**THE COURT OF APPEAL**

**Record Number: 142CJA/22**

**McCarthy J.**
**Kennedy J.**
**Donnelly 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 -**

**C.R.**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 18th day of May 2023 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.

**2.** The indictment contained a total of 48 counts. Counts 1-36 relate to 18 counts of rape and 18 counts of sexual assault upon one complainant, LR and counts 37-48 relate to one count of rape and 10 counts of indecent assault upon another complainant, DP.

**3.** The respondent entered pleas of guilty to counts 1, 36, 37 and 48, the remaining counts taken into consideration. The pleas to the counts in respect of the complainant LR were entered on a representative basis, as were the pleas in respect of the indecent assault counts concerning the complainant, DR, whereas the rape count concerning DR was a standalone count.

**4.** The respondent was sentenced to six years' imprisonment with the final eighteen months suspended in respect of count 1; s. 2 rape of LR, two years' imprisonment in respect of count 36; sexual assault of LR; four and a half years' imprisonment in respect of count 37; s. 2 rape of DP and two years' imprisonment in respect of count 48; indecent assault of DP. All sentences to run concurrently.

**Background**

**5.** The appellant is the older brother of both complainants. He was 14 years of age at the commencement of the offending and 19 years of age at its conclusion. 18 months of offending occurred after he attained his majority. The offences perpetrated upon DP were first in time;

occurring when she was aged between nine and eleven years and the offences upon LR occurred when she was aged between six and ten years.

**6.** In relation to DP, the abuse consisted of repeated digital penetration of the vagina and one incident of rape. The offending occurred late at night. DP would awake to the respondent touching her vaginal area and her underwear would be around her ankles. He never spoke and she would freeze and feel pain. She pretended to be asleep during these incidents. DP recalled an incident where she was awoken by the respondent masturbating and touching her externally. She said that the offending happened on at least a weekly basis. In terms of the rape offence, this occurred on a top bunk. DP awoke to the respondent on top of her with her legs apart, penetrating her and that her underwear was again, around her ankles. She recalled feeling wet when this ended.

**7.** In relation to LR, the abuse consisted of multiple incidents of digital penetration of her vagina and multiple incidents of rape over an extensive period. She recalled waking to the respondent penetrating her and that she said, "*Get off me*" and with that, he punched her in the stomach. Another incident of rape occurred on the day of her First Holy Communion. After another incident of rape, the respondent gave LR £2 to buy a small hurl. Similar to DP, the respondent would not communicate with LR during these incidents. LR stated that their parents would go out for a walk in the evenings 3-4 times a week and that she would be beckoned upstairs by the respondent and that he would either rape or sexually assault her and that, as a result, she would dread her parents going for a walk.

**8.** The offending became known following a telephone conversation between the two complainants on the 1st December 2018. Each had believed up until that point that they were the only victims of the respondent. On the 7th December 2018, the respondent admitted to family members that he had abused the two complainants.

**9.** The respondent was arrested on the 27th February 2019 and initially denied raping either of the two complainants. A trial date was set which was adjourned in order to assess his fitness to stand trial, this took some time as Covid-19 intervened and on the 14th March 2022, it was indicated that pleas would be entered. The Director takes no issue of substance with the timing of the plea in the circumstances of assessing the respondent's fitness.

**Personal Circumstances**

**10.** At the time of sentence, the respondent was single and residing with his mother. He had worked in the local area in various jobs since leaving school. He was described as a lone solitary type of individual. He had no previous convictions.

**11.** The respondent has a history of mental health difficulties. He was hospitalised for same at 15 years of age. Indeed, the sentencing court had sight of a psychological report prepared by Dr Coyle and a psychiatric report prepared by Dr Monks.

**Sentencing Remarks**

**12.** The sentencing judge noted that the appropriate sentences imposed for all of the respondent's offending were required to be much less than that which would have applied to an older adult. He nominated a headline sentence of seven years' imprisonment in respect of the count of s. 2 rape of DP and a headline sentence of three years' imprisonment in respect of the indecent assault offence. He further nominated a headline sentence of nine years' imprisonment in

respect of the s. 2 rape of LR and a headline sentence of three years' imprisonment in respect of the sexual assault offence.

**13.** In terms of mitigation, the judge acknowledged the respondent's guilty plea, although noting that it was a late one, his remorse and letter of apology, his lack of previous convictions, his solid work record and that he lived a quiet and solitary life.

