



**THE COURT OF APPEAL**

**Record No: 198/23**

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

**BETWEEN/**

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

**RESPONDENT**

**V**

**JMcM**

**APPELLANT**

**JUDGMENT of the Court delivered on the 11<sup>th</sup> day of July 2024 by Ms. Justice Isobel Kennedy**

- 1.** This is an appeal against sentence. On the 27<sup>th</sup> June 2023, the appellant was sentenced to 4 years and 10 months' imprisonment on each of the 9 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, 11 years' imprisonment on each of the 8 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981, as amended and 9 years and 7 months' imprisonment on each of the 17 counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, leading to a total sentence of 11 years' imprisonment.
- 2.** A somewhat unusual situation arises here in that this matter was listed before this Court by way of an appeal against conviction and sentence. That in itself, is of course, not unusual, but on the conclusion of argument on the appeal against conviction, the matter proceeded to the hearing of the sentence appeal and at this point, the Court advised counsel of the extent of the Court's jurisdiction on such appeal. The appeal proceeded, only for counsel to stop in the early stages to take instructions. An application was then made to withdraw the appeal against sentence. The Court decided to proceed with the sentence hearing *de bene esse* and we now give judgment on whether to permit the appellant to withdraw his appeal against sentence.
- 3.** For the reasons stated hereunder, we have decided to refuse to grant such leave and therefore, we will also deal with the sentence appeal.

4. The jurisdiction of this Court in the case of appeals against sentence is now provided for under s. 3(2) of the Criminal Procedure Act, 1993 which replaces s. 34 of the Courts of Justice Act, 1924 which section permitted the Court of Criminal Appeal to reduce, increase or otherwise vary a sentence following a defence appeal. Section 3(2) of the 1993 Act provides:-

*"On the hearing of an appeal against sentence for an offence the Court may quash the sentence and in place of it impose such sentence or make such order as it considers appropriate, being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial."*

5. The power to increase sentence therefore remains.

6. It is the practice of this Court to advise those appellants it considers at potential risk of an increase in sentence of that hazard. The potential risk is by no means set in stone and may decrease or increase as the arguments are made during the hearing.

7. Order 86C of the Superior Courts Rules provides as follows:-

*"15. (1) An appellant or applicant who is not on bail may, at any time after he has duly served notice of appeal or of application for enlargement of time, abandon his appeal or application by giving notice of abandonment to the Registrar and to the respondent in the Form No 29 **not later than ten days before the date fixed for the hearing of the appeal or application.***

*(2) When the Registrar receives a notice of abandonment under sub-rule (1), he may, at the request of the Chief Prosecution Solicitor, list the matter before the Court of Appeal on notice to the appellant and the Chief Prosecution Solicitor for the purpose of the making of any consequential order.*

*(3) An appellant who is on bail, or who wishes to abandon his appeal or application later than ten days before the date fixed for the hearing of the appeal or application shall apply to the Court of Appeal by motion on notice to the Chief Prosecution Solicitor for leave to abandon the appeal or application and for such consequential orders as are required **and the Court of Appeal may allow or refuse the application** and if it allows the application, may make any necessary consequential orders."*

8. It is essentially a matter for the discretion of this Court whether or not to allow an application for abandonment of an appeal outside of the ten-day period.

9. It is axiomatic that all appellants should be treated in accordance with fair procedures, hence the practice of this Court to inform appellants that they may be at risk of an increase in their sentence. This is not in any way to deny an individual of the right to appeal, but to simply confirm that the appellant in question is fully cognisant of the range of options available to the Court.

10. The present case is not an easy one, in that having been advised of the range of options, the matter proceeded for a short period. That, in itself, would not cause the Court to refuse leave to withdraw the appeal. In this case, we decided to proceed to hear the arguments *de bene esse*, which, in reality, meant that the appellant's counsel was left to argue that the sentence was within range. No arguments were advanced by the Director who rested upon her submissions.

