



THE COURT OF APPEAL

Record Number: 205/21

**The President.
McCarthy J.
Kennedy J.**

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

AO'F

RESPONDENT

JUDGMENT of the Court delivered on the 24th day of May 2022 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency. The respondent pleaded guilty to 7 counts of rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act, 1990, 10 counts of sexual assault contrary to s.2 of the 1990 Act, 3 counts of invitation to sexual touching contrary to s.4 of the Criminal Law (Sexual Offences) Act, 2017 and a single count of use of information and communication technology to facilitate sexual exploitation of child contrary to s.8 of the 2017 Act. The judge imposed a sentence of five years on each of the 7 counts of rape contrary to s. 4 of the 1990 Act, and took into consideration the balance of the counts. The sentence was wholly suspended on conditions.
2. Seventy five counts were preferred on the indictment, concerning offending over a period of three years commencing when the respondent was aged between 14 and 17 years and the injured party was aged between 8 and 11 years. The respondent pleaded guilty to the aforementioned counts on a representative basis. The offending came to light in April 2019, when the injured party's mother's partner discovered messages of a sexual nature on a gaming app on the injured party's tablet. These messages had originated from the

respondent herein, who is the injured party's uncle. The messages informed the court relating to the use of information technology to facilitate the sexual exploitation of a child.

3. Following this discovery, the Gardaí attended at the injured party's family home and the investigation commenced.

Background

4. The injured party is the respondent's niece and the evidence disclosed that the majority of the offending conduct occurred when he was babysitting. The sexual offending began with a range of inappropriate sexual conduct including the touching of the vagina and breasts, and compelling the injured party to masturbate him and moved on to multiple incidents of oral rape. It is to be noted that when the respondent was interviewed in relation to the matter, he admitted his involvement, and indeed admitted his involvement in activity to an extent greater than had been described by the injured party.
5. Evidence was given of four identifiable incidents relating to the counts contrary to s.2 and s.4 of the 1990 Act with the balance of the counts constituting sample counts.
6. Concerning the four incidents, recalled with specific detail by the injured party; the first of those occurred when the injured party was playing Minecraft with the respondent and her brother. When her brother left the room, the respondent began touching the injured party, rubbing her arms, wrist and hips. She said that this lasted for 2-3 minutes and that the respondent told her not to tell anyone. The injured party was eight years' of age at the time.
7. The second incident occurred when the respondent was babysitting the injured party and her siblings, on this occasion, the respondent instructed her to take off her pants. The injured party described being naked and being rubbed and touched by the respondent and being made to rub and suck his penis. She recalled the respondent grabbing her ponytail, moving her head in a back and forth motion while his penis was in her mouth. She also recalled the respondent grabbing her wrist and moving her hand back and forth on his penis. The injured party tried to run away but the respondent caught her arm to bring her back. The respondent accused told her that if she did not do as he instructed, he would tell her mother that she woke up her sibling and that she would be grounded for at least a month for waking him up. She described the respondent pulling her back by the ponytail and that he ejaculated.
8. A third incident took place on a morning when the injured party was told by the respondent to come into the kitchen to tell him what she wanted for breakfast. He demanded oral intercourse, when she refused he grabbed her and the tone of his voice was such that she knew if she did not do as he said he would yell at her, wake everyone up and blame her. She described his voice as "vicious". The respondent pushed her to her knees, grabbed the back of her head, pushing it forward and pulling it backward with his penis in her mouth. She described how she felt her whole head was being ripped off. She said that the respondent stopped and pulled back up his pants upon hearing the injured party's younger sister but that she had seen him ejaculate.

