



**THE COURT OF APPEAL**

**Record No: CA 84/2019**

**The President  
Edwards J.  
Kennedy J.**

**Between/**

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

**RESPONDENT**

**V**

**M. C.**

**APPELLANT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 19th day of October 2021 by Mr Justice Edwards.**

**Introduction**

1. On the 5th March 2019 the appellant was convicted of 72 counts of indecent assault contrary to common law as provided for by s.6 of the Criminal Law (Amendment) Act, 1935. The indictment had charged the appellant with 73 counts of indecently assaulting the complainant, all of which were said to have occurred in her place of residence, bar one incident which was said to have occurred at an unidentified beach. The trial judge directed an acquittal in respect of this charge. The counts covered a time period between October 1973 to August 1979 and were broken down into 4-month increments with four separate allegations being alleged in each separate increment. The appellant was convicted of all 72 remaining counts by a 10-2 majority verdict of the jury.
2. On the 3rd of May 2019 the appellant appeared before Her Honour Judge Elma Sheahan in the Circuit Criminal Court in Dublin for sentencing and was sentenced to an overall term of ten years, comprising of consecutive terms for Counts No's 1-7, and concurrent terms for Counts No's 8 to 72. The individual sentences imposed on Counts No's 1-7 were sentences of 17.1428571429 months (rounded to 17.14 months) being 120 months divided by 7. The individual sentences imposed on Counts No's 8 to 72 inclusive were terms of 20 months imprisonment, to be served concurrently with the sentence on Count No 1 (i.e., they commence running at the same time as Count No 1 and will expire through effluxion of time after 20 months less whatever remission the appellant has earned. Strictly speaking the Circuit Court's Order which states that they are "*to run concurrently to each other and to the sentence imposed on Count No 1*" should have expressed them as being concurrent to Counts No's 1 and 2, as they slightly overlap

Count No 2. However, no point has been made about this and in practical terms there are no implications for the amount of time that the appellant will have to serve having regard to the consecutive sentences that were also imposed.)

3. The appellant lodged a notice of appeal against his conviction in the Court of Criminal Appeal on 13th of May 2019. On the 25th of March 2021 the Court of Criminal Appeal dismissed the appellant's appeal against his conviction.
4. The appellant now appeals against the severity of his sentence.

#### **Factual Background**

5. The complainant was born in 1966. The appellant was in a relationship with the complainant's mother whom he had first met when they were working in the same restaurant. They subsequently moved into a 3-bedroom apartment in a north Dublin suburb where the two adults shared a room and the complainant and her stepbrother, who was six years younger than the complainant, occupied the other two rooms. The appellant provided the role of de-facto stepfather in the complainant's life at the time of the offences.
6. The complainant stated that the first offence occurred at a time before her Holy Communion when she was 7 years of age. She gave evidence that the appellant was sitting in a chair and tickling both the appellant and her stepbrother when the appellant unbuckled his trousers and asked the complainant to rub his penis saying that "*If you tickle this, something will happen*" and "*Rub it*". The complainant stated that she did rub his penis and it became erect. The appellant then said to the complainant "*Don't say anything to anybody.*" The complainant stated that she was always afraid of the appellant.
7. Thereafter there were repeated incidents of abuse between 31st October 1973 and 24th August 1979 comprising of,
  1. the appellant having the complainant rub his penis.
  2. the appellant penetrating the complainant's mouth with his penis,
  3. the appellant touching the complainant's vagina with his mouth and
  4. the appellant having the complainant rub herself up and down his penis while she was naked.
8. The complainant stated that the offences occurred when her mother was out at work or at bingo and generally lasted around one to two hours. The appellant would wake the complainant up and bring her to his bedroom where he would make her take off her night dress and make her rub and suck his penis. The appellant would make the complainant kiss him all over his body and he would kiss her on the mouth and lick her vagina. The complainant said the appellant treated her like a "*sex doll*". The complainant stated that the offending occurred two to three times a week until she was 12 years of age. The

complainant attributed the cessation of offending behaviour to a combination of the onset of her periods and her starting comprehensive school.

14. Gardaí first received an email from the complainant on their website which stated that the complainant had been the victim of historic sexual abuse in a named area of Dublin. On the 15th February, Sergeant R McM contacted the complainant and took details of the circumstances surrounding the sexual abuse. On the 22nd of October 2015 the complainant attended a named garda station and made a statement to Sergeant McM.
15. On the 1st of November 2015 the appellant was contacted by the gardaí for the first time and was invited to attend a named garda station which he attended on the 4th of November 2015 where the allegations were put to him. He reattended, at the request of the gardaí for further questioning on the 8th of June 2016 and denied ever being in the apartment on a Friday night at the time of the offences as he would have been in a club and that he was "*never the type of guy who sat in minding kids.*" He was arrested and charged on the 11th of September 2017.
16. It was confirmed by Sergeant McM that no similar allegation had ever been made against the appellant by any other individual.
17. The appellant pleaded not guilty at his trial.