- 11.** This Court is in a position to determine whether to grant leave to withdraw the appeal against sentence having read the transcript of the evidence, the submissions filed, the oral argument and the sentencing remarks.
- 12.** When an appeal against sentence comes before the Court, in the interests of fairness, an appellant is ordinarily advised of the options available to the Court. Should leave be sought to withdraw the appeal, this Court will then decide how to exercise its discretion. Following the Court reminding the appellant of the range of options open to it, no cogent argument was advanced as to why we ought to grant leave.
- 13.** It must also be borne in mind that the Supreme Court issued the clearest guidance in *People (DPP) v FE* [2021] 1 IR 217 as to the range within which the first rape potentially fell and so, in our view, the appellant was at serious risk of an increase in the headline sentence for that offence alone. We have come to the decision in the circumstances of the within case to refuse to grant leave to withdraw.
- 14.** We come to that conclusion on the basis of a consideration of the sentence imposed which appears to us to be outside the appropriate sentence for such serious offending and so we will proceed to consider the question of sentence.
- 15.** The appropriate sentence is that which is appropriate for the offences as committed by this appellant. The ultimate sentence for all the s. 2 rape offences was one of 11 years' imprisonment.
- 16.** Before we proceed to further detail, we say that the first offence of rape involved tying an 8-year-old child to the bed, holding a knife to her throat and threatening to hurt her if she told anyone. The appellant then raped her causing her to bleed. This single offence alone merited a headline sentence at the top end of the mid-range, whereas a headline sentence of 13 years was nominated on all of the s. 2 rape offences. The first rape offence was preceded by a sexual assault offence and then followed by many other rapes, s. 4 rapes and sexual assault over a 3-year period on a young child.
- 17.** Therefore, we have concluded that the appeal should proceed as it is clear there is an error in principle, that being that the headline sentence nominated for these offences of rape is simply too low, diverging significantly from the norm for this type of offending.

#### **Background**

- 18.** The complainant gave evidence that between the ages of 8 and 11 she was sexually abused by the appellant whose partner is her stepfather's niece. She stated that she regularly visited the appellant's home, particularly at weekends and holiday periods which included many sleepovers. She gave accounts of sexual assault by way of inappropriate touching, rapes and s. 4 rapes by way of the penetration of her anus and mouth, all of which occurred on a regular basis.
- 19.** The first instance of s. 2 rape occurred when she was around 8 years of age when the appellant tied her to the bed with tights or a scarf and held a knife to her throat and told her that if she told anyone, he would hurt her.
- 20.** Numerous instances of sexual abuse occurred thereafter and were perpetrated on a frequent basis. Counsel for the respondent provided a précis of the evidence at the sentence hearing with which the prosecuting garda agreed.
- 21.** The first incident was when the complainant was eight years of age and it comprised of a sexual assault whereby the appellant touched her vagina, her bottom and her breasts under her

clothes at the front door.

**22.** The next incident was four or five months later and concerned the rape offence as described. The complainant also described how the appellant would lock the door of the bedroom when he was abusing her. He anally raped her in the bedroom and the sitting room, with the final act of anal rape occurring two days before an operation to remove her tonsils. One event of anal rape took place outside. The abuse involved inappropriate touching and oral rape. The counts were preferred on a representative basis.

**23.** In her victim impact statement, the complainant detailed how the appellant became more aggressive and sneakier as the offending behaviour went on. She described feeling scared and numb and that she felt as though her childhood had been taken from her, that she previously enjoyed going to see her cousins and spending time in the appellant's home but that this was ruined because of the appellant's behaviour. She detailed that she suffered with her mental health, has undergone counselling and is on certain medication to reduce anxiety and help her sleep.

#### **Personal Circumstances**

**24.** The appellant has a wife and three daughters. It is said that he was raised in a situation of considerable deprivation, wherein his family struggled to make ends meet. He has been in gainful employment and has also engaged in a number of projects in the voluntary sector.

**25.** The appellant has six previous convictions including convictions for unauthorised possession of a firearm and ammunition, s. 3 assault, burglary and road traffic matters. A psychological report and letters from his family were furnished to the court.

#### **Sentencing Remarks**

**26.** The sentencing judge noted the aggravating factors as the breach of trust, the age disparity between the complainant and the appellant, the aggressive nature of the offending, the fact that the period of offending was considerable, spanning a three year period and that the court was concerned with different types of offending including vaginal, anal and oral rapes, the impact on the complainant, that she was a young child for the entire period of offending and that she came from a chaotic background, which would have been known to the appellant.