9. The injured party's description of this violation involved the respondent pushing her to her knees so that she hit the floor with a really big impact causing her pain in her knees, grabbing her head, pushing her forward and pulling her hair. She felt like she would scream and throw up.
10. The fourth incident occurred at her grandmother's house when the respondent pulled down his pants, and told her to perform oral sex on him. She recalled that she said no and that the respondent told her that if she did not do it she would get in big trouble and that he would get her younger sister involved. Her younger sister was five years old at the time.
11. The injured party disclosed that the respondent would usually say to her that if she did not do what he asked, she would regret it, which scared her. Her description of these incidents involved the use of force by the respondent; pushing her, pulling her, grabbing her, he ignored her refusals and when she tried to escape, the respondent would hold her or do something to prevent her escape. A very focused and powerful victim impact report prepared by the injured party was read to the sentencing Court.
12. On the 30th October 2019 the respondent was arrested and taken to the Garda Station where he was questioned. As already stated, the respondent admitted to frequent sexual activity with the injured party herein, stating that sexual activity occurred every two to three weeks for the three years prior, but denied the use of force. His admissions were significant and the respondent followed through with pleas of guilty and it appears that it was indicated from an early stage that pleas would be forthcoming. The appellant was 19 years old at the time of sentence.
13. In terms of the respondent's background and personal circumstances, he had no previous convictions. Through probation reports and psychological reports, the court heard, and it was accepted in the course of the sentence hearing, that he had been watching pornography since the time when he was in fourth class, aged 9 to 10 years. The combined effect of the various reports was to indicate that he was functioning at a low intellectual level. A report from a forensic and psychological service considered that he may be on the autistic spectrum.

The sentence imposed

14. The judge concluded that the reports "indicated an urgent need for treatment by means of therapeutic intervention to address the risk of reoffending."
15. She found the offending behaviour of the respondent to come within the category of more serious cases, as defined in *The People (DPP) v FE* [2019] IESC 859 and nominated a headline sentence of five years' imprisonment in order to take account of the respondent's age at the time of offending and his emotional immaturity.
16. In terms of mitigation, the judge noted that the respondent acknowledged his guilt from the outset, that he made full admissions and that he supplied additional detail to the Gardaí to that provided by the injured party. The judge further noted that the respondent

was honest about his difficulties in resisting his “urges” and that since the discovery of these offences, he has attended counselling on a regular basis and has engaged well for the purposes of psychological assessment and with The Probation Service. She considered that the respondent herein was entitled to significant mitigation.

17. Turning to rehabilitation, the judge was of the view that the respondent’s psychological vulnerability was such that “a prison term might well crush him rather than foster his rehabilitation.” Having regard to the respondent’s engagement with counselling and the probation and psychological assessments, his early admission of guilt, the judge took the view that the respondent had demonstrated a willingness to undertake the necessary treatment to address his sexual deviancy and that this was better achieved within the community.
18. The judge imposed a sentence of five years on each of the seven count of rape contrary to s. 4 of the 1990 Act and took into consideration the balance of the counts to which the respondent had entered pleas of guilty. She then suspended the sentence for a period of five years on terms.

Grounds of appeal

19. The applicant seeks to review the sentence on eight grounds, however, in truth the issues which arise concern the nomination of the headline sentence and the suspension of the sentence in its entirety. The legal principles that are applicable to undue leniency reviews was not the subject to any real dispute between the parties, and indeed, those principles have not been the subject of any controversy since the first such case of this type, the case of *The People (DPP) v Byrne* [1995] 1 ILRM 279.

Submissions of the applicant

20. In essence, Mr. Fitzgerald SC for the Director asserts that the headline sentence nominated was simply too low. He refers to the Supreme Court decision in FE, where Charleton J. placed cases falling within the more serious category as meriting a headline sentence of 10-15 years. Whilst the Director accepts that such a range is a guide and particularly so in the present case given the respondent’s age when the offences were committed and his emotional immaturity, nonetheless, it is said that the nominated headline sentence of 5 years is insufficient.
21. It is said that the aggravating factors merited a custodial element to the sentence. The injured party’s young age, the breach of trust, the nature of the sexual activity, the duration of the offending, the elements of force and coercion involved in the offending and the harm caused to the injured party, render this a serious case.
22. Whilst it is accepted that there are weighty mitigating factors present, in particular, the plea of guilty, the applicant submits that the imposition of a fully suspended sentence constitutes an error in principle. In support of this, reliance is placed on the well-known decision in *The People (DPP) v Tiernan* [1998] IR 250, where the Supreme Court held that, save in exceptional circumstances, rape should be punished with a substantial term of immediate imprisonment, even in the absence of aggravating factors. The applicant

submits that the facts in the present case are not so exceptional as to warrant anything other than a sentence with a custodial element.

23. While the applicant accepts that the respondent was a person of limited maturity it is noted that the psychological assessment described that he did "not lack intellectual ability." Similarly, the applicant accepts that the respondent was a young person within the meaning of the Children Act, 2001 but contends that that the respondent's age, whilst a relevant factor, is not so exceptional as to warrant a departure from the principle established in *Tiernan*.
24. The applicant in written submissions refers to O'Malley's on *Sentencing Law and Practice*, 3rd ed, at para 31-55:-

"Strictly speaking, a sentence should be imposed for each offence of conviction, though the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive, applying the totality principle or mitigating fines."

