



THE COURT OF APPEAL

[71/19]

**Edwards J.
McCarthy J.
Kennedy J.**

**BETWEEN
THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]**

RESPONDENT

AND

A.B

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 13th day of May 2021 by Mr Justice McCarthy

1. This is an appeal against severity of sentence. The appellant's appeal against conviction was dismissed by this Court on the 18th of February 2021. The background to the case is set out in that judgment and this judgement should be read with it. However, we think it is material to refer to certain of the facts here too, to some extent.
2. The victim herein is the appellant's stepdaughter and was born on the 13th of May 1976. The appellant's offences began when his stepdaughter was a few months short of her twelfth birthday in or about the time when she first menstruated; these offences involved oral sex. When she attained the age of 12 he began to have sexual intercourse with her and this occurred weekly if not twice weekly and on a regular basis thereafter until she attained the age of 16. The offences occurred in the family home and whilst her mother was out at work. The last offence occurred on the 30th of June 2017. He manipulated and controlled the victim over the years in question, abusing his position as her stepfather; the gravest breach of trust took place.
3. The appellant migrated to Ireland in 2010 and married the victim's mother. They had a child of their own in 2013. The appellant is an Irish citizen. He has some English. He worked in an unskilled capacity after he arrived here. He has no previous convictions.
4. The trial court had the benefit of a Victim Impact Report. We cannot set it out *in extenso* but we have given it careful consideration as did the trial judge; it is plain that the consequences for the victim were of the utmost seriousness and this is reflected in the headline sentence.
5. Before we proceed further we might refer to the fact that the appellant had entered a plea of guilty to three counts (numbers 29, 30 and 31 on the indictment) of defilement. These

were in respect of three freestanding incidents of sexual intercourse and accordingly in what we might describe as the overall scheme of offending those pleas could not be regarded as being of any significance having regard to the frequency with which the offence of rape occurred.

6. We refer to a portion of the judgment of the learned trial judge which we think material as follows:-

"Now, the Court, having given this serious consideration, does not consider the plea to Counts 20 [sic], 30 and 31 in any way entitling the accused person to mitigation. The injured party had to give evidence, he denied all the other charges, and I really consider that aspect, in terms of the plea, a neutral issue in relation to the sentence the Court has to impose. Now, it's not an aggravating factor, the fact that he pleaded guilty to the vast majority of the charges, but the mitigation which he would be entitled to on a full plea of guilty to the offences in a timely way, prior to the trial commencing, is not available to the accused person. Of course, the aggravating circumstances of the offences are the serious breach of trust; a stepfather in a position of trust to his stepdaughter and the length and time and severity of the abuse suffered by this young girl. This is a case of the utmost seriousness.

The mitigation circumstances are effectively two; the accused's previous good character and the substantial imposition on him, as an Irish citizen but of foreign extraction, where his command of the English language is very small or slight, and therefore imprisonment will be difficult for him, certainly more difficult than if he had a full command of the English language and used to the culture here, so the Court takes those two matters into consideration. The Court notes that he was a good provider, that he had no previous convictions, but really, the intolerable nature of the abuse, and there was a kind of an aspect to it which, I mean, the Court was particularly disturbed about, as if it was some sort of -- something that just happened as a matter of rote, that he felt that he was entitled to do this, ringing her up, or contacting her, that's an element to it which causes the Court some serious concern, in other words that he was kind of regarding it as part of his normal routine nearly, and really, when you think of it, the nature of the offences committed on [the complainant] really just doesn't bear thinking about and -- a lovely young woman whose self-esteem has probably been damaged for life as a result of these crimes. The Court is quite entitled to sentence consecutively, but it will, effectively, sentence concurrently, but reflecting what the Court has already said, the seriousness of the offences, on the basis that the Court has an entitlement to sentence consecutively."

