



**THE COURT OF APPEAL**

**Record Number 7/18**

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

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**TMcD**

**APPELLANT**

**JUDGMENT of the Court (ex tempore) delivered on the 25th day of February 2020 by Ms. Justice Kennedy**

1. This is an appeal against sentence. The appellant was found guilty of a count of rape contrary to s.4 of the Criminal Justice Rape Amendment Act, 1990, a count of sexual assault contrary to s.2 of the Criminal Law Rape Amendment Act, 1990 and a count of robbery contrary to s.14 of the Criminal Justice Theft and Fraud Offences Act, 2001.
2. The background to the offence is set out in the *ex tempore* judgment delivered earlier on today's date.

**The Sentence**

3. The judge placed the offending at the upper middle end of the offending and identified the following mitigation;-

"A number of matters have been considered in mitigation. In my view, a grave factor is the youth or the relative youth of the accused at the time of this offending. He was just in around fifteen and a half years of age and he had no previous convictions relevant to the rape and sexual assault charges. His background was from an undoubtedly deprived background and he suffered a lack of education leaving school at the age of thirteen. There was a degree of cooperation at the trial and certainly the agreement of a number of witnesses shortened the trial very considerably, and that was not in just ease of the court in the administration of justice but must have been in ease of the victim as well. Finally, there was mention of his cooperation with the Gardaí, he did cooperate to every extent except admitting the offence. "One matter I should say that was mentioned in the victim impact statement was his lack of remorse in his fight in the case. He had every

right to fight the case and plead not guilty and I am not holding that in the least against him”.

4. The sentencing judge then proceeded to impose a sentence of eight years’ imprisonment with the final eighteen months suspended on terms in respect of the count of rape. In respect of the count of sexual assault a term of three years’ imprisonment was imposed and a sentence of eighteen months’ imprisonment in respect of the count of robbery all to run concurrently.

**Submissions of the appellant**

5. The appellant submits that the trial judge failed to adequately consider the youth of the appellant as a mitigating factor. While it is accepted that the trial judge did refer to the fact of the appellant’s youth, the sentence handed down was disproportionate to the appellant’s age and mental development.
6. The appellant refers to *The People (DPP) v. JH* [2017] IECA 206 where the Court reduced the headline sentence from one of four years’ imprisonment to two and a half years. This case concerned an appellant who was convicted of two counts of section 4 rape and two counts of sexual assault. The offences were perpetrated when the appellant was fifteen years old but he was not sentenced until he was twenty-three years old. The Court noted as follows:-

“What is relevant in the context of sentencing is the fact that the appellant, although now an adult, committed the crimes in question when he was fifteen years old. A sentencing court is required to assess the offender’s level of maturity at the time of the commission of the offence and to accordingly assess his culpability as of that time.”

7. The appellant also refers to the following cases: *The People (DPP) v. McCormack* [2000] 4 IR 356, where the Court of Criminal Appeal allowed a severity appeal of a sentence of three years’ imprisonment with the final two years unconditionally suspended. The defendant had pleaded guilty to aggravated sexual assault and attempted rape. The defendant was 17 years old at the time and his youth was one of the main considerations in sentencing.
1. In *The People (DPP) v. Elders* [2014] IECA 6 the Court of Appeal suspended the final twelve months of a five-year sentence, where one of the considerations of the Court was the youth of the appellant where he was seventeen at the time of commission of a particularly serious assault.
8. In *The People (DPP) v. MH* [2014] IECA 19 the Court of Appeal reduced a nine-year sentence with the final three years suspended to one of seven years with the final three suspended for a young man who had over a period of years had seriously and repeatedly sexually abused a young female relation. In that case, the appellant had commenced his sexual abuse when his cousin was six years of age and he was twelve, it continued until

he was eighteen and she was twelve, culminating in a vaginal rape after the appellant had reached his age of majority

9. The appellant submits that there is a difficulty in assessing the mitigation afforded by the sentencing judge as he failed to identify a headline sentence before applying the mitigating factors.