The applicant submits that the gravity of the offences which were taken into consideration warranted the marking of a sentence for each offence.

25. Furthermore, the applicant asserts that in imposing a fully suspended sentence, the judge failed to take into account the harm caused to the injured party and the effect of the offending on her.
26. The applicant contends that insufficient regard was had to the principle of deterrence in that the imposition of a fully suspended sentence in respect of a 3-year campaign of rape against a girl aged between 8 and 11 years of age serves neither to dissuade the general population from criminal offending nor to dissuade the respondent from further offending.
27. The applicant relies on several decisions to include *The People (DPP) v MH* [2014] IECA 18, *The People (DPP) v JH* [2017] IECA 206, and *The People (DPP) v TD* [2021] IECA 289. In *MH*, where the offender was aged between 12 and 18 years and the injured party between 6 and 12 years, an effective sentence of 4 years was imposed. There were nine offences, including sexual assaults and rape. In *JH*, a 2 ½ years sentence was imposed with the final year suspended in respect of two offences of s. 4 rape and two of sexual assault. The offender was 15 years old and the injured party was 11 years old. Finally, in *TD*, an 8 year sentence with 1 year suspended was imposed in respect of 7 counts of sexual assault and 2 counts of rape contrary to s.4 of the 1990 Act where the appellant was aged between 14 and 18 years and the injured party aged between 8 and 12 years, the offending continued for a period of 4 years.

Submissions of the respondent

28. Ms. O'Connell SC on behalf of the respondent submits that the sentence imposed would represent a clear divergence from the norm were it not for the "cardinal feature" of the respondent's young age during the period of offending.

29. Reliance is placed on the age and immaturity of the respondent and the reports put before the sentencing court. In terms of the age of the respondent, it is pointed out that he was 17 years of age or under throughout the entire period of offending and when he was interviewed in October 2019.
30. In terms of his capacity for rehabilitation, the respondent outlines that the Detective Garda acknowledged in direct examination that the respondent accepted responsibility for more than four offences originally described by the injured party and that his approach overall was "honest and forthcoming." It is submitted that, unusually, in the course of his interview, the respondent described the injured party as a person to be trusted to tell the truth. He did not "quibble or cavil in any way with what she said." It is said that this offers some insight into the respondent. It is further submitted that the respondent had no interaction with the Gardaí prior to the offending herein or subsequent to it and that he comes from a decent and supportive family.
31. The respondent refers to the cross examination of the Detective Garda where he described having spoken to the Coordinator of the local YMCA Programme of which the respondent was a part. This Coordinator told the Detective that the respondent was a model student, that "everything was 100%" and that he socialised well in the group, which included girls.
32. The respondent notes that the trial judge made it clear from a very early stage that a non-custodial sentence was not being ruled out and sought information regarding the therapeutic supports that were available both inside the prison system and outside.
33. The main points emerging from the psychological report and the second probation report are summarised and relied upon by the respondent. It is submitted that it was the psychologist's view that community therapy would be more effective for the respondent than prison based therapy. The report did not provide information on therapy within custody. The probation officer took the view that the respondent should address his risk factors through planned therapeutic intervention.
34. The respondent submits that the comparator case law advanced by the appellant perpetuates the absence of engagement with the central feature of the case, namely the age of the respondent at the time of offending.
35. The respondent refers to *JH*, in which Mahon J. observed that prison, "disrupts the child's normal development and education and thereby hamper the opportunity for the child to achieve adulthood in what might be described as normal circumstances. Undoubtedly also, there is a concern that places of detention facilitate children getting into bad company and paving the way towards criminality in adulthood."
36. In addressing the concern regarding the viewing of pornography by the respondent, which it appears he viewed from a very early age, it is suggested that the judge may have given some weight to the wider societal responsibility for the respondent's exposure to

pornographic material when assessing the moral culpability of a child in the context of sexual offending. It is submitted that it was just to do so.

