach of trust involved, the ages of the injured parties and the effect upon them, the sentences arrived at were well within the discretion of the sentencing judge.

27. It is pointed out that the sentencing judge took into account that a plea was entered on the day of the trial in respect of bill number 05/2022 and treated bill number 68/2022 as an early guilty plea and that he further took into account as mitigating factors: the pleas, the remorse shown, the lack of previous convictions, his work history and that he cared for his mother. It is submitted that the judge had sufficient regard to the mitigating factors in the case.

28. In relation to the appellant’s intellectual understanding, it is submitted that this was taken into consideration by the sentencing judge, but it is noted that he was of the view that the appellant could appreciate that what he was doing was wrong. It is further noted it was conceded by defence counsel in the court below that the appellant had tried to conceal his behaviour.

### **Discussion**

29. Of the grounds of appeal filed, most are applicable to both bills of indictment and the majority relate to the discount afforded for mitigation. One ground which is applicable to Bill No. 68/22 only, concerns the imposition of the maximum sentence and the final ground common to both bills relates to the failure to nominate a headline sentence, thus making it difficult to assess the discount allowed for mitigation. However, no issue of substance is taken with the failure to nominate a headline

sentence in itself, simply that the allowance permitted by the judge for mitigation cannot be determined.

**30.** The common ground that the judge failed to nominate a headline sentence was expanded upon in oral argument with the argument advanced that the issue of the appellant's intellectual difficulties was relevant in determining the appellant's moral culpability and where the judge failed to nominate a headline sentence, it cannot be seen as to whether he took this into account appropriately or at all. It is said that his intellectual functioning was such that it lessened his moral culpability.

**31.** Counsel for the appellant points to aspects of the psychological report furnished in support of this argument; in particular, that the appellant has a limited capacity to understand boundaries.

**32.** There is no doubt but that the appellant's intellectual functioning is at a very low level. It is also the position in law that the culpability of a person with the intellectual functioning of the appellant may be diminished; specifically, that he may not have the same level of moral culpability as an adult person without his level of difficulty.

**33.** In that regard, we have considered the hypothetical situation of the appropriate penalty for these very serious offences for a person without mental disability. We have considered this question in terms of a global punishment for both series of offending and conclude that a fully functioning adult could expect a post-mitigation global sentence in excess of ten years' imprisonment. It must be borne in mind that while the nature of the second series of offending could be said to be less egregious than the nature of the first, the fact of the commission of the first series of offending aggravates the second and so elevates the gravity of those offences. Those offences were serious in themselves, committed on a young child over a protracted period and on a regular basis. The later offences carry a maximum penalty of 14 years' imprisonment.

**34.** The first series of offences were very serious indeed and were committed on a young child aged between 4 and 8 years old. The offending was on a frequent basis. The maximum available penalty was 5 years' imprisonment. That offending included, *inter alia*, the insertion of an object into the child's vagina and an attempted rape, albeit charged as a sexual assault. There was also the evidence that the appellant told the child to be quiet or she would be in trouble.

A judge dealing with those matters alone would be justified in considering a headline at the top end of the upper end of the available range, if not the maximum sentence. Consecutive sentences could also be considered, adjusted accordingly to take account of the totality principle.

**35.** Moreover, it would be difficult to see how the imposition of consecutive sentences could be successfully challenged for the second series of offending given the fact of a second victim and also that the appellant would stop his activities if someone was approaching.

**36.** The judge considered the issue of intellectual functioning in terms of the appellant knowing right from wrong and that he did his best to avoid detection, and the evidence was clear in this respect. Counsel for the appellant contends that this does not provide an answer to whether the judge gave consideration to or adequately considered whether his culpability was diminished by his inability to understand matters and to understand boundaries and if so to what degree.

**37.** We are not persuaded that the judge erred in this assessment. He certainly referred to the issue of the appellant's intellectual difficulties and stated that he must take that into account. The degree to which he took account of this was a matter within the discretion of the sentencing judge.

**38.** While the judge did not identify a headline sentence, it is not entirely clear as to the degree to which he felt the appellant's intellectual functioning diminished his culpability, *but* it is very clear that the ultimate sentence imposed was less than that which would have been imposed if the appellant was a fully functioning adult.

**39.** In terms of Bill No. 68/22, insofar as imposing the maximum sentence is concerned, it must be recalled that the judge imposed a global sentence in respect of these offences. It was within his discretion to impose lesser sentences on each of the offences to which the appellant pleaded guilty and impose consecutive sentences, but he chose to impose a sentence on a global basis to reflect the gravity of the offending. There were 19 counts on the indictment and evidence was given on a full facts basis. Moreover, whilst it could be said that the judge did not state in express terms that he was satisfied that there were exceptional circumstances that warranted the maximum sentence, the reality is that he stated more than once, that he was punishing the appellant for his cumulative misbehaviour. It is readily apparent that the judge in imposing the maximum sentence was sentencing the appellant for the series of offences on this bill of indictment, there being numerous counts and prolonged and frequent offending. While he could have structured the sentence in an alternative manner which may have had the result of the same or indeed a greater sentence, we see no error in his approach.

**40.** In those circumstances, we are not persuaded the judge erred in his approach in imposing a global post-mitigation sentence of 5 years' imprisonment.

**41.** The balance of the grounds common to both bills concern the said failure of the judge to have adequate regard to the mitigating factors including the appellant's intellectual deficits, personal



circumstances, the absence of previous convictions, the pleas of guilty and that he is a person who would find incarceration more difficult as a consequence of his intellectual deficits.

**42.** The judge acknowledged many of the mitigating factors and again while it is not possible to determine the reduction he afforded for mitigation, the ultimate sentence imposed on both bills was that of 7 ½ years with the final two years suspended, thus leaving a custodial element of 5 ½ years imprisonment.

**43.** On the second bill, that is bill number 05/22, the appellant entered a plea of guilty after a jury was sworn in, thus reducing the weight to be afforded to his plea. The period of suspension was in order to aid his rehabilitation.

**44.** While the appellant certainly had clear mitigation to include his difficulties and how that might make a prison sentence more difficult for him, we are not persuaded that the judge erred in the ultimate sentence imposed.

**45.** It may well be that the judge could have adopted a different approach to sentencing from the point of view of structure, but when we look to the actual carceral element of 5 ½ years for such protracted and serious offending with the associated breach of trust and impact on the victims, to name two of the aggravating factors, and then look to the mitigation present, it does not seem to us that the cumulative sentence imposed is disproportionate.

**46.** Accordingly, all grounds fail and the appeal is dismissed.