**14.** In terms of aggravating factors, the judge took into account that the offences were committed repeatedly against two very young girls over a period of two and four years, respectively, that the respondent moved from the first victim to the next victim and that he did so in relative secrecy, waiting until his parents were out on their evening walks, that he abused the trust of his sisters as their older brother, that he exploited their childish lack of understanding and that he destroyed their childhoods and inflicted damage on their growth and development as children which has had a long-lasting impact upon them into adulthood.

**15.** In relation to DP, the judge imposed a sentence of four and a half years' imprisonment in respect of the s. 2 rape and two years' imprisonment for the indecent assault offence. In relation to LR, he imposed a sentence of six years' imprisonment in respect of the s. 2 rape and two years' imprisonment for the sexual assault offence. All sentences to run concurrently with the final 18 months of the overall sentence suspended for a period of two years on conditions to make provision for the respondent's return to the community and to promote rehabilitation.

**Grounds of Application**

**16.** The Director relies on three grounds of application as follows:-

> *"1. The learned sentencing judge erred in fixing a headline sentence in respect of each of the offences, that was unduly lenient in the circumstances of the case.*
> *2. The learned sentencing judge erred in according undue and excessive weight to the mitigating factors in the case and in particular to the personal factors relating to the respondent.*
> *3. The learned sentencing judge erred in failing to attach appropriate weight to the aggravating factors in the case."*

**Submissions of the Director**

**17.** It is the Director's position that the sentences imposed in the present case both individually and cumulatively constitute a substantial departure from the appropriate sentence in the circumstances as per the principles laid out by McKechnie J in *People (DPP) v Stronge* [2011] IECCA 79.

**18.** It is emphasised that the respondent's pleas to counts 1, 36, 37 and 48 were offered and accepted on the basis that the remaining counts on the indictment would be taken into consideration. In this regard, it is submitted that the headline sentences nominated by the sentencing judge, particularly the headline on the count 1 rape of LR, did not adequately recognise all of the aggravating features in the case. In oral hearing, Ms Murphy SC for the Director indicated that she is placing most emphasis on the discount afforded for mitigation.

**19.** In terms of the individual sentences, the Director submits that the headline sentence nominated did not adequately reflect the significant differences in the offending perpetrated on LR as against those perpetrated against DP. In this regard it is noted that the offending perpetrated

upon LR occurred when the respondent was older, that these were more serious offences upon a younger victim, over a longer period of time. It is specifically noted that the respondent was an adult at the time of any offences occurring after January 1992 and continued for a period of 18 months, and that at that time, LR was not yet nine years of age.

**20.** It is submitted that if a court were sentencing an 18/19-year-old for the rape of an 8–10-year-old sibling in isolation, a higher sentence would have been imposed and that a headline sentence of nine years' imprisonment for such an offence alone is a serious departure from what would be the appropriate sentence.

**21.** It is contended that the sentencing judge, in considering the appropriate sentence, in effect, treated the respondent as a child in respect of all the offending and did not attach sufficient weight to the fact that an appreciable part of the offending occurred when he was an adult.

**22.** In terms of the overall sentence imposed, which really is the focus of this appeal, it is submitted that it wholly failed to capture the overall seriousness of the offending in question. The Director relies on the aggravating factors in the case including the frequency of the offending, its duration, the ages of the complainants and the serious breach of trust, to demonstrate this point.

**23.** In terms of mitigation, while it is submitted in written submissions that the respondent's plea was not an early plea, little emphasis is placed on this on the hearing of the appeal. It is noted that the respondent was assessed with borderline intellectual functioning and has "*some form of schizoid/autistic to his personality*" however, it is submitted that there is no suggestion that this impeded his capacity to know right from wrong or the harm the offending was causing or did cause.

**24.** The Director further submits that there was an element of double counting insofar as the respondent's age was concerned, in that the judge reduced his moral culpability with reference to his young age in nominating the headline sentence and also considered his age in terms of mitigation serving to reduce the nominated headline sentence. Further, the Director questions why the respondent's lone, solitary type lifestyle constituted a point of mitigation.

**Submissions of the Respondent**

**25.** In response to the Director's submissions on the headline sentences nominated, the respondent submits that the court conducted the appropriate balancing act in relation to sentence in circumstances where the lesser part of the offending was committed when the respondent had just reached the age of majority. It is the respondent's position that the sentencing judge adopted the correct approach in sentencing the respondent and that the sentence imposed does not meet the threshold for undue leniency.