#### **Impact on the victim**

18. In her victim impact statement, the complainant outlines the "*the psychological effects that were caused by the child abuse*" and the effect the resultant drug and alcohol abuse had had on her mental health. She stated that this contributed to her inability to provide an "*emotional stable home*" for her daughters and that they became affected indirectly by the offence.
19. The complainant stated that following the abuse at a young age and into her adult life she has suffered from depression due to her doubts as to her sexuality and her inability to form healthy relationships and emotional connections with people.
20. She continued to explain how the abuse had led her to being unable to trust people and engaging in behaviour which pushed people away at times in her life when she needed their support the most. She described herself as a "*lonely wolf*".
21. The complainant described how the abuse had had an impact on how she interacts with her own children and had affected her normal parent/child relationship. She described how she is always fearful when her daughters go out, believing them to be in danger from a sexual assault.
22. The complainant stated that she had been in therapy and counselling for most of her life and that she had been diagnosed with Post Traumatic Stress Syndrome (PTSS) and was currently undergoing a course of Eye Movement Desensitization Reprocessing (EDMR) treatment.

23. The claimant described how her childhood had been taken away from her stating "*I can say with 200% that I have never been a child.*" She suffered from alcohol and drug addiction problems from an early age and left the family home when she was 16 years of age.
24. The complainant concluded that she is now settled in another country and has been drugs free from four years prior to the trial. She is receiving therapy specifically tailored for women who have suffered abuse, along with trauma therapy and alcohol addiction counselling.
25. In relation to coming forward and making the complaint against the appellant she stated, "*This has been an emotional roller coaster and I never thought I would be able to get this far.*" She stated that the impact of the abuse lives with her every day.

#### **Personal circumstances of the accused**

26. The accused was born on the 29th of July 1948 and was 70 years of age at the time of the trial.
27. The appellant met the complainant's mother when they were working in the same restaurant and after their relationship developed, they moved to a three-bedroom house in a north Dublin suburb with complainant and the appellant's son, who was 6 years her junior.
28. The appellant and the complainant's mother never formally married but she used his surname for formal occasions. The claimant went by the appellant's name as a child to avoid any stigma. They were in a relationship for 8 years and had a child together. The relationship ended in 1988 when he moved out of the house. He then formed another relationship and currently he and his wife care for their grandson who suffers from autism. Both the appellant's daughter and his grandson live with the appellant.
29. The appellant had worked in a hotel as a chef in 1961 or 1962 and then began working in the restaurant where he met the complainant's mother in 1968. During the trial he stated that he used to work night shifts which would finish at 11pm.
30. The trial judge noted that the appellant was of previous good character and had a good and productive work life over many years.
31. The appellant has two convictions under s.49 of the Road Traffic Act, dating back to year 2000.
32. The appellant has no previous convictions for sexual offences.

#### **Remarks of the sentencing judge**

33. The trial judge noted that notwithstanding that the offences occurred 45 years previously, the victim impact statement demonstrated the fear and anxiety the complainant continued to feel to this day. She stated "*It is difficult to overstate or underestimate the level of fear or anxiety which must afflict a child so young when the regularity of the*

*abuse attested to by the appellant is part of one's daily life for those formative years of early childhood.*" As a de facto stepfather he was in a position of trust.

34. The trial judge outlined the aggravating factors of the case as follows:
  1. The seriousness of the offence
  2. The breach of trust by the appellant
  3. The youth, vulnerability and dependence of the complainant on the appellant even after the abuse ceased.
  4. The position of authority of the appellant within the family unit.
35. The trial judge then set out the mitigating factors as follows:
  1. The appellant's previous good character.
  2. The appellant's productive work life over many years.
  3. The appellant's age.
  4. The appellant's more recent long-term relationship.
  5. The appellant had not come to garda attention for similar offences since 1977.
    - i. The appellant's placement on the Sex Offenders Register and its penal nature.
    - ii. The effect of prison on the accused due to his age and good character.
  6. The care the appellant provides with his wife to his autistic grandson.
36. The trial judge noted the since the appellant had *"not expressed any remorse or acceptance of the verdict"* the court was not able to *"assess the appellant's rehabilitative prospects"* but that the court could note *"the lack of insight on his part"* at that point. The trial judge further noted the *"length of time since the offences were committed"*, being in the region of 45 years and the advanced years of the appellant.
37. In assessment of the sentencing required the trial judge was of the opinion that the sentencing range of a maximum of 2 years per count did *"not meet the seriousness of the offending behaviour."* She continued by stating that *"the court is required to impose a sentence in accordance with the requirements of proportionality in an appropriate manner which affords adequate weight to the particular and unique circumstances before it."* She then set out the necessary factors which the court must be cognisant of in the assessment of sentence as:
  1. The scale and nature of the offending.
  2. The circumstances of the offending.