37. In addressing the applicant's submissions regarding the dicta in *FE* and the coercion and control the respondent inflicted upon the injured party, it is submitted that the Prosecution Garda acknowledged an absence of any reprehensible behaviour outside of the offending itself. It is the respondent's position that the applicant was mistaken in submitting that the case came within the higher category of *FE*.
38. Further emphasis is placed on the young age of the respondent herein and s. 143 of the Children's Act, 2001 and Article 37 of the United Nations Convention on the Rights of the Child is cited in this regard. It is the respondent's position that it is irrational that an offender should go "off a cliff edge" on reaching their 17th birthday so that imprisonment becomes a starting position instead of a last resort. It is submitted that this would be irrational for any offender but especially for the offender herein who is immature, of limited intellectual functioning and likely to be on the autistic spectrum.

Discussion and Decision

39. The jurisprudence relating to undue leniency appeals is well settled. This Court will not intervene in the sentence imposed unless it is satisfied that the sentence constituted a substantial departure from the appropriate sentence.
40. Insofar as the nominated headline sentence is concerned, we are entirely satisfied that the judge properly considered that these offences fell within the category of more serious cases as identified in *FE*. The offending in the present case was certainly of a serious order where the victim was of very tender years, where the respondent coerced, frightened and threatened her, including a most insidious threat to turn his sexual attentions to her younger sister. Moreover, the sexual misconduct was conducted on a frequent basis over a protracted period of time and the respondent abused his position of trust, not only as the uncle of the injured party but also as a trusted babysitter. Indeed, the majority of the offending occurred when he was babysitting the injured party and her siblings. The respondent on occasion caused the injured party physical pain, and used force in his effort to satisfy his sexual urges. Therefore, this case falls foursquare within the serious case category as identified by Charleton J. in *FE*:

"There is a category of rape cases which merit a headline sentence of 10 to 15 years imprisonment. What characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation be on that associated with the offence, or the abuse of trust."

41. The judge indicated that if the offences had been committed by an adult, she would have nominated a headline sentence of 10-12 years. However, this is where we diverge from the sentencing judge in that in the opinion of this Court, had the Court been sentencing an adult for this type of offending, this Court would have nominated a headline sentence in the region of 12-14 years. The offending was clearly of a serious order, and caused understandably deep distress to a vulnerable and very young child, causing her to feel

scared and insecure in her own home where she ought to have felt the most secure. To our minds, the threat to turn his unwanted attentions to her younger sister is very perturbing, indeed. We note that the injured party in her Victim Impact Statement eloquently expresses how distressing that period in her life was and that she hopes to now enter a new phase in her life.

42. This case involves a young offender aged between 14 and 17 years at the time of the offending. Again, the judge properly took account of his age of the time of the offending and also took account of his particular emotional immaturity having regard to the various reports furnished to her. In those circumstances, she nominated a headline sentence of five years' imprisonment.

Decision on Headline Sentence

43. The question for this Court is whether that nominated sentence constitutes a substantial departure from the norm. In cases of this nature where the offender, although an adult of the time of sentence committed the crimes when he was a minor, a court must have regard to the level of maturity of the particular offender. Whilst we have received several decisions from the applicant and respondent, the decision of this Court in *TD* is of some relevance. Although it involved an appeal against severity of sentence, the factual background is somewhat similar in that the offender was aged between 14 and 18 years whilst the injured party was aged between 8 and 12 years. The offending involved a series of sexual assaults and s. 4 rape offences and continued over a period of four years. The offender and the victim were related. In *TD*, the Gardaí were satisfied that the offending commenced with "experimentation based on pornography the appellant had seen", and the offending conduct became more serious as it progressed. The appellant had no previous convictions and made extensive admissions to the Gardaí.
44. Overall, whilst there are certain similarities with the instant case, it must be noted that the appellant in *TD* committed some of the offences after having attained his majority. However, a psychologist reported that he had poor coping strategies and poor mood control consistent with ADHD. Ultimately, this Court did not quash the sentence but suspended the unserved portion of the sentence imposed in the court below, where the appellant had spent just shy of five years in custody, amounting to approximately six years and one month allowing for standard remission.
45. There are many aggravating factors present in the instant case, however the gravity of the offending is extenuated by virtue of the fact that the offending was committed when the respondent was himself a minor. The Court must have regard to the age of the respondent at the time of offending and his emotional immaturity in determining the appropriate headline sentence. There is no doubt that the sentencing judge did just that, however we consider that the headline sentence ultimately nominated by the judge was insufficient to mark the gravity of the offending conduct. We have already stated the aggravating factors and it must be recalled that the judge took into consideration the fourteen counts to which the respondent pleaded guilty. In the circumstances, we consider that the judge erred in her nomination of the headline sentence at five years' imprisonment.