**26.** The respondent relies on several decisions of this Court in respect of the treatment of defendants who committed sexual offences during childhood. In *People (DPP) v H(M)* [2014] IECA 19, the offender, who was a minor at the time of the offending was sentenced to nine years' imprisonment with the final three years suspended at first instance and on appeal to this Court, the sentence was substituted for one of seven years with the last three years suspended. It is submitted that there were similar aggravating factors in that case such as the breach of trust, the age of the complainant and the duration of the offending. That case concerning a single injured party.

**27.** Reliance is also placed on *People (DPP) v JH* [2017] IECA 206 in which this Court commented that:-

> "*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*."

**28.** In that case, reference was made to *R v Ghafoor* [2002] EWCA Crim 1857 as follows:-

> *"In R v. Ghafoor [2002] EWCA Crim 1857, the court said:-*
> *'The approach to be adopted where a defendant crosses the relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as 'a powerful factor'. That is for the obvious reason that … the philosophy of restricting sentencing powers in relation to young persons reflect both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults and, (b) the recognition that inconsequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrents than in the case of adults. It should be noted that the 'starting point' is not the maximum sentence that could lawfully have been imposed, but the sentence that the offender would have been likely to receive.'"*

**29.** It is submitted that the reports of Dr Coyle and Dr Monks add an additional layer of vulnerability to the respondent, particularly in the context of his incarceration and that both the respondent's age and vulnerabilities were at the forefront of the sentencing judge's mind in formulating the appropriate sentence in this case. It is noted that in *Ghafoor*, the Court adopted a position that the starting point for the sentence is what the defendant would likely have received should he have been sentenced at the date of the commission of the offence.

**30.** It is submitted that this is particularly relevant given the additional vulnerabilities of the respondent. Mr Fitzgerald SC lays emphasis on the respondent's mental health and cognitive abilities, which he says serve to act as mitigating factors. He also references the respondent's level of maturity at the time of offending.

**31.** Further reliance is placed on the more recent decisions of this Court*; People (DPP) v TD* [2021] IECA 289 and *People (DPP) v AO'F* [2022] IECA 122. In *TD*, this Court commented that:-

> *"…as regards the aggravating effects of the escalating nature of the offending and the age differential, account must be taken in weighing these of the fact that the appellant here was only 14 himself when the offending commenced and he had only just attained 18 when the offending ceased. We think that in the circumstances of this case the degree of ultimate aggravation provided by the matters pointed to was modest, having regard to the countervailing circumstances of the youth and likely immaturity of the appellant the effect of which would have been to mitigate his culpability."*

**32.** It is submitted that turning 18 years old is not regarded by the court as an automatic switch or bright line at which point a person may be conferred with all of the maturity and insight of an experienced adult, it is a gradual process. This was recognised by this Court in *TD* and *AO'F*.

**33.** In terms of mitigation, it is emphasised that the respondent entered guilty pleas to sample counts on a full facts basis prior to the commencement of the trial and in so doing saved both

complainants the trauma of giving evidence as well as saving the resources of the State. It is submitted that the timing of the guilty pleas can be explained by the concerns raised by his legal representatives and later by Dr Coyle following a psychological assessment of the respondent. It is further submitted that following Dr Coyle's fitness to plead assessment of the respondent, it was necessary to obtain a psychiatric report which occasioned delay given the first Covid lockdown.

**34.** While Dr Monks found the respondent fit to be tried, it is submitted that he made relevant findings which, in conjunction with Dr Coyle's report, provide evidence of the respondent's vulnerabilities which he possessed at the time of offending and into adulthood including his "*borderline intellectual disability and schizoid personality or mild autistic traits."*

**35.** It is noted that Dr Monks identified the respondent as someone likely to experience difficulties with incarceration in comparison to other prisoners. It is submitted that this was a factor which also fell for consideration by the sentencing judge in imposing sentence on the respondent. Reliance in this regard is placed on *People (DPP) v Power* [2014] IECA 37, as follows:-

> *"It is therefore the Court's view that in imposing the sentence that was imposed, a sentence of ten years imprisonment, and in failing to address the question of the relevance of the mental health issues which were potentially relevant at two levels: relevant in the sense that it formed part of the background of the individual who was being sentenced, but it also was potentially relevant in terms of how the person who was going to be sentenced would cope in prison and how prison would affect them, that the sentencing court was in error."*

