



THE COURT OF APPEAL

Record No.: 119/2019

**Edwards J.
Donnelly J.
Ní Raifeartaigh J.**

BETWEEN/

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

RESPONDENT

-AND-

A.D.

APPELLANT

**JUDGMENT (*ex tempore*) of the Court delivered on the 22nd day of September, 2020
by Ms. Justice Donnelly**

1. On 31st January, 2019, the appellant, pleaded guilty on a full-facts basis to 9 offences of rape. On 5th June 2019 he was sentenced by the trial judge (White J.) to 13 years' imprisonment with the final two years suspended on certain conditions. In sentencing him the trial judge identified the headline penalty as one of 15 years. The trial judge indicated that this was a case where a consecutive sentence was merited but it was appropriate to impose a substantial concurrent sentence in respect of all the offences on the basis that imposing individual sentences would minimise the seriousness of the individual offences. The appellant appeals against the severity of that sentence.
2. The Notice of Appeal was drafted by the appellant personally. He did not identify any grounds of appeal in this notice. In written submissions, having recited various case-law concerning sentencing generally and rape sentences particularly, counsel submitted as follows:

"In the instant case herein, notwithstanding his previous good character, and his guilty plea, the Appellant was sentenced to thirteen years imprisonment, with two years suspended on conditions. He submits that the deduction of two years from the identified headline sentence of 15 years and the suspension of two years, on conditions, was not a sufficient deduction by way of mitigation, having regard to the guilty plea and the absence of previous convictions, and, in all of the circumstances, the trial judge perpetrated an error of principle."

Background Facts

3. On 16th August, 2017, when she was aged 14 years, the complainant, "B" a daughter of the appellant, through her mother, reported to gardaí that she had been molested by her father. When subsequently interviewed at the garda station, B detailed that the appellant had first raped her when she was aged about nine years old. She described how he had

invited her into his bedroom, locked the door, asked her to take off her trousers and lie on the bed where he then lay on top of her and raped her. The subsequent rapes, as outlined in the indictment, followed a similar pattern and she stated that they had occurred approximately twice a week when her mother was not at home. She contended that when she told her father that she didn't want to have sex he would take a belt off his trousers, and hold it up in a threatening manner, and, although he never actually hit her, she felt scared.

4. The Victim Impact Report was read into the record at the sentence hearing. The victim set out how she felt her father had controlled her and that had prevented her from reporting the rapes earlier. She had to get preventative treatment for STD's which she found distressing. In recent times she had lost a patch of her hair which she felt was due to stress. She outlined feelings of loneliness, isolation, betrayal, and loss of confidence. She felt like a part of her childhood was taken from her. This had a very negative impact on her relationship with her mother, but since she had reported the matter and her mother found out what had been happening they had become very close.
5. The appellant is a Nigerian national who came to Ireland in the early 2000's. He has no previous convictions. In mitigation it was submitted that though the appellant attempted to minimise the number of rapes perpetrated by him and to shift the blame to his daughter, he had nonetheless entered pleas of guilty, and on a full facts basis, and that this was of significant importance. It was noted that the probation report showed that he was aware of the psychological damage he had caused his daughter and found him to be at a low risk of re-offending. It was submitted that he had a difficult background and had been exposed to violence, and that since the offending he was effectively homeless and his relationship with his family was over, leaving him vulnerable as a non-national to a more difficult time in prison.

Sentence

6. It was noted by the sentencing judge that the guilty plea was on a full-facts basis and the sentencing judge also had regard to the probation service report dated the 17th May 2019, the victim impact statement of B, and also a prison governor's report from the prison in relation to the appellant.
7. The sentencing judge outlined general sentencing principles with regard to punishment, deterrence and rehabilitation and the need to have regard to totality and proportionality principles and the need to avoid a sentence that constituted cruel and unusual punishment. Having done so, the sentencing judge observed that the appellant's offending behaviour occurred regularly over a period of five years such that whilst it was an appropriate case for consecutive sentencing, instead, he would deal with it by imposing a substantial concurrent sentence in respect of all of the offences on the basis that imposing individual sentences would minimise their seriousness, in light of the number of counts to which he had pleaded guilty.
8. The sentencing judge outlined the "obvious" aggravating factors; a serious breach of trust by a father to his daughter, accompanied by a form of control, naturally these acts were

physically violent to B, and that one cannot doubt the seriousness of the type of activity effectively pursued with regularity over a substantial period of time. The trial judge placed the offending at the upper scale. The sentencing judge also noted a "lack of insight" on the appellant's part in relation to the impact of his offending. In respect of mitigation, the sentencing judge noted the guilty plea tendered by the appellant which he regarded as important in that the appellant had fully acknowledged his guilt before the sentencing judge and taken full responsibility for all his actions over the period of time. Based on the probation report the trial judge also considered it imperative that the probation service was involved in the management of this case.

