



THE COURT OF APPEAL

[2024] IECA 292

Record Number: CCAOT0082/2023

McCarthy J.

Kennedy J.

Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

D. C.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 11th day of November 2024 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. On the 1st of March 2023, the appellant was sentenced to 5 years imprisonment in respect of count 2 on the indictment, indecent assault contrary to common law and s.10 of the Criminal Law (Rape) Act, 1981. In respect of counts 4, 5 and 6 on the indictment, relating to sexual assault contrary to s.2 of the Criminal Law (Rape)(Amendment) Act, as amended by the provisions of s.37 of the Sex Offenders Act, 2001, the appellant was sentenced to

20 months imprisonment on each count, those sentences made concurrent inter se, but consecutive to the sentence in respect of count 2. The final six months of the latter sentences were suspended for 2 years on conditions.

Factual Background

2. The appellant was convicted in 2022 in respect of sexual offending against two of his nieces. The offending occurred on four separate dates over a six year time span, the appellant being aged between 31 and 37 years of age during the course of the offending. One niece, (Ms. K), was aged 11 at the time of the incident relating to count 2, and 17 at the time of the incident relating to count 6, while the other niece (Ms. M) was aged 16 at the time of the incidents relating to counts 4 and 5, which occurred on the same day.

Personal Circumstances of the Appellant

3. The appellant contested his trial but was co-operative with the investigation. He has now accepted the jury verdict and wrote a letter of apology to his victims following his conviction.

4. The appellant has a good history of employment and no previous convictions. The appellant has high blood pressure and cholesterol issues.

Sentencing Judge's Remarks

5. The sentencing judge had regard to a number of "significant aggravating features": the young age of the victims, particularly the niece who was 11 years old at the time of the offending impugned by count 2; the significant age disparity; an extreme breach of trust in light of the familial relationships involved, and the fact the offending took place within the family home; the significant harm caused to both victims and their family as demonstrated by the victim impact statements.

6. In light of this, the court found that the assault the subject of count 2 was at the upper end of the mid-range of gravity, and nominated a headline sentence of 6 years. In relation to counts 4, 5 and 6, the court found that the offending was at the mid-range of gravity and the appropriate sentence was one of 2 years on each count.

7. The sentencing judge considered the mitigating factors to be the fact the appellant has no previous convictions; the appellant's good work history; his family's testimonials; his involvement in his local community; his elevated blood pressure and cholesterol issues; a late apology and acknowledgement of the jury verdict, indicating some remorse.

8. The sentencing judge had particular regard to the Supreme Court decision in *DPP v M.J.* [2022] IESC 50.

9. He noted that the conduct of the defence had significant negative effects on the family of the victims, and that an early plea might have prevented this. The judge stated that, therefore, the "significant mitigation available on a guilty plea in sexual offences is completely absent in this case".

10. In light of the available mitigation, the judge reduced the headline sentence of 6 years to 5 years, and reduced the headline sentences of 2 years to 20 months, respectively.

11. The 20 month sentence in regard to the offence against Ms. K was imposed consecutive to the 5 year sentence in light of the 6 year lapse in time between the two offences, and because the judge found that such consecutive sentencing would not offend the totality principle.

12. In relation to the two 20 month sentences in respect of offending against Ms. M, the sentencing judge made these concurrent to one another and concurrent to the 20 month sentence against Ms. K, but consecutive to the 5 year sentence

imposed on count 2. The judge stated this was because the offences occurred over a period of a number of years, and because there was a different victim from the first offending.

13. The final six months of the sentence was suspended for a period of two years post release, on condition that the appellant cease all sporting activities insofar as they involve children, and in particular that he does not train or coach persons under the age of 18 years in either badminton or swimming.

Grounds of Appeal

14. The appellant relies on 6 grounds of appeal, but essentially the principal argument put forward at oral hearing is that the headline sentence imposed on count 2 was excessive.

Submissions of the Appellant

15. The appellant submits that the sentencing judge erred in principle by failing to have adequate regard to a number of mitigating factors, in particular: the apology and acceptance of the jury verdict; the fact that the appellant has no previous convictions particularly where he is in his mid-60s, the appellant's good work history; his age and health; the impact of a custodial sentence on his family members, and particularly the financial impact on his wife.

16. The appellant also submits that sentencing judge misidentified the correct headline sentences. In this regard, the appellant places reliance on, and draws analogies from, the comparator cases of *DPP v P.R.* [2019] IECA 150 and *DPP v AD* [2018] IECA 308.

17. Finally, the appellant submits that the sentencing judge did not have adequate regard to the totality principle in imposing a consecutive sentence. The appellant places reliance upon *DPP v MJ* [23023] IESC 4 in this regard.