3. The impact on the complainant.
  4. The ages of the appellant and the complainant respectively at the time the offences were carried out.
38. In relation to the abuse in the case before her, the trial judge held that "*culpability is aggravated by the nature of the offending, the intensity and the persistence of the abuse, which was at the upper end of indecent assault*", noting that the effects of the abuse had had a devastating life-long impact on the complainant's life.
39. Acknowledging that the imposition of "*consecutive sentences ought to be the exception rather than the rule*", the trial judge however, was of the view that the case demanded a significant sentence due to culpability and the harm done and that it was appropriate in this case that she exercise her discretion in that regard.
40. The 72 counts in the case were sample charges charged on a three-monthly basis. Taking into consideration the principles of deterrence, retribution and rehabilitation, to "*meet the verdict of the jury for reasons already set out in the absence of mitigation*" the trial judge held that the appropriate headline sentences were;
- i. On Count 1 to Count 7 inclusive, two years to run consecutive to each other.
  - ii. On Count 8 to Count 72 two years on each count to run concurrent to each other and Count 1.
41. To reflect mitigation the sentencing judge reduced each individual two year or 24-month headline sentence by four months leaving individual post mitigation sentences 20 months before consideration of totality. In doing so, the trial judge stated that although "*the greatest mitigating factor of a plea of guilty was not available to the court*" she acknowledged that "*this was in no way to be seen as a criticism of the accused's right to call on the State to prove their case against him.*" The sentencing judge expressed awareness that a lengthy term of imprisonment would be difficult for a man in his 70's, but noted that the court had not been furnished with any evidence as to the appellant's health status.
42. Taking the principle of proportionality and totality into consideration, and also bearing in mind the age of the appellant and the fact that he hadn't been in prison before, the trial judge saw fit to further reduce the overall sentence from 11 years to 10 years.
43. Having regard to the cases of *The People (DPP) v. JG* [2018] IECA 84, *The People (DPP) v. Kenneally* [2018] IECA 274, and *The People (DPP) v. JS*, [2017] IECA 318, and in the absence of the acceptance of the jury's verdict or any expression of remorse by the appellant, the sentencing judge did not view it appropriate to suspend any portion of the sentence.
44. The sentence was backdated to the 5th of March 2019.

### **Ground of Appeal**

45. The appellant appeals against the severity of his sentence on the following grounds:

1. The sentence imposed by the sentencing judge was excessive and oppressive in all the circumstances;
2. The sentencing judge erred in law and in fact in placing excessive weight on the aggravating factors as outlined during the sentencing hearing;
3. The sentencing judge erred in failing to attach sufficient weight to the age of the appellant and his previous unblemished record;
4. The sentencing judge erred in failing to attach any weight to the Appellant's medical conditions and the difficulties these would cause him in custody.

However, ultimately the only ground that was pressed at the hearing of this appeal was Ground of Appeal No 1.

### **Submissions of the appellant**

46. Relying on the cases of *The People (DPP) v. P.R.* [2019] IECA 150 and *The People (DPP) v. J.H.* [2019] 355 counsel for the appellant submits that in comparison with cases of a similar nature, the sentence imposed in the case herein is excessive. It was submitted that notwithstanding that the accused in *P.R.* entered a guilty plea, the case still shares many similarities with the present case in relation to position of authority of the accused, the breach of trust and the youth of the victim. It was submitted that the sentence in the present case is five times that which was imposed in the *P.R.* case.
47. Notwithstanding that the Court of Appeal upheld a sentence of 15 years for offences of rape and sexual assault in *J.H.*, the court went on to acknowledge that the sentence was severe due to the seriousness of the offence. Counsel for the appellant also contends that the sentence of 10 years imposed in the present case is excessive where the offence is of a level of less seriousness and the appellant has no previous convictions for sexual assault.
48. Counsel for the appellant submits that by imposing two years as the headline sentence in relation to counts 1 to 7 the trial judge was placing the offence at the highest possible level.