7. The judge thereafter proceeded as follows:-

"So, having taken all those matters into consideration, I'm going to start at the rape counts, and the offences will be, as I say, the sentences will be imposed consecutively. In relation to each count, from Count 14 to 25, the Court imposes a sentence of 12 years imprisonment. The headline sentence that the Court has taken into consideration is of 15 years imprisonment, so the mitigation in relation to the

fact that he is of foreign extraction and of previous good character, is a period of mitigation of three years. So, Count 14 to 25 inclusive, is a sentence of 12 years imprisonment, to be imposed concurrently. Counts 26 to 28 inclusive, the same, 12 years imprisonment, to be imposed concurrently. Count 32 is a period of five years imprisonment, to be imposed concurrently. Count 32 is a sexual exploitation, that's five years imposed concurrently. And Count No. 1, the Section 4 Rape, before she was 12, six years imprisonment to be imposed concurrently in relation to the other matters, so the total sentence imposed on [Mr A.B] is a period of imprisonment of 12 years."

The Court took Counts 29, 30 and 31 into consideration.

Grounds of Appeal

8. The appellant's grounds of appeal against sentence (we use the enumeration of the original notice of appeal which dealt with both conviction and sentence) are as follows:-

Ground 4: The learned trial judge erred in fixing a headline sentence of 15 years;

Ground 5: The learned trial judge erred in failing to give weight to the relevant mitigating circumstances, namely the appellant's guilty plea in relation to Counts 29, 30 and 31 and the appellant's co-operation with the Gardaí during the investigation;

Ground 6: The learned trial judge erred in fact and in law in failing to suspend a portion of the custodial sentence.

We deal with them together.

9. Mr Reynolds very sensibly conceded at the commencement of his presentation that the fixing of the headline sentence at 15 years could not be criticised and accordingly the appeal was advanced on the remaining grounds with which we will deal together.

10. The appellant submits that the sentencing judge did not afford any weight to the appellant's guilty plea in relation to Counts 29, 30 and 31. An early guilty plea it is submitted in any matter constitutes significant mitigation. It is submitted that the timing of the plea in question could and should be taken into account by the sentencing court but should not mean that no credit or weight be afforded to it. Section 29 of the Criminal Justice Act, 1999, provides that the relevant sentencing court, if it considers it appropriate to do so, shall take into account the stage in the proceedings at which the person indicated an intention to plead guilty, and the circumstances in which this indication was given. It was recognised by Detective Garda Corrigan, during the sentencing hearing on the 25th March 2019, that the appellant co-operated with the Garda investigation, agreed to the voluntary interview and made admissions in the course of the voluntary interview. It is submitted that the judge did not afford any weight to this. The judge expressly acknowledged two mitigating factors, namely the appellant's previous good character and the fact that he was a prisoner with poor English, being an Irish citizen but of foreign origin.

11. We do not think any significance can or should be attached to the supposed cooperation of the appellant with the Gardaí when investigating the matter or any admissions made by him because the appellant resiled from the substance of those admissions and contested the matter.
12. The respondent *inter alia* submits that it is difficult to see how the pleas to Counts 29, 30 and 31 could mitigate the sentences to be imposed in respect of charges to which he had not pleaded guilty but rather had been convicted by a jury following a trial in which the account of the injured party was challenged.
13. No one doubts but that consideration should be given in the ordinary course to a reduction in sentence on the basis of pleas of guilty. A plea of guilty does not inevitably result in a reduction in sentence but of course the general rule is that it will ordinarily be a mitigating, perhaps a significant mitigating, factor giving rise to such a reduction. In the present case there is no reality to the idea that the pleas in any meaningful way were in some sense mitigating since they related to three discrete incidents of sexual intercourse in circumstances where the offending extended to offences involving sexual intercourse as often as twice a week over four years. Certainly, even if in theory the judge fell into error the post mitigation sentence is not open to criticism.
14. The remaining issue then is whether or not the judge ought to have suspended a portion of the sentence of twelve years. We do not see that there was any evidential basis for doing so. Counsel referred in to a Governor's Report of 11 May as to how the appellant spends his time in custody. It appears that the appellant has been doing well in prison in terms of behaviour and engagement in classes. In this connection he also emphasised the fact that the appellant has little English. The fact that the appellant is not a fluent English speaker and was not born here was taken into account by the judge. We cannot have any regard to the Report.
15. We accordingly reject the appeal on all grounds.