**27.** In mitigation, the judge took into account the materials furnished on behalf of the appellant including testimonials and other materials detailing his charity work. In respect of the psychological report before the court, the judge noted that same referred to the family background of the appellant, that he lost his brother as a result of suicide and lost his mother thereafter, that he experienced childhood poverty and that during his childhood, he witnessed a serious road traffic accident. The report further referred to previous attempts at self-harm and that the appellant had previously suffered from depression. The judge further noted that the appellant had been using his time in custody in a constructive manner and had no disciplinary matters.

**28.** The court noted the appellant's previous convictions but was of the view that they did not concern the court as they did not involve sexual offending and occurred many years ago.

**29.** The court agreed with the Director's assessment that the case belonged in the more serious category as identified by the Supreme Court in *People (DPP) v FE*, meriting a headline sentence of 10 to 15 years.

**30.** The court nominated headline sentences of 13 ½ years in respect of the s. 2 rape offences and imposed sentences of 11 years' imprisonment. In respect of the s. 4 rape offences, the court

nominated headline sentences of 12 years and imposed sentences of 9 years and 7 months' imprisonment. In respect of the sexual assaults, the court nominated headline sentences of 6 years and imposed sentences of 4 years and 10 months' imprisonment. A two-year period of post-release supervision pursuant to s. 28 of the Sex Offenders Act, 2001 was also imposed.

### **Grounds of Appeal**

**31.** The appellant lodged the following two grounds of appeal against sentence:-

*"(a) The learned sentencing judge erred in law by selecting an excessive headline sentence in the circumstances of the case;*

*(b) The learned sentencing judge failed to have proper or adequate regard for the personal circumstances of the appellant resulting in the Court failing to give adequate mitigation when considering the appropriate sentence to apply."*

### **Submissions of the Parties**

**32.** The parties' written submissions address ground (b): inadequate mitigation. Counsel for the appellant, resting on his written submissions with focus on the submission regarding the mitigating factors, contended that the sentence was constructed in such a way as to fail to promote rehabilitation as a sentencing goal. When pressed by this Court, the appellant conceded that there was no error in principle.

### **The Appellant**

**33.** Insofar as an error is contended for mitigation, reliance is placed on Prof. O'Malley on *Sentencing Law and Practice* (3<sup>rd</sup> Ed, Round Hall, 2016) at para 2-20:-

*"A sentencing court may decide to select a measure designed to further an offender's rehabilitation or to reduce the risk of re-offending, the two objectives being quite compatible. Here, rehabilitation is functioning as a purpose rather than as an incident of punishment...Once proportionality is treated as a limiting principle, it allows for the use of measures that may be more lenient than the nature of the offence would otherwise deserve but which will hopefully assist the offender to refrain from further crime...Rehabilitative sanctions can help offenders to address problems and issues that may have contributed to their offending conduct. They can thus have beneficial consequences, not only for the particular offender, but also for society at large which will clearly benefit from the reduced risk of further harm. Research also teaches us that courts should be alert to the capacity of more seasoned offenders to desist from further crime if they reach a point where, for example, they have developed significant social bonds. A judicial expression of confidence in their commitment and ability to remain on the path of desistance can provide them with an all-important incentive to persevere in their efforts at reform."*

**34.** The strong relationship formed by the appellant with his family, as referenced in the psychological report is emphasised as follows:-

*"It would appear from the narrative provided by the spouse, that the client has devoted much of his time to his relationship with his wife and raising their three daughters. The Client reported that when he met his wife, at aged nineteen, that he ceased his juvenile concerns, relating to alcohol and drug abuse, that had resulted in him spending four months in prison, at aged seventeen for assault."*

And by the appellant himself:-

*"This happening to me is the worst thing to ever happen to them, we are all very close. My wife is wearing my wedding ring around her neck. [Appellant's wife] and me spent all our time with our children, we gave them everything that we could and showed them all the love we could so this is the worst thing to happen to our family"*

**35.** It is further emphasised that the appellant has been using his time in custody constructively as was outlined in the Prison Governor's Report which it is said reflects a wish to engage in the process of rehabilitation. Further reliance is placed on the psychological report as follows:-

*"[The appellant] would appear to have experienced significant childhood poverty and did not perform well academically. It would appear that he continued to find employment at various positions throughout his life and completed training in various courses to compensate for his lack of academic achievement. [The appellant] attends school in prison to improve his reading and writing function, and would appear to enjoy the art and pottery classes."*

