



THE COURT OF APPEAL

Record Number: 76/2022

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

P.N.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 21st Day of February 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against severity of sentence. On the 1st of April 2022, the appellant was sentenced to ten years' imprisonment with the final two years suspended for one count of defilement of a child under 15 years of age contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act, 2006 with a further count under s. 3(1) of the same Act and a count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, taken into consideration.

Background

2. The background to the offending is that the appellant met the injured party when he was 21 years of age, and she was 13. They commenced a sexual relationship in late 2005. The appellant stated that he initially thought that the injured party was 16 years old but that shortly after commencing the relationship he learned of her true age. The relationship ceased for a short period of time but was resumed by the appellant and continued for approximately three years.

3. The injured party became pregnant during the summer of 2007 when she was 15 years old. She gave birth to a daughter and the appellant was noted as the baby's father on the birth certificate. The hospital notified An Garda Síochána given that the injured party was only 15 years

of age when she became a mother. The matter was not investigated at the time because the injured party and her mother indicated that they did not want the matter taken any further. Tusla also became involved but similarly, no action was taken. The injured party continued to live with and be in a relationship with the appellant until she was 16 years of age.

4. In 2020, the injured party made a statement of complaint to An Garda Síochána. She explained that she was motivated to make her statement at this particular point in time because her daughter was now 12 years of age and the thought of her daughter becoming involved in a sexual relationship was troubling to her and caused her to reflect on her own youth at the time of her relationship with the appellant. She described that at times during the relationship, the appellant was jealous, obsessive and violent towards her and that he would try to undermine her. She described how she sustained black eyes, bruising and that her nose was broken at his hands.

5. The injured party prepared a victim impact statement in which she refers to the loss of her childhood and explains that she is extra cautious with her own children as a result of the offending. She further outlines that the appellant both physically and emotionally abused her and that she suffers from severe body image issues, trouble sleeping and nightmares.

Personal Circumstances of the Appellant

6. The appellant is a father to two children aged 10 and 14 at the time of sentencing. He has previous convictions for road traffic matters, possession of drugs and public order offences all of which would have been dealt with summarily. He has no previous convictions of a sexual nature.

Sentencing Remarks

7. The sentencing judge noted the aggravating factors as the age disparity between the appellant and the injured party, that the appellant was aware of this age disparity and yet persisted in the relationship, the length of time over which the offending took place, that the injured party became pregnant as a result of the offending, that the relationship continued for the appellant's own sexual gratification and in defiance of advice given to him, his exercise of control over the injured party, his limited empathy for the injured party and the effect of the offending on the injured party.

8. In terms of mitigation, the judge had regard to the appellant's early guilty plea, his cooperation with the investigation, his apology and expression of remorse and that he was assessed at being at a moderate to low risk of reoffending. The judge noted that the appellant regrets the relationship, but is thankful for their daughter.

9. The sentencing judge considered there was a degree of coercive control on the part of the appellant and that the injured party was isolated from her friends during the relationship. He did not accept that the appellant was not violent towards the injured party.

10. The judge placed the offending at the upper end of the mid range and nominated a headline sentence of 12 years' imprisonment. Taking into account mitigation, this was reduced to 10 years. In order to foster and encourage the rehabilitation of the appellant, the final two years of the sentence was suspended for a period of five years on terms. The sentence was imposed on the s. 2(1) charge with the other charges taken into consideration.

Grounds of Appeal

11. The appellant relies on the following grounds in his appeal against sentence:-

"1. The learned sentencing judge failed to give sufficient weight and consideration to the personal circumstances of the applicant, and the supporting evidence;

2. The learned sentencing judge fell into error by giving undue importance to the principle of deterrence and failing to correctly balance that principle with the applicant's circumstances.

3. The severity of the sentence imposed by the learned sentencing judge was excessive and disproportionate having regard to all the circumstances of the case;"

Submissions of the Appellant

12. It is the appellant's position that the 12-year headline sentence was too high and that the sentencing judge erred in placing the offence on the upper end of the middle range. It is submitted that the appropriate headline sentence should have been at the mid to low range of the middle range before any discount for mitigating factors.