#### **Submissions of the respondent**

10. The respondent submits that it is clear that the trial judge clearly took into account the appellant's youth, lack of education and deprived background.
11. In relation to the cases referred to by the appellant, the respondent notes that *The People (DPP) v. JH* [2017] IECA 206; *The People (DPP) v. McCormack* [2000] 4 IR and *The People (DPP) v. MH* [2014] IECA 19 all involved appellants who had entered guilty pleas, as opposed to this case which was fully contested.
12. The respondent submits that the trial judge was accurate in his classification of the offending as at the upper middle end and refers to the remarks of Charleton J. in *The People (DPP) v. FE* [2019] IESC 85 in which he noted at para 43:-

“...time and again, since *The People (DPP) v. Tiernan* [1988] 1 IR 250, it has been unequivocally declared by the courts that rape is a violation in the most serious way of the constitutionally protected rights of women to their bodily integrity and to their physical and mental independence. In *The People (DPP) v C* [2015] IECA 76 the Court of Appeal acknowledged the long-standing view of the courts that rape and other offences of sexual violence “cause suffering that is profound and long-lasting” impacting on family and children and which “often takes years” to overcome the trauma and to report offences.”
13. The respondent further refers to *The People (DPP) v. WD* [2008] 1 IR 308 where the Court stated as follows:-

“The reports tend to indicate that where a perpetrator pleads guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years imprisonment. The substantial mitigating factor of a guilty plea, present in such a case, suggests that such cases will attract around six to seven years imprisonment where the factors of early admission and remorse coupled with the early entry of a plea of guilty, are absent.”
14. In light of such, it cannot be said that a sentence of eight years with the final eighteen months suspended is disproportionate.

#### **Discussion**

15. The appellant was sentenced in respect of three separate counts; section 4 anal rape, sexual assault and robbery. Each of those offences are of themselves serious offences and in our view the circumstances in this case are egregious indeed.

16. The injured party was lured down a laneway. She was then subjected to an appalling violation by a person who was known to her. She was a vulnerable individual and, as the appellant knew her, this must have been known to him. She was then sexually assaulted through the appellant biting her on the breast causing her extreme pain and leading to her suffering from that particular injury for some time thereafter which included bleeding from the area for a period of some four weeks.
17. Her much valued mobile phone which her mother had bought for her was taken from her, and when she was stunned by the pain of the biting, the appellant proceeded to violate her by entering her back passage. All of these actions understandably caused the injured party to suffer physical and psychological injury. Her victim impact statement makes most poignant reading. This offending had a devastating impact on her. In short, the attack on this injured party was a dreadful violation of an innocent and vulnerable young girl.
18. The strongest mitigating factor in the appellant's case is that of his age. He was a young person aged fifteen years and seven months at the time of the offending and aged nineteen years at the time of sentence. He cooperated with the investigation apart from the acceptance of the offending conduct. He had, in effect no previous convictions. He comes from a deprived background, he was expelled from school and as a consequence his education was cut short.
19. *The People (DPP) v. JH* [2017] IECA 206; *The People (DPP) v. McCormack* [2000] 4 IR 356 and *The People (DPP) v. MH* [2014] IECA 19 . are decisions which are relied upon by the appellant. However, these are cases where the offenders in each instance entered pleas of guilty and so each had the benefit of a strong mitigating factor of which this appellant cannot avail.
20. As has been stated by Charleton J in *The People (DPP) v. FE* [2019] IESC 85, rape is: -

"A violation in the most serious way of the constitutionally protected rights of women to their bodily integrity and to their physical and mental independence."
21. Primary emphasis is placed by Mr. Devally S.C. on the appellant's age at the time of offending in the assessment of the appellant's culpability. As stated in the decision of *The People (DPP) v. JH* [2017] IECA 206 :-

"What is relevant in the context of sentencing is the fact that the appellant, although now an adult, committed the crimes in question when he was fifteen years old. A sentence in court is required to assess the offender's level of maturity at the time of the commission of the offence and to accordingly measure his culpability as of that time."
22. Issue is taken on behalf of the appellant therefore with the assessment of the gravity of the offence as a headline figure of eight years' imprisonment. In the assessment of gravity, one looks to the moral culpability of an offender, in which assessment a court

considers the aggravating and the mitigating factors bearing on the culpability of the offender.

**Conclusion**

23. In the assessment of the appellant's culpability, we take into consideration his age at the time of the offending, that being age fifteen years and seven months. He was a young person and his culpability must be measured accordingly. This Court is of the view that if sentencing an adult for offending of this calibre, that the offence merited a headline sentence in double figures.
24. While the sentencing judge's sentencing remarks are somewhat unclear, it seems to this Court that the headline sentence was one of eight years' imprisonment. The judge, as we know, then proceeded to suspend eighteen months of that sentence thus leaving an actual sentence of six and a half years' imprisonment.
25. It is difficult to see in light of the aggravating factors present, notwithstanding the appellant's age, that the headline sentence could be anything less than eight years' imprisonment.
26. Accordingly, we are satisfied that there was no error of principle on behalf of the sentencing judge and we dismiss the appeal against sentence.