Suspension

46. We will now move to consider whether the judge was correct in suspending the entirety of the sentence and as to whether there existed in the present case such exceptional circumstances so as to render it appropriate to so suspend. Having nominated a headline sentence of five years' imprisonment, the court then proceeded to consider mitigation and the rehabilitation of the respondent. She acknowledged the admissions made by the respondent and specifically referred to the additional detail he supplied to the Gardaí, moreover, she took into account his pleas of guilty, his attendance at counselling on a regular basis and his engagement with the service, his level of intellectual functioning and the content of the psychological and probation reports. She properly considered that he was entitled to significant mitigation.
47. She then proceeded to consider the prospect of rehabilitation and again properly acknowledged the importance of rehabilitation when sentencing young offenders. She then said: –

“However, having observed this young man and considering the contents of the various reports received, his psychological vulnerability is such that in the Court’s view a prison term might well crush him rather than foster his rehabilitation.”

The judge acknowledged the mitigating factors and concluded that his rehabilitation was probably better achieved within the community. She ultimately suspended the entire sentence on conditions.

Decision on Wholly Suspending the Sentence

48. There are certainly significant mitigating factors in the present case, however rape offending ordinarily will attract an immediate custodial sentence. There are, of course, cases where such exceptional circumstances exist which would warrant a suspended sentence. As observed by O'Malley in his text on *Sexual Offences*, 2nd ed, at para. 25-21 with reference to *People (DPP) v Y.(N.)* and *People (DPP) v Keane*: –

“Taken together, what these two judgments confirm is that rape should ordinarily attract a substantial and immediate term of custody and that it is not the law that in each and every case a trial judge must consider the possibility of a suspended or non-custodial sentence. However, if some factor or, much more likely, a combination of factors points to the case being exceptional, the trial judge should not exclude the possibility of a non-custodial measure which, for present purposes, would include a suspended sentence. A case deemed to be exceptional will not automatically attract a non-custodial measure; a short prison sentence will often be more appropriate response”.

49. A sentence must be tailored to take account of the particular offender before the court and his or her particular set of circumstances, however, we believe that the sentencing judge erred in suspending the entirety of the sentence and in failing to include a custodial element to the sentence. Whilst we acknowledge that youth is of course a mitigating factor and that, in general, leniency is extended to those who commit offences while they

are minors and sentenced as adults, the latter is considered in the context of assessing the moral culpability of the offender.

50. Rehabilitation is one of the aims of sentencing and no doubt the judge in the present case was concerned to ensure that the sentence she constructed would have the maximum rehabilitative impact on the respondent.
51. However, this Court is of the view that the judge erred in suspending the entirety of the sentence imposed. We believe that the judge placed excessive weight of the contents of the psychological reports and, as a consequence, suspended the entirety of the sentence.
52. Moreover, it is not possible to discern the allowance permitted for mitigation and that permitted for rehabilitation. It was, in our view, necessary to incorporate a custodial element to the sentence. In those circumstances, we will quash the sentence imposed and proceed to resentence the appellant as of today's date.

Re-Sentence

53. We will not rehearse the aggravating factors present, but in view of those factors, and with regard to his age at the time of offending and his emotional immaturity, we consider the appropriate headline sentence to be one of 7 ½ years. As we have stated, there are considerable mitigating factors present, moreover, we have received updated documents on behalf of the respondent, confirming that he is on the autistic spectrum, that he continues to regularly attend counselling and has attended an IT course. In view of those factors, we will reduce the headline sentence by 1/3, resulting in a sentence of 5 years' imprisonment on each of the counts contrary to s.4 of the 1990 Act, imposed concurrently, with the balance of the counts taken into consideration.
54. Rehabilitation is essential and we are concerned to structure the sentence in a manner which is directed towards incentivising his continued rehabilitation. In furtherance of that objective, we will suspend the final 2 ½ years of the sentence for a period of 2 ½ years on the conditions that he cooperate fully with The Probation Services and comply with all directions from that service and continue to attend counselling as advised.
55. We will also impose 2 years post-release supervision and will hear submissions in this regard.
56. Finally, the respondent remains on the sex offenders register and will remain so indefinitely.