Submissions of the Respondent

18. The respondent submits that the sentence imposed was proportionate in all the circumstances, and the sentencing court manifestly had regard to the mitigating factors and the respondent's personal circumstances in its remarks. The respondent submits that the reduction afforded was well within the sentencing judge's discretion, and notes that the sentencing judge went further in suspending the final 6 months of the sentences in respect of counts 4, 5 and 6 despite a lack of evidence of a capacity to rehabilitate.

19. The respondent submits that the sentencing judge was correct to remark, "[t]he significant mitigation that is available on a guilty plea in sexual offences is completely absent in this case". The respondent submits that this is particularly relevant in this case in light of the significant negative impact the trial process had on the victims and their familial relationships. In this regard, the respondent places reliance on the case of *DPP v P.S.* (unreported) Ní Raifeartaigh J, March 12th 2024.

20. The respondent further submits that the sentencing court was entitled to impose a consecutive sentence, gave specific reasoning for doing so, and gave adequate regard to the totality principle. The respondent places further reliance on the case of *DPP v P.S.* in this regard.

Discussion

21. The principal argument advanced on behalf of the appellant is that the headline sentence nominated on count 2 is too high in light of the nature of the activity. While some issue is taken with the discount afforded for mitigation, the emphasis rests firmly with the headline nominated on count 2 and the "domino effect" of that notional sentence on the ultimate sentence.

22. The aggravating factors of the offending the subject of count 2 are readily apparent. The age of the child, the relationship being that of uncle and niece, the significant breach of trust, the significant impact on the victim. The activity involved the appellant causing the child to go onto a bed, spreading her legs while clothed, getting on his knees and facing her genital area, running his hands along her legs and onto her hips while commenting that she was a lovely girl. There is no doubt that this offending is serious carrying with it the undoubted element of humiliation and confusion for the victim. It is quite understandable that the actions of the appellant has had and continues to have long lasting effects on the victim.

23. We are urged to have regard the decisions of the Supreme Court, in particular, *DPP v M.J.* where it is said the offending was more serious in nature and where in the present case, the counts were not considered on a sample basis but constituted four separate incidents.

24. The respondent contends that the sentences imposed reflect the gravity of the offending and are within the margin of appreciation afforded to a trial judge.

Conclusion

25. We consider the offending the subject of count 2, while serious, is not offending which merited the headline sentence of 6 years as nominated by the sentencing judge. While there are significant aggravating factors, certain aggravating factors are not present.

26. As we find an error in principle on this discrete issue, we will proceed to quash the sentences imposed and proceed to re-sentence as of today's date.

Re-Sentence

27. Gravity is assessed with reference to the culpability of the offender and the harm done. There can be no doubt whatsoever that the harm done to both victims

was significant and long-lasting. In light of the aggravating features on count 2, we consider the appropriate notional sentence to be that of 4 years imprisonment.

28. In terms of mitigation, it is said that the appellant now accepts the verdict of the jury, and preferred an apology at the point of sentence in respect of which the judge failed to give due weight. We are not impressed by this argument. While every accused is entitled to contest a trial, if convicted, then that accused does not have the benefit of a plea of guilty in mitigation.

29. We acknowledge the mitigation present and have regard to his conduct whilst incarcerated. Accordingly, we reduce the notional sentence to that of 3 years and 4 months on count 2.

30. We find the sentence imposed on counts 4 and 5, being that of 20 months after discounting for mitigation, to be appropriate.

31. However, the position is different when we look to count 6. This count concerns Ms. K and the judge properly considered a consecutive element to the sentence on this count. His reasons for doing so are entirely logical. This offending concerned the same victim after a period of some 6 years had lapsed, and when the victim was aged 17 years. He compelled her to drink alcohol which aggravates the offence and then sexually assaulted her. The fact that he had previously sexually assaulted her also aggravates this offence. The sexual assault involved the appellant putting his hand under her top and "mauling her breasts". This was while she was feeling unwell and had lain down on the couch. Aside from her young age, the intake of alcohol provided by him clearly rendered her vulnerable.

32. Consequently, bearing in mind the penalty available to the Court, that being 5 years imprisonment, we consider the appropriate sentence to be that of 3 years imprisonment, which sentence we reduce to that of 2 years and 6 months. We impose the sentences on counts 4, 5 and 6 concurrent inter se but consecutive to

the sentence imposed on count 2. This brings the total sentence to one of 5 years and 10 months.

33. The sentence must be a proportionate one and in order to give effect to the principle of totality, we will impose a sentence of 3 years imprisonment on count 2 and 2 years imprisonment on count 6. We are not minded to suspend any element of that 5 years.

34. However, we consider it necessary to impose a period of post release supervision to protect children from the appellant and to prevent the commission of further sexual offences.

35. We will impose a period of 5 years post release supervision under the supervision of the probation services, he must comply with all directions of the service and on the condition that he cease all sporting/training or coaching of any persons under the age of 18 years.

36. He remains on the sex offenders register for life.