**36.** The following from Prof. O'Malley's text is also relied upon:-

*"Part-suspension may be an effective means of promoting or encouraging rehabilitation where that seems to be a realistic prospect, even in circumstances where the nature of the offence, the offender's record or both make some element of immediate custody inevitable... An immediate term of custody may be necessary to reflect that reality although some portion of the overall sentence may usefully be suspended if the offender seems to be setting out on a pathway towards desistance."*

**37.** It is submitted that the rehabilitation of the appellant is a goal which should be encouraged by this Court particularly in light of the fact that the appellant has already proven that he is an individual who is attempting to use his time in custody constructively.

#### **The Respondent**

**38.** The respondent also rests upon her written submissions and says that the sentencing judge took account of all of the mitigation in the case. It is emphasised that the sentencing judge specifically referred to the reports and testimonials relied upon by the appellant as well as the fact that the appellant had been doing well in custody in handing down the above sentences.

**39.** The respondent draws this Court's attention to the fact that the appellant did not indicate an acceptance of the verdict nor apologise to the complainant for his wrongdoing and, further, that as of the sentence hearing, the appellant had not made any specific efforts to address his offending behaviour. It is submitted that in these circumstances, the scope for incorporating a large discount in the sentence to incentivise rehabilitation was severely limited.

**40.** Reliance is placed on the comments of this Court in *People (DPP) v Counihan* [2015] IECA 76 as follows:-

*"...the judge was mistaken in considering that the respondent had engaged in rehabilitation. That process requires acknowledgement of guilt and acceptance of responsibility for past wrongful conduct, features which are very clearly absent from this case."*

## Discussion

**41.** We have referred to some of the factual matters above, but for the purpose of this appeal, it is necessary to provide further detail.

**42.** The complainant stated that the abuse happened on so many occasions, she could not recall specifics. She described how the abuse would occur mostly every time she was in the appellant's home. She described how the incidents normally occurred; where the appellant would grab her hand and push it down his trousers, and then compel her to perform oral sex on him. He would lock the bedroom door when abusing her. He anally raped her, bending her over the bed or the couch. She described an occasion of anal rape which occurred outside behind a large gate. The transcript of the evidence adduced at the sentence hearing refers to the DVD of interview with the child, and so we have viewed this also in our consideration of this appeal.

**43.** The victim impact statement provides an account of the severe impact on the victim.

**44.** The sentencing judge properly identified the aggravating factors to include the breach of trust, the age disparity, that the offending was particularly aggressive in nature with reference to some of the actions, the prolonged nature of the offending and the impact on the victim.

**45.** The judge identified the mitigating factors as the testimonials, the appellant's charity work, the neuropsychology report setting out his background, difficulties and bereavements. She noted that the psychologist referred to previous attempts at self-harm and incidents of depression. The psychologist was unable to address victim empathy in light of the fact that the appellant did not accept the jury's verdict. The judge acknowledged that he had been doing well in custody and referred to the Prison Governor's report and the letters received from his family.

**46.** The Director placed the gravity of the offending within the "*more serious cases*" category identified in *FE* where it is stated by Charleton J:-

*"What characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust."*

**47.** Cases requiring up to life imprisonment are considered with reference to the decision in *People (DPP) v WD* [2008] 1 IR 308 which case set out a series of factors which aggravate the offence of rape, including, "*special violence, more than usual humiliation...abusing a position of trust...abusing a disparity in ages...abusing a particularly young or vulnerable victim...coldly engaging in a campaign of rape.*"

**48.** Cases falling into the "*more serious cases*" category may also have some of the hallmarks of those within the even more serious category and vice versa. This is one of those cases, in particular with reference to the first rape offence, which, in our view falls within the category of cases requiring up to life imprisonment.