**36.** It is submitted that it was open to the sentencing judge in sentencing the respondent who was diagnosed with a recognisable mental disorder, to order part of the sentence to be served in a non-custodial context. *People (DPP) v C(M)* (Unreported, Court of Criminal Appeal, 1997) is relied on as follows:-

> *"If it can be established, by expert medical evidence, that the rehabilitation of a mentally disordered accused can be facilitated by the imposition of a less restrictive sanction then the Court, in a proper case, is justified in imposing a lesser sentence, or canvassing the range of non-custodial sentencing options provided by law. The taking into account of these considerations in respect of a mentally disordered offender is but a particular example of the general constitutional duty of a trial judge to impose a sentence that strikes the balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person accused."*

**37.** Further reliance is placed on Prof O'Malley on *Sentencing Law and Practice,* 3rd Ed where he refers to the decision of *R v Tsiaris* [1996] 1 VR 398 as follows:-

> *"First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time. Fourth, specific*

> *deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health."*

**38.** It is noted that *Tsiaris* was cited as a useful authority by the Court of Criminal Appeal in the judgment of *People (DPP) v C* [2013] IECCA 91. The decision in *Tsiaris* underwent further refinement by the Victoria Court of Appeal in *R v Verdins* [2007] VSCA 102 which clarified that such principles not only apply to persons with serious psychiatric illness but also to those with mental abnormalities, disorders or impairments which may have an impact on their person.

**39.** In light of the foregoing, it is submitted that the reduction in the headline sentence of approximately one third afforded appropriate weight to the mitigation which was before the sentencing court.

**Discussion**

**40.** The principles for determining undue leniency are well established and do not need re-statement. In *People (DPP) v Stronge*, McKechnie J distilled the applicable principles and in essence, the Director must prove that the sentence imposed constitutes a substantial departure from the appropriate sentence before this Court will intervene.

**41.** The onus is on the Director to establish that the sentence was unduly lenient and to do so, she must demonstrate that the divergence between the sentence imposed and that which ought to have been imposed constitutes an error of principle. It is not sufficient that this Court may have imposed a different sentence or for the DPP to demonstrate the sentence is lenient, instead the sentence must be proven to be a gross departure from the norm.

**42.** With those principles in mind, we now turn to a consideration of this case. We look first to the headline sentence nominated of nine years on the rape offence concerning LR, and bear in mind that the pleas to counts 1 and 37 were entered on a representative basis.

**43.** The focus of this appeal insofar as the headline sentence is concerned relates to that sentence of nine years. This is not in any way to lessen the serious nature of the offending concerning DP, but it seems to us that the nominated headline sentence of 7 years for the free standing rape offence is within the margin of appreciation afforded to a sentencing judge, and it must also be recalled that the offending concerning LR commenced once the respondent ceased his assaults on her sister, DP and thus the former offending aggravates the latter.

**44.** Having made those observations, following our analysis of the headline sentence of nine years, we will look to the overall penalty imposed in order to see if it accurately reflects the gravity of the entire offending conduct.

**45.** The injured party, LR was of most tender years, aged 6 years when the offending commenced, which offending involved full penetration of a very young child. The offending was frequent, with the injured party indicating that she was raped 8, perhaps 10 times and sexually assaulted on a weekly basis. The offending continued until she reached the age of 10 years. This case bears the hallmarks of many cases which this Court all too frequently sees; vulnerable injured parties, the breach of trust, dominion, prolonged offending, committed in secret, manipulative conduct, humiliation and severe impact on an injured party. He ceased his assaults on her when she reached puberty. Additional factors include that on one occasion he punched her in the stomach and that he raped

her on the occasion of her First Holy Communion. There is no question but that this offending is of a most serious order.

**46.** It was open to the sentencing judge to impose consecutive sentences in the present case, particularly where the respondent ceased assaulting one girl and then proceeded to assault her sister, or, as he chose to do, to impose concurrent sentences. Either way, the headline sentence nominated must take into account the moral culpability of the respondent and the harm done. As the judge rightly pointed out, the moral culpability must reflect the pattern of escalating abuse.