9. In the circumstances the sentencing judge identified 15 years' imprisonment as the headline sentence and, taking all of the mitigation factors into account, and to deal with the important element of rehabilitation, he imposed a sentence of 13 years' imprisonment with two suspended in the appellant's own bond of €100 and subject to the condition that he keep the peace and be of good behaviour for the duration of his imprisonment and for two years thereafter; that he will be assessed for the sex offender treatment program while in prison, and participate in a victim awareness program on his release; participate in offence focused work and attend all appointments offered by the supervising probation officer, and adhere to all requirements under the Sex Offenders Act and to notify his probation officer of any change of address.

The Appellant's Submissions

10. In written submissions, the appellant referred to a number of well-established principles of sentencing law. Sentences must be proportionate to the circumstances of the case having regard to the nature of the offence, the effect on the victim and the circumstances of the convicted person: *see: The People (Attorney General) v. O'Driscoll* [1972] (1 Frewen 351) and *The People (Director of Public Prosecutions) v. M* [1994] 3 I.R. 306.
11. The appellant referred to M (above) in which the Court applied *The People (D.P.P.) v. Tiernan* [1988] I.R. 250 and confirmed that an admission of guilt was a very important mitigating factor in such cases particularly as it avoided the necessity for the victims to relive the trauma of their experiences in court and be subjected to cross-examination.
12. The appellant also referred to the approach to sentencing in which the reduction in mitigation is not always calculated in direct regard to the maximum sentence applicable.
13. The appellant referred to a number of other cases in written submissions, but as these were mainly referred to as illustrative of sentences imposed in other cases, this Court does not consider it necessary to deal with them other than to observe that some of them had such different facts that no value could be gained from including them in any comparison.
14. At the oral hearing, counsel urged matters of mitigation upon the Court with particular regard to the importance of the early plea of guilty in this case and also to the appellant's background. Counsel referred to the difficult childhood and early adulthood of the appellant. Counsel referred the Court to the fact that his client was from Nigeria and that

when he spoke to the gardaí he told them that his daughter was the moving party and he minimised these activities in the extreme having admitted only two occasions where he had sexual intercourse with his daughter and he also indicated difficulties in his relationship with his wife. Counsel spoke of the difficulty for counsel in advising in those circumstances; the appellant was advised of the difficulties regarding seeking to contest the other matters and told of the benefit of a plea. That was the context in which he pleaded guilty and it was counsel's submission that while the sentencing judge addressed certain matters, the question that this Court has to decide is whether the sentence was unduly harsh in the context of the plea of guilty. Counsel for the appellant submits that the Court has to bear in mind that he is Nigerian and the fallout from this is that he is a foreigner living in Ireland without family support or background.

15. Counsel asked the Court to have regard to the circumstances of the appellant. The application before the Court is based upon the plea of guilty and the acceptance of full responsibility. Counsel referred to the appellant's background/culture which may have lead him to deny everything.
16. Counsel submits that the sentence did not give sufficient credit for the plea of guilty. Counsel accepted that the offences were serious but submitted that this Court had to have regard to the appellant's circumstances. Counsel finally submitted that a headline sentence below that indicated was more appropriate.

The DPP's Submissions

17. In written submissions, the DPP submitted it was not entirely clear if the appellant was submitting that the 15 year headline sentence was excessive. In any event the DPP contended that it was not excessive. The circumstances of this case were, counsel submitted, in the words of the experienced sentencing judge, "appalling" and in those circumstances, the headline sentence of 15 years was warranted.
18. The DPP submitted that in the circumstances of such depraved offences with the degree of culpability attaching to it, the sentencing Judge would have been wholly justified in imposing a much higher sentence.
19. The DPP accepted that the plea offered by the appellant was a mitigating factor, and one for which he deserved and received full credit. Even though the appellant demonstrated marked reluctance with the gardaí and the probation services to actually accept what he did, he had nonetheless entered his plea and that plea was credited to him. The sentencing judge made it very clear that while the minimization was aggravating, it at the same time could not diminish the value of the plea and this was acknowledged by the sentencing judge in full:

"The important mitigating circumstances are the plea of the accused to all the offences. I think it's important to acknowledge that even though he did minimise it originally in interviews, and even with the Probation Service, he has fully acknowledged his guilt before this Court, taken full responsibility for all his actions over the period of time. The plea renders two very important matters which the

Court takes into consideration. It's an important acknowledgment to [B], and also [B]'s mother, of the serious criminal activity that he engaged in, and it also and particularly in this case where there was a dispute about the degree of offending by him, is of significant assistance to the Court as to the plea offered. [B] has not had to give evidence and the issue of teasing out some of these issues as to whether it was a lot more common than he said, doesn't need to be teased out now. So, the plea has been an important one for the Court."