**49.** The headline sentence nominated for this offence was that of 13 ½ years' imprisonment. There is no doubt that the judge carefully considered the entirety of the offending and indeed took some time to consider the appropriate sentence. In sentencing the appellant, she noted that the counts preferred were sample counts to reflect the entirety of the offending and in relation to the rape offences the judge stated:-

*"So, in relation to the section 2 rape offences, and that's in relation to all of the section 2 rape offences, this court is of the view that a headline sentence of 13 and a half years would be appropriate."*

**50.** Charleton J in *FE* refers to Emmins on *Sentencing* (4th Ed, 2001) in the context of assessing the seriousness of offences at para. 18 of FE:-

*"It is very difficult to define 'seriousness' in the abstract, and no attempt is made to do so in existing sentencing law. It is of great importance, however, for the sentencer to gauge the seriousness of one offence in relation to another, and to distinguish within each offence, for example one case of burglary from another case of burglary. Distinctions also need to be drawn between the respective roles played by co-defendants in a particular case. This is a demanding task for the sentencer, but it is central to the sentencing decision. It is perhaps not so difficult as it might sound. In assessing seriousness, the sentencer should have regard to the immediate circumstances of the offence, and the degree of the offender's culpability in relation to that offence....In determining the seriousness of the offence, the sentencer must always take into account any aggravating or mitigating factors which impinge upon the question of the offence seriousness. Some of the factors apply across a range of offences. An example....is where the offender has committed the offence in 'breach of trust'....It also has relevance in sexual offences,.."*

### **Conclusion**

**51.** The first offence of s. 2 rape occurred some months after the first offence of sexual assault, the child was around 8 years old at the time. The description of that incident of rape is very serious. Tying a child to the bed with tights or a scarf and holding a knife to her throat to reinforce that she ought not to tell anybody or he would hurt her and then raping her is an offence which, in our view, falls within the category of cases requiring up to life imprisonment.

**52.** Nominating a headline sentence of 13 ½ years for that offence amounts to an error in principle, in our view, which was compounded by nominating the same penalty for all subsequent rape offences which continued over a three-year period.

**53.** We are of the view that the sentence imposed constitutes a substantial departure from what would be the appropriate sentence in the circumstances and so we will quash the sentence and proceed to sentence the appellant *de novo*.

### **Re-Sentence**

**54.** In that regard, we take account of the DVD of interview with the victim, the evidence at the sentence hearing, the plea in mitigation and the report of the psychologist and the testimonials.

**55.** We also take account of the appellant's current situation; it was outlined that on commencing his sentence, he started at English Level 1 and has since attained Level 3, he has been attending mental health and drug addiction courses and has been involved in metal work and art. Further, after Christmas, the appellant was appointed as a landing cleaner and enjoys enhanced prisoner status as a result. He has no P-19s.

**56.** Having carefully considered the facts of the first rape offence and the subsequent rape offending, we are of the view that the appropriate headline sentence for the totality of the s. 2



rape offences and s. 4 rapes offences is that of 20 years. This headline sentence is imposed on a global basis to properly reflect the overall gravity of the offending. While all the rape offences and s. 4 rape offences, bar the first rape offence, fall within the "*more serious*" category, this figure takes account of the particular aggravating factors relevant to the first rape offence, and the aggravating factors relevant to the balance of the rape offences. If sentence were to be imposed solely on the first rape offence, we would consider a sentence in the region of 17 years pre-mitigation to be appropriate.

**57.** We leave the headline sentence nominated on the sexual assault offending.

**58.** Insofar as mitigation is concerned, it is somewhat limited, but we look to the mitigation offered as identified by the sentencing judge. We note the appellant's background and circumstances, his issues as identified by the psychologist and his family support. He does not have available to him the mitigation provided by pleas of guilty, remorse or insight into his offending.

**59.** In consequence of the mitigation, we will reduce the headline sentence of 20 years to 16 years. The sentence on the sexual assault offences remain as imposed by the sentencing judge. We are of the view that this properly reflects the gravity of the offending.

**60.** We acknowledge that the appellant has sought to make progress by improving his education and attending courses while incarcerated. However, whilst this is laudable, rehabilitation requires an acceptance of responsibility for the offending concerned. It is instructive that the psychologist was unable to address victim empathy as the appellant did not accept the jury's verdict. This is, of course, his right, but the effect of this is that very little weight can be given for efforts towards rehabilitation. However, in recognition of the improvements he is making, we will suspend the final 6 months on the statutory condition. Post-release supervision as imposed by the trial judge remains.

**61.** In summary, the appellant's sentence on the rape offences contrary to s. 2 and the s. 4 rape offences is now 16 years with the final 6 months suspended. All sentences are imposed concurrently.