*"Taking into account the principles of deterrence, retribution and rehabilitation, the Court is of the view that to meet the verdict of the jury for the reasons already set out in the absence of mitigation, the appropriate sentence is, on Counts 1 to Count 7 inclusive, two years consecutive to each other , two years on each count consecutive to each other in relation to Counts 1 to 7 inclusive. And in relation to Counts 8 to 72, two years on each count to run concurrent to each other and concurrent to Count 1."*

The judge then chose to exercise her discretion in making the first seven counts consecutive to each other resulting in a cumulative sentence of 14 years. In reliance of

*People (DPP) v. Loving* [ 2006] IECCA 28 Counsel contends that this does not accord with Irish jurisprudence and that the case herein does not justify the imposition of a maximum sentence.

49. In support of the contention that the offending in this case was not at the most serious level counsel for the appellant urges upon us that many frequently encountered aggravating factors highlighted by Mr O'Malley in his work on Sentencing Law and Practice (3rd edn) were not present in this case, including:
- i. committing rape or another offence by way of revenge or as an expression of hatred or animosity towards a category of persons to which the victim belonged;
  - ii. plying a young victim, in particular, with alcohol or drugs to facilitate commission of offence;
  - iii. making a video recording of the assault or taking intimate photographs of the victim;
  - iv. abducting or attacking a stranger at night;
  - v. use of a firearm, knife or other dangerous weapon to commit the offence or to intimidate the victim;
  - vi. making a threat to kill.

Counsel submits that the absence of these factors takes the case herein out of the highest category.

**Submissions of the respondent**

51. Counsel for the respondent submits that the appellant has not demonstrated to the court that the sentence imposed upon him was excessive and disproportionate. It is submitted that the trial judge set out her sentencing decision in a comprehensive and complete manner in order to ensure that the sentence imposed was proportionate and struck the appropriate balance between the offending conduct and the personal circumstances of the offender.
52. The respondent submits that the court took all the relevant factors into account and imposed a proportionate sentence in accordance with the principle of totality.
56. In considering the principles of proportionality and totality the trial judge continued:

*"Taking the age of the accused, as well as the fact that he hasn't been in prison before into account, it is appropriate that the overall sentence of 11 years and a half be reduced to 10 years. I have considered suspending a portion of the accused's sentence; but where there is no acceptance of the jury's verdict or remorse expressed, it is not appropriate in my view to suspend any part thereof.*



57. Counsel for the respondent submits that the appellant has failed to identify any error in law or principle such as to warrant the interference of the court with the sentence imposed.

### **Analysis and Decision**

58. At the oral hearing of this appeal counsel for the applicant made much of the fact that in setting the headline sentence for each individual instance of indecent assault the sentencing judge had nominated the maximum available penalty as her starting point. He says that in circumstances where even more egregious offending circumstances might be imagined this was an error of principle. Moreover, he says that the sentencing judge's error can be traced to the view that she expressed that, "*[i]n my view, the sentencing range available does not meet the seriousness of the offending behaviour.*"
59. Counsel submitted that the judge's personal views as to the adequacy of the penalty range were neither here nor there. She was bound to sentence according to the penalty range set by the Oireachtas. It was submitted that the maximum penalty of two years imprisonment provided for by the Oireachtas should be reserved for offences at the most serious level. While it was accepted that the appellant's offending had been serious, it was submitted that it was not at the most serious level, certainly judged by the standards of the 1970's when these offences were committed.
60. We have no hesitation in expressing disagreement with the submission that the offending was not at the highest level, even by the standards of what society considered acceptable in the 1970 when there was perhaps less awareness of the profound harm caused to victims of sexual offences. We are completely satisfied that even in the 1970's the four principal forms offending described by the complainant in this case as having been perpetrated upon her, one of which comprises offending conduct which since 1990 would qualify as s.4 rape, would have been regarded by any right thinking member of society as totally unacceptable and involving egregious violation of the victim in this case. We are satisfied that it was indeed offending at the highest level. The fact that one might conceive of even more aggravated offending does not in any way undermine that assessment.
61. As to the view expressed by the trial judge that the sentencing range available did not meet the seriousness of the offending behaviour, it is clear to us that she was referencing the fact that there were a very large number of counts committed over a protracted period and that to sentence the accused using concurrent sentences alone would not produce a distributively proportionate outcome. Rather, to render a proportionate overall sentence in the case would necessitate having recourse to consecutive sentencing. In that regard the sentencing judge expressly stated that "*I accept that consecutive sentences ought to be the exception rather than the rule.*" (At the risk of being pedantic we would make the point that what the jurisprudence says is that consecutive sentencing should be engaged in sparingly, not that it necessarily needs to be exceptional. There are certain types of cases, e.g., those involving historical sex abuse over a protracted period and/or involving multiple victims where consecutive sentences are routinely imposed.) This was clearly a case that required consecutive sentencing, and the trial judge was right to have

recourse to it for some of the offences. We find no error in her approach in that respect. It was not a case of her disrespecting the penalty ranges set by the Oireachtas. This was never a case that could have been disposed of without recourse to at least some consecutive sentencing.

