



THE COURT OF APPEAL

Record Number: 23/2022

**Edwards J.
Kennedy J.
Burns J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

G.S.D.S.

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 9th day of June 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against severity of sentence. On the 11th January 2022, the appellant was sentenced to five and a half years' imprisonment with the final eighteen months suspended for 1 count of defilement of a child under fifteen years of age contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act, 2006, as amended.

Background

2. The offence occurred on the 10th November 2017, on which date, the appellant was aged 17 and the injured party was aged 12. The injured party and a friend met with the appellant and his friend.

3. The appellant told the injured party that he wished to speak with her alone. He took her by the hand and led her behind a container where he started to kiss her. The injured party pushed him away and told him to stop.

4. The appellant then pulled his trousers down and the injured party once again told him to stop, stating that: "*this is so awkward...I'm in first year and you're in sixth year*", to which the appellant responded: "*so nobody needs to know.*" The appellant proceeded to push the injured party to the ground and forced her to perform oral sex on him until he ejaculated onto her clothing. Throughout the incident, the injured party asked the appellant to stop. The injured party's jacket was forensically examined, and semen was found on the sleeve of same which matched the DNA of the appellant.

5. The offending came to light after the injured party told a friend who repeated it to people at school. The injured party was questioned by the school and became upset.

6. On the 20th November 2017, the appellant attended the Garda Station with his father where he made a voluntary cautioned statement. He stated that he had kissed the injured party and that it was consensual.

7. The appellant was arrested on the 5th April 2018. In interview, the appellant denied knowing the age of the complainant or that she had asked him to stop. He suggested that the injured party had consensually touched him but that there had been no ejaculation. He later conceded that there had been ejaculation and that he had known the complainant to be in "first or second year" and therefore "around thirteen."

Personal Circumstances

8. The appellant was 21 years of age at the time of sentencing. He has no previous convictions.

Sentencing Remarks

9. The sentencing judge noted the aggravating factors as the significant age difference, that the appellant was fully aware of this age difference, the very young age of the injured party, premeditation, that the sexual act itself was of a gross and invasive nature and that it persisted for a significant period of time and involved the use of force and compulsion. The judge also had regard to the injured party's victim impact statement and commented that the offence had a severe and negative psychological impact on her.

10. The court took into account that the appellant was a juvenile at the time of the commission of the offence, and noting the aggravating factors, a headline sentence of seven years' imprisonment was nominated.

11. In terms of mitigation, the judge noted the appellant's lack of previous convictions, that he had not come to adverse attention since the offence, his plea of guilty, that there was some level of cooperation with the investigation, that he displayed some remorse and shame for his actions, that he has a good record of employment and that he enjoyed very strong family support.

12. In recognition of those mitigating circumstances, the headline sentence of seven years' imprisonment was reduced to one of five and a half years' imprisonment. Having regard to the young age of the appellant, the need for rehabilitation and in order to incentivise that rehabilitation, the court suspended the final eighteen months of the five-and-a-half-year sentence, leading to an effective sentence of four years' imprisonment.

Submissions of the Parties

13. Two issues of concern were raised at the hearing; firstly, that inadequate account was taken of the appellant's age at the time of the offending in ameliorating his moral culpability as part of the nomination of the headline sentence. Secondly, that insufficient discount was afforded for mitigation.

Headline Sentence

14. Reliance is placed on *People (DPP) v JMcD* [2021] IECA 31 in which this Court said:-

"In respect of certain other offences, cardinaly scaled by the legislature to provide for a range of penalties running from non-custodial dispositions up to imprisonment for life we have suggested that the majority of such offences are capable of being sentenced on the basis that they fall to be located for punishment purposes at some point on an effective fifteen year spectrum, with a low range attracting a sentence ranging from a non-carceral

sentence to imprisonment for five years, a mid-range involving imprisonment from five to ten years, and an upper range involving imprisonment from ten to fifteen years."

And:-

"...we do not feel able to suggest specific starting points. Nevertheless, we feel we can safely say that s. 2(1) defilement offences not involving force, coercion or seriously aggravating circumstances would in general merit the nomination of a headline sentence in the low range, the precise appropriate starting point necessarily depending on the circumstances of the case. By the same token, if the offending behaviour has involved force or coercion (including blackmailing type behaviour, abuse of a dominant position or exploitation of an inequality of power) or other seriously aggravating circumstances (e.g., multiple instances of the offending behaviour over a prolonged period; the causing of significant harm or suffering beyond that intrinsic to the basic violation; degradation or humiliation of the victim beyond that intrinsic to the basic violation; exploitation of a known vulnerability; a gross breach of trust, recording the crime and/or dissemination of a recording of the crime, to name but some possibilities), it will merit a headline sentence starting in the mid-range, or possibly above particularly where there are multiple such aggravating circumstances and depending on the egregiousness of them."

15. In *JMcD*, there was a four-year age gap between the appellant and the complainant, there were two separate incidents of defilement on two separate dates and a power imbalance was identified between the parties in circumstances where the complainant had been infatuated with the appellant. Further, the case featured the "seriously aggravating" factor of the appellant's recording of the incidents and dissemination of same as well as using same to blackmail the complainant to engage in a sexual act with the appellant's friend. This Court reaffirmed the sentencing court's nominated headline of eight years' imprisonment.

16. The appellant distinguishes the present case on the grounds that this involved a single incident with no power imbalance beyond that inherent in the age differential between the parties, there was no exposure of the injured party or of the act to other parties in real time or by recording, and there was no blackmailing of the injured party to engage in further sexual acts. It is said that this offence would more appropriately be placed in the low range.