13. The appellant complains that the reduction from the 12-year headline sentence to 10 years in recognition of the appellant's mitigation represents a reduction of 16.7% and was a departure from sentencing norms in circumstances where the appellant had the benefit of the mitigating factors of full cooperation at the investigative stage and an early guilty plea. It is noted that the final two years of the ten-year sentence were suspended but that this was expressly done to foster and encourage rehabilitation and not to afford credit for his cooperation and early plea.

14. Attention is drawn to the collateral consequences of the appellant's conviction and sentence. It is submitted that the appellant's registration on the sex offenders register has the potential to impact upon his employment prospects and freedom of movement. It is further

submitted that his incarceration impacts upon his two children who are at formative ages. Prof O'Malley on *Sentencing Law and Practice* 3rd ed is cited as follows:

"The imposition of a custodial sentence may have a devastating impact on persons who are dependent on the offender for material or other support but who were in no way responsible for the offence itself. Young children and elderly relatives are likely to suffer most, but an offender's employees and their families may also, in a real sense, become victims of a crime.... The governing principles, on which there is a fair degree of consensus across common-law jurisdictions, are that the impact of a custodial sentence on vulnerable dependents, especially young children, is a relevant factor at sentencing, that it will not save a person from imprisonment where the offence is sufficiently serious although it may justify some mitigation, and that in a cusp case it may tilt the balance in favour of a non-custodial measure."

It is submitted that insufficient weight was attached to the impact of the length of the appellant's sentence on his relationship with his children.

15. The appellant contends that the failure of the relevant adults and authorities to intervene and break up the illegal relationship between the appellant and the injured party and the deterrence of these failures was at the forefront of the sentencing judge's mind in imposing sentence in the present case. It is suggested that the impact of the offending on the injured party was exacerbated by this failure of those entities other than the appellant and that this was made clear in her victim impact statement. It is submitted that the appellant cannot be held culpable for the failures of others who had an obligation to act but failed to. We say at this stage that we are not persuaded that there is merit in this argument. The appellant could have desisted from the offending. He was an adult with knowledge of the injured party's age and took the decision to persist in the offending.

16. The appellant relies on the oft-cited passage of *Elliot v Harris (No.2)* (1976) 13 SASR 516 in relation to suspended sentences as follows:-

"So far from being no punishment at all, a suspended sentence is a sentence to imprisonment with all the consequences such a sentence involves on a defendant's record and his future, and it is one which can be called automatically into effect on the slightest breach of the terms of the bond during its currency".

17. The appellant relies on *People (DPP) v JMCD* [2021] IECA 31 as a comparator case. In that case the accused was sentenced to two concurrent four-year sentences for two counts of defilement of a child under 15 years of age committed when the accused was 16 and a half and the complainant was 12 and a half. The offending involved coercion and blackmail and the complainant developed PTSD and anxiety in the aftermath. The accused had seven previous convictions, none of which involved sexual offending and all of which were dealt with summarily. He was uncooperative with the probation services and assessed at a high risk of reoffending. There was also an early plea of guilty.

18. While it is acknowledged that the appellant herein was not a minor at the time of the offending, it is submitted that the discount of 50% applied in *JMCD* was as a result of both the appellant's age and his guilty plea. In that respect, it is noted that the circumstances of the appellant herein's plea were more favourable than those of the appellant in *JMCD* and therefore, it is submitted that the 16.7% discount was not an appropriate discount for the appellant's *"mitigation outlined and in particular the guilty plea, the expression of remorse, his assessment at moderate to low risk of reoffending."*

19. *People (DPP) v DM* [2019] IECA 147 is relied on. The disparity between the 33% reduction for mitigation in *DM* and the 16.7% reduction in the present case in circumstances where the appellant herein pleaded guilty at the first mention date is highlighted. It is submitted that the reduction for mitigation in the present case represents a departure from sentencing norms.