62. The sentencing judge was also not in error in her overall approach by nominating a global proportionate figure and seeking to structure the individual component sentences to ensure that she ended up there. This Court has previously indicated in *The People (DPP) v Casey and Casey* [2018] IECA 121 that this is a permissible approach although it can be complicated to give effect to properly.
63. Experience has shown that courts sometimes approach sentencing for multiple offences in different ways. The most common way of doing it is to determine a proportionate sentence for each offence in the first instance, including deciding on what to make concurrent and what to make consecutive, all without reference to totality; before then, and only then, performing the metaphorical “standing back” and giving consideration to whether adjustments need to be made in the interests of overall proportionality. However, others have exhibited a preference for deciding in the first instance on what the global or ultimate sentence should be, and only then determining on the individual sentences, or groupings of individual sentences that will, through whatever combination of concurrent and consecutive sentencing the sentencer sees fit to apply, yield up that global figure. Mr O'Malley in his work referenced earlier suggests that some common law jurisdictions ‘have evinced a distinct preference’ for the former approach and suggests that ‘without being absolutely prescriptive’ that ‘that approach is preferable, although it is not always followed in Ireland’. The existence of differing views on how to approach sentencing for multiple offences was acknowledged in *The People (DPP) v Casey and Casey* where the Court of Appeal expressly declined to be prescriptive or to indicate a preferred approach.
64. That case had involved an undue leniency review of sentences imposed on the respondents for a spree of burglaries committed by them. The DPP had been critical of the approach of the sentencing judge at first instance, not least because he had not adopted a global approach to the sentencing. The DPP argued that that a global sentence was required in the circumstances of the case to send a deterrent message. The Court of Appeal took the opportunity presented by that case to offer appellate guidance concerning sentencing for burglaries generally, including burglaries committed during a spree which circumstance obtained in the case the subject matter of the review. However, in addressing the specific argument that the sentencing judge at first instance should have adopted the global sentencing approach, Birmingham P (for the court) stated:

*‘It is a matter for individual sentencing judges to adopt the approach with which they are most comfortable, and which seems to them most appropriate in the circumstances of an individual case. We are, however, satisfied that the failure to adopt the global headline sentence approach in the present case cannot, per se, be said to have been an error of principle.’*

65. We find no error in how the sentencing judge in this case approached the sentencing of the appellant. In saying that we would like to offer as a constructive criticism that it was not perhaps ideal to fix the lengths of the individual sentences to be served consecutively at 17.1428571429 months (rounded to 17.14 months). There was nothing technically wrong with this, and the fact that it was done in that way is not, we are satisfied, likely to give rise to difficulty in this case as there is no risk that any individual component sentence might be impugned and the aggregate of the seven sentences imposed on Counts No's 1-7 computes to an even 10 year period. However, we could envisage circumstances arising in another case where having recourse to this approach might create difficulties in terms of the committal warrant which must reflect a sentencing judge's order. The Governor of whatever prison or penal institution an accused is committed to in order to serve his sentence will need a warrant that clearly indicates the length of the sentence that the prisoner has to serve in respect of each offence, so as to be able to properly calculate remission, and calculate the date on which one sentence ends and the next begins, and also to determine the prisoner's ultimate release date. Expressing sentence lengths other than as whole years, and/or months and/or days is liable to lead to calculation difficulties and potential errors, particularly where, as in this case, the periods are expressed in decimal terms and to a number of decimal places. We suggest that this is not ideal, and that in the future where recourse is being had to global sentencing whole years and/or months and/or days should be used, even if this requires a less than even apportionment of sentences amongst the components making up the global total, or a slightly reduced (or increased) overall sentence to achieve the necessary arithmetic. Any unevenness arising would be capable of being justified as being within the sentencing judge's margin of discretion and as necessary to ensure clarity in the drawing of the committal warrant that is to reflect the sentences.
66. In conclusion, the appeal is dismissed.