17. The appellant further relies on *People (DPP) v DM* [2019] IECA 147 in which case this Court substituted a headline sentence of nine years for a headline sentence of seven and a half years for offending which took place against the backdrop of five months of grooming of the complainant, in which there were multiple acts of defilement which included masturbation, oral sex and digital penetration of the complainant and the offending had involved exposure and sexual acts on camera. It is submitted that the present case is distinguishable on its facts and by virtue of the absence of the aggravating factors outlined above.

18. The respondent rejects this submission and relies on *JMcD* as follows:-

"The issue before us is not whether the sentencing Judge could have started where he did in terms of the sentencing options that were open to him, but rather whether he was right to start where he did in the circumstances of the case. That issue is concerned with whether the sentences imposed by the sentencing Judge were ordinarily proportionate...."

Ensuring ordinal proportionality in sentencing....involves the....sentencing Judge...looking at relative culpability and harm done; and then determining at what point on the spectrum of available penalties that has been set by the legislature their punishment should be located after taking account of both aggravating and mitigating factors."

- 19.** It is submitted that the sentencing judge took into account all relevant aggravating factors and all relevant mitigating factors and properly applied the sentencing principles.
- 20.** The respondent rejects the contention of the absence of power imbalance and submits that the evidence demonstrates that the injured party did as she was instructed and that at least some level of coercion was employed. It is noted that same were cited by the Court in *JMcD* in stating that it had no hesitation in expressing the view that the circumstances merited a headline offence of 8 years.
- 21.** While the respondent accepts that the aggravating factors of video recording and blackmail as arose in *JMcD* did not arise in the present case, it is submitted that those factors were considered in *JMcD* in locating the offences in the upper half of the mid-range whereas in the present case the judge placed the offence below the mid-point in the mid-range.
- 22.** The respondent notes the appellant's reliance on *DM* and emphasises that in *DM* the appellant induced the complainant to masturbate him but stopped when it was clear to him that she did not wish to engage in that behaviour whereas in the present case the injured party repeatedly asked the appellant to stop his offending behaviour, which request he ignored.
- 23.** In *DM*, Baker J endorsed the proposition in *People (DPP) v Conroy* [2018] IECA 350 that the age of the child is a core consideration in assessing the seriousness of the offence. It is pointed out that in *Conroy*, the age of the injured party was close to her 15th birthday and therefore close to the age at which the maximum sentence would have been reduced from life to 5 years' imprisonment whereas in the present case the injured party was only 12 years old and therefore not close to the upper age limit for an offence under s. 2. It is noted that in *DM* the complainant was 14 years old and the Court described her as:-

"a very young girl, barely into puberty and barely at an age where the Oireachtas has marked the correct approach to sentencing as carrying a maximum life sentence."

- 24.** With reference to the injured party's victim impact statement, the respondent relies on the significant impact of the offending behaviour on the injured party including that she now suffers from mental health and emotional difficulties.

Discussion

- 25.** Limited emphasis is placed on the judge's identification of certain aggravating factors, the focus of the argument concerns the age of the appellant at the time of offending. It is said that the fact he was 17 years old did not operate to sufficiently extenuate his culpability, thus amounting to an error in principle in the nomination of an excessive headline sentence.
- 26.** There is no doubt that the aggravating factors were many; the age disparity, the tender years of the child, an element of pre-mediation, the coercive element and the persistence of the appellant in continuing with his actions despite the injured party's protestations. The appellant was 17 years old at the time and so the degree to which his moral culpability is reduced by virtue of his age is less than that which would be afforded to a younger person.

27. We believe that the nominated headline sentence of 7 years was at the outer margins of the judge's discretion, but within the margin of appreciation afforded to the sentencing judge in light of the aggravating factors. The coercive and persistent elements and the fact that the injured party was only 12 years old elevate the gravity of the offending.

Mitigation

28. Insofar as the reduction for mitigation is concerned, it is submitted by the appellant that this fails to attach appropriate weight to the value of the appellant's guilty plea, particularly in light of the nature of the offending and the age of the injured party.

29. Again, *JMcD* is relied on as follows:-

"He was certainly entitled to claim significant mitigation for the fact that he was a minor at the time of the offences, and in that regard the sentencing judge singled this out as being "the biggest factor the court takes into consideration". Related to this was the sentencing judge's decision to treat him as having no previous convictions, so that he was in effect treated as a first-time offender."

30. It is emphasised that in *JMcD* a 50% reduction in sentencing on the basis of mitigation was upheld by this Court. This Court had regard to *inter alia* the plea of guilty, the absence of previous convictions, the fact that the appellant was a minor at the time of the offences and the appellant's family circumstances. It is submitted that a similar combination of mitigating factors arises in the present case.

31. The respondent submits that a 43% reduction in the carceral element of his sentencing was not a departure from the norm of sentencing in similar cases and it was an appropriate level of discount.

Discussion

32. It is very clear that the discount afforded for mitigation was significant reducing the sentence from one of 7 years to that of 5 ½ years. The judge then suspended 18 months in order to incentivise rehabilitation and enable attendance on various programs.

33. Whilst we agree the headline nominated was on the high side, when we look to the ultimate carceral portion of the sentence, that of 4 years' imprisonment, we cannot agree with the appellant that the sentence is too severe. We find no error in principle and accordingly, the appeal is dismissed.