**47.** The judge properly took into account in his nomination of the pre-mitigation sentence that the appropriate sentence should be less than if the offending had been committed by an older adult and thus reduced accordingly. In so doing, he clearly took account of the fact that many of the offences were committed when the respondent was under 18 years and that some of the offences, those committed over a period of 18 months in respect of LR, were committed when he had attained his majority. By stating that the sentence "*must be much less than would have applied to an older adult*", the judge took account of the submission made by Mr Fitzgerald that turning 18 years old is not regarded as an automatic switch to maturity.

**48.** This is, as we have stated, serious offending. Notwithstanding the respondent's difficulties, there is nothing to suggest that the did not know the difference between right and wrong. Had he committed all the offences as an older adult, it is likely that the nominated headline sentence of nine years would be considered to a substantial departure from the norm, this is particularly so in circumstances where his moral blameworthiness increased as he continued with the offending, having attained his majority. However, this is not the factual position, the offending was committed by this offender, as a child and as a young adult and further, as a person with certain difficulties. In the circumstances, whilst we consider the nominated headline sentence of nine years to be lenient, it is not unduly lenient.

**49.** We now look to the discount afforded for mitigation, and this, it is fair to say, is the focus of the applicant's submissions. The judge identified the pleas of guilty and properly determined to give such pleas significant weight notwithstanding the late entry of the pleas in circumstances where issues regarding his fitness to plead and the prevailing circumstances at the time. The respondent expressed remorse and furnished a letter of apology. The judge acknowledged his work history and his solitary life. Although, it is difficult at first blush to see the value in terms of mitigation of the latter, we think it relates to his own particular difficulties as identified in the reports. The court also took account of his life in the intervening 30 years or so, and as a result, reduced the sentence of nine years to that of six years.

**50.** The judge then, having reduced the sentence by 1/3, suspended 18 months of the sentence to make provision for the respondent's return to the community under the supervision of The Probation Service, thus leaving the carceral portion of the sentence at one of four and a half years' imprisonment.

**51.** In nominating the headline sentence, the judge took account of the appellant's age and level of maturity at the time of offending and thus, as he stated, nominated a much-reduced headline sentence. Whilst a lenient pre-mitigation sentence, we do not think it is unduly lenient.

**52.** Having considered the respondent's age and level of maturity in terms of nominating the headline sentence, the issue of age did not fall for consideration again under the rubric of the

discount to be afforded for mitigation. The pleas of guilty were obviously a strong mitigating factor, even if entered late in the day in the particular circumstances of the present case. He received significant credit for the pleas. Aside from the pleas, the respondent expressed remorse and issued an apology. We consider the fact of the absence of previous convictions to be of little weight given the prolonged offending. Equally, limited weight can be assigned to the good work record in the context of the nature of the offending. What remains is the respondent's personal characteristics, the life he has led in the timeframe of 30 years or so and the fact that serving a sentence will be more difficult for him given the factors identified in the psychiatric report.

**53.** Having assessed the discount for mitigation and the portion of the sentence that was suspended, we consider that the ultimate sentence does not adequately reflect the offending conduct.

**54.** This was, as stated, serious serial offending, with many aggravating factors. It is important to observe that pleas were entered on a representative basis. However, we believe that the overall sentence imposed fails to accurately reflect the seriousness of the offending conduct when viewed in its entirety.

**55.** In our view, the discount permitted for mitigation and the length of the period which was suspended was too great.

**56.** In those circumstances, we are satisfied that the sentence imposed was a substantial departure from the norm and amounts to an error in principle. Consequently, we will quash the sentence imposed and proceed to re-sentence the respondent *de novo* as of today's date.

**Re-Sentence**

**57.** We do not intend to rehearse the aggravating or mitigating factors. We have examined all the relevant factors and considered the new material furnished us, being that of a positive Prison Governor's Report. We will focus on the sentence nominated in respect of the offending concerning LR. We will not interfere with the pre-mitigation sentence of nine years imprisonment imposed on the rape count.

**58.** Having assessed the mitigating factors, we consider that the appropriate reduction from the headline sentence in terms of the mitigation identified above is that of seven years' imprisonment. We consider that it is essential to suspend a portion of that sentence to enable the respondent's smooth transition back into society following his term of incarceration and consequently, we will suspend the final year of that sentence on the same terms as imposed by the sentencing judge. We consider a sentence of seven years' imprisonment with the final year suspended properly takes account of the overall offending and the personal circumstances of the offender.

**59.** Accordingly, the substituted sentence on count 1 is that of seven years with the final year suspended. The remaining sentences are as imposed by sentencing judge. The respondent remains on the sex offenders register for life.