Submissions of the Respondent

20. It is the respondent's position that the headline sentence was justified having regard to the aggravating factors which applied to the appellant. Reliance is placed on the age disparity between the appellant and the injured party, the protracted period of time over which the offending took place, that the relationship continued for the appellant's own sexual gratification and in defiance of advice given to him, his exercise of control over the injured party, his limited empathy for the injured party, the degree of coercive control and physical abuse exercised by him, the impact of the offending on the injured party and the deprivation of her childhood and the emotional trauma suffered by the injured party and its continuation.

21. It is submitted that the sentencing judge, with the benefit of this Court's decision in *JMCD* imposed a sentence which properly considered all of the relevant factors.

22. It is noted that this Court has recognised that while a consistency in approach to sentencing is highly desirable, it is not expected there will be uniformity in terms of the actual

sentences that are imposed as each judge must take into account the individual circumstances surrounding the individual offender and offences. It is submitted that the sentencing judge did not fall into error in his imposition of a 12-year headline sentence as same fell within the margin of appreciation afforded to him and the discretion which the trial judge has in determining the headline sentence.

23. It is submitted that an issue of sexual predation arose in the present case given the age disparity, the unequal power in the relationship and the coercive control exercised by the appellant and that this goes to his moral culpability.

24. It is submitted that there was a clear element of dominion being exercised by the appellant over the injured party and, indeed, an exploitation of her vulnerability which was evident to the sentencing judge.

25. The following passage of Prof. O'Malley on *Sexual Offences* 2nd ed is cited:-

"While adults may not owe any positive obligations to children for whose welfare they have no legal or moral responsibility, they are still morally obliged not to inflict harm on any child. To that extent they may be said to be in a position of trust towards children generally."

26. In terms of the reduction afforded for mitigation, it is submitted that the sentencing judge had due regard to each of the mitigating factors in the case, the consequences of incarceration on the appellant and his family and that he would be subject to the sex offenders register for life and accordingly, he reduced the headline sentence of 12 years' imprisonment to 10 years to take account of the mitigation and suspended the final two years thereof to foster and encourage the rehabilitation of the appellant. It is emphasised that the early guilty plea must be viewed in light of the prosecution evidence and the fact that a child was born as a result of the offending behaviour.

27. Reliance is placed on *People (DPP) v O'Loughlin* [2022] IECA 18 as follows:-

"It is well established that a Court must construct a proportionate sentence and should do so by locating where the offence falls on the overall scale of the gravity regard to the offending conduct. In order to do so, the Court will have reference to the culpability of the offender and the level of harm done". ---- "The maximum sentence in the present case is one of life imprisonment and we consider the nominated notional or pre-mitigation sentence of 12 years to be appropriate. From that notional sentence a Court will then consider the particular circumstances of the offender and it is in that context that a Court will consider the mitigating factors. In the present case, the Court considered that there

was limited mitigation available in order to mitigate the gravity of his offending conduct. Nonetheless, he reduced the notional sentence of 12 years to one of 10½ years of imprisonment. This constitutes a considerable reduction given the level of mitigation present.”

This Court in *O’Loughlin* considered that a reduction for mitigation of 1 and a half years was not an error and dismissed the appeal against severity of sentence.

28. It is submitted that viewing the guilty plea in the context of the evidence, there was little or no other mitigating factors that the sentencing court could have considered in providing a reduction greater than that which was in fact applied.

Discussion

29. The first issue under discussion is the nominated headline sentence of 12 years, which it is argued is excessive in the circumstances. Reliance is placed on *JMcD*, however, this seems to be more in terms of the reduction afforded for mitigation and of course, the facts in *McD* were quite different. In *McD*, a headline sentence of 8 years was nominated with a reduction of 50% for mitigating factors. The appellant was a minor and the offending was that of two incidences of defilement. However, in *McD* the appellant video recorded the offending on his mobile phone and his associates took photographs of the offending on their phones. That was a significant aggravating factor which, when taken with the other factors, including the use to which the recordings were put, justified the imposition of a headline sentence of 8 years. *McD* is therefore of very limited value as a comparator in terms of the headline set but is of significance from the perspective of the identification of the range of sentences available.