20. The DPP submitted that the lack of previous convictions is also a mitigating factor, though at the same time this is tempered to a significant degree in cases which involve long-running sexual assaults. It is well-established that sexual offences of an on-going nature attract significantly less mitigation for an absence of previous convictions; this was recently reiterated by this Court in *The People (DPP) v. Hearne* [2019] IECA 137, paragraph 39, where Kennedy J. held that:-

"the absence of previous convictions is ordinarily a mitigating factor. There are circumstances where the absence of convictions may not be treated as such, for example, where an accused has been engaged in sexual offending over a prolonged period but has not been brought to justice"

21. Finally, the appellant's difficult personal background is accepted by the DPP to be of relevance, as is the fact that he is a foreign national, and the DPP submitted that this was all explicitly taken into consideration by the sentencing judge.
22. The DPP submitted that from the headline sentence of 15 years to the ultimate custodial sentence of 11 years, the appellant received a discount of 26%. The DPP submitted that this accurately represents the discount to which he is entitled in order to reflect the mitigation and the desire to encourage rehabilitation.
23. The DPP submitted that in all the circumstances the headline sentence set by the sentencing judge was correct, and that the discount applied by him in ultimately determining the sentence to be served was appropriate.
24. Counsel submitted that it was for appellant to identify an error in principle. There was none. It was horrific offending. She submitted that all mitigation had been taken into account. In so far as he alluded to particular cultural difficulty, there was no evidence to suggest that there was any reason for this. The appellant painted a detailed picture of engaging in sexual activities with a child. There was not just confusion with the gardaí but he had maintained the position with the probation service. She submitted that there is no error in principle.

Discussion and Analysis

25. There is no doubt that this was offending of utmost seriousness. There were regular, repeated, frequent rapes of a child, aged 9-14 years, a period of 5 years, by her father, a person in a position of the utmost trust of any child. The harm to the victim extended to her relationship with her mother. The sentencing judge clearly justified why he was

sentencing to a single composite sentence in circumstances where consecutive sentencing was merited.

26. Both parties have cited the recent Supreme Court case of *The People (DPP) v. F.E.* [2019] IESC 85, and correctly so as this is the governing authority on sentencing in rape cases. In that case, Charleton J. reviewed recent sentencing in rape cases. The Court noted in the course of its analysis that cases with more than the ordinary degree of degradation, or violence, or abuse of trust, the headline will ordinarily fall into the range of 10-15 years.
27. We are satisfied that in the circumstances the headline sentence was not excessive. Indeed, if a higher sentence had been indicated in the present circumstances, it may not have been found excessive, but we are not required to decide that.
28. The main contention has been that the sentencing judge failed to take into sufficient account the mitigation in the context of the plea of guilty and the appellant's circumstances. Counsel submits that the plea of guilty was particularly important to bear in mind given the manner in which the appellant had addressed the matter in response to the gardaí. If this is to be understood that an accused is to gain more credit because he pleaded guilty to greater offending than he was prepared to admit when questioned by the gardaí, we do not accept that as a matter of principle this is correct. The opposite is usually the case; the earlier and more holistic the acceptance of guilt, the greater the mitigation because apart from the plea of guilty, there will be additional aspects to take into account such as genuine remorse and the real prospect of rehabilitation. The plea of guilty must be given credit in its own right however, regardless of the circumstances in which it arises; the weight to be given to the plea is a factor to be assessed in light of the circumstances surrounding it.
29. An unusual aspect of the appeal was the request that this Court take into account his culture as a Nigerian when assessing the fact that he denied these offences (and blamed his daughter as an instigator and her mother as having caused difficulties in their own relationship) when confronted by the gardaí. We cannot let this go without comment. This Court will not ascribe behaviours to an entire culture as to do so would be to adopt stereotypes leading to the dangers of discrimination. We are satisfied in any event that in the present case, while his background as an asylum seeker might have given him reason to distrust police when first confronted, there is no basis for this submission in circumstances where following his plea of guilty he maintained his claims of innocence when dealing with the probation service and, it seems, throughout this entire process.
30. The sentencing judge in this case took into account the difficult background of the appellant and gave credit for his plea of guilty in this case. Given the facts before him, we are satisfied that the credit he gave for these matters was appropriate and there was no error in principle. We are satisfied that the sentence was not excessive.
31. In the circumstances, we dismiss this appeal.