30. *McD* considered that the majority of cases where the maximum penalty is one of life imprisonment fall to be located at some point on “*an effective fifteen year*” scale. A similar approach was suggested for robbery offences in the case of *People (DPP) v Leon Byrne* [2018] IECA 120. Therefore, the ranges extend from that of a suspended sentence to one of five years, a mid range of five to ten years, and an upper range of ten to fifteen years. However, as stated by Edwards J. in *McD*:-

“To suggest this is not to ignore the fact that the legislature has provided for up to life imprisonment. Individualisation in sentencing means there will always be outliers so that for truly egregious cases a sentence above fifteen years and indeed up to life imprisonment remains possible, but such cases are anticipated to be rare.”

31. In the present case, we are concerned with determining if the judge erred in his nomination of a headline sentence of 12 years in the circumstances of this case. The pleas were entered by the appellant on a representative basis, that is to reflect the overall offending which offending was prolonged, continuing for a period of three years. The appellant was an adult who became aware of the injured party's very young age and persisted in the relationship, nonetheless. This particular section in the 2006 legislation is designed to protect children under the age of 15 years from sexual activity as defined under the Act. The fact that the maximum penalty is one of life imprisonment clearly reflects how society views such crimes.

32. Moreover, in this case, not only did the offending continue for a protracted period but on occasion, the appellant was violent towards the injured party, he was manipulative, exercised coercive control over her and isolated her from her friends. The fact that she was vulnerable, not only by virtue of her tender years, but also that she does not appear to have enjoyed a great deal of support from her family, and the impact of the offending on her, further aggravates the offending. The disparity in their ages is a further significant factor.

33. Insofar as the disparity in age is concerned, the appellant was an adult when the offending began, the injured party was 13 years old. As observed by Edwards J. in *McD*, disparity in age may be indicative of "*dominion by an 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...*" This is clearly applicable in the present case.

34. The judge placed the matter in the upper end of the mid-range and identified a headline sentence of 12 years. In so doing, he actually placed the notional sentence in the lower end of the upper range. However, we are concerned to look at the actual figure nominated by the judge and find whilst it could be said that identifying 12 years and so outside of the band nominated is an error in principle, we are not persuaded that it is an error of substance. Moreover, whilst any one of the members of this Court may have nominated a slightly lower headline sentence, that is not the issue, the nominated headline sentence in our view falls within the margin of appreciation afforded to a trial judge.

35. We now look to the argument advanced that the judge did not allow of sufficient reduction for mitigation. Those factors are set out above and we will not rehearse them here. Suffice to say, the judge reduced the sentence to one of 10 years' imprisonment to reflect the mitigation, being a reduction of 16.7%. We acknowledge that when we look to the mitigating factors, the reduction is somewhat low, however, the appellant is not of good character, he is a man with previous

convictions and, whilst those convictions do not aggravate the offending, they lead to a progressive loss in mitigation. Again, whilst any member of this Court may have afforded greater discount for mitigation, we find that the reduction allowed again falls within the margin of appreciation.

36. Having found the proportionate sentence to be one of 10 years' imprisonment, the judge then considered the potential for rehabilitation and in this regard, concluded that it was appropriate to suspend the final two years of the sentence to encourage such rehabilitation. We cannot lose sight of the fact that while the suspensory portion of the sentence was to incentivise rehabilitation, the overall reduction from the headline sentence was that of 33%. This leaves the actual carceral period at 8 years' imprisonment. Whilst a suspended sentence is nonetheless a sentence, we are satisfied that it meets the justice of the case and will assist the appellant in his reintegration to society.

37. Finally, we make the observation that no evidence was given of the offence of sexual assault, which was taken into consideration. This is not a satisfactory state of affairs. The judge took that count into consideration, the appellant having entered a plea of guilty to that specific count. However, in practical terms, it seems that this count played no part in the judge's assessment of the evidence or in the sentence which was ultimately imposed. The sentence focused on the prolonged defilement of the injured party.

38. Accordingly, as we have not found an error in principle, we dismiss the appeal.