



**THE COURT OF APPEAL**

**Record Number: 226CJA/19**

**Birmingham P.  
McCarthy J.  
Kennedy J.**

**IN THE MATTER OF S.2 OF THE CRIMINAL JUSTICE ACT,1993, AND  
IN THE MATTER OF:**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**- AND -**

**E.R.**

**RESPONDENT**

**JUDGMENT of the Court (*ex tempore*) delivered on the 3rd day of July 2020 by Ms. Justice Kennedy.**

1. This is an application for a review of sentence pursuant to section 2 of the Criminal Justice Act, 1993. The respondent pleaded guilty to three counts of rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act, 1990; four counts of rape contrary to section 48 of the Offences Against the Person Act, 1861 and section 2 of the Criminal (Rape) Act, 1981 as amended by Section 21 of the Criminal Law (Rape) (Amendment) Act, 1990; three counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990; one count of child exploitation contrary to section 3 of the Child Trafficking and Pornography Act, 1988 (as amended) and one count of invitation to sexual touching contrary to section 4(1) of the Criminal Law (Sexual Offences) Act, 2017.
2. The respondent received a sentence of ten years' imprisonment with the final two years suspended on terms.

**Background**

3. The respondent is the uncle by marriage of the complainant. His spouse and the complainant's mother are sisters. The complainant was born in 2010 and she was aged eight at the time of the offences which spanned from 15th October 2018 to 16th January 2019.

4. There was an arrangement that the complainant's aunt, the wife of the respondent, minded the complainant and her siblings after school, along with her own children. The respondent would often pick the children up from school and mind them until he had to return to work. During this time he developed a "secret code" in order to signal to the complainant to go upstairs. The sexual abuse occurred at least on a weekly basis and involved the touching of the complainant's genitals, performing oral sex upon her and penetrating her with his penis. It also included his encouragement and emotional manipulation of her in order for her to fondle his genitals and to perform oral sex upon him. The majority of the offending took place in the respondent's home, aside from one instance of rape which took place in the complainant's home.
5. The offending came to light in January 2019 when the complainant confided to a family member that the respondent would use a special code to signal for her to go upstairs in order to abuse her. At this time, the respondent was in Dublin Airport with the intention of returning to the Philippines due to marital difficulties. The respondent learnt of the allegations being made and eventually returned from the airport and presented himself at the garda station where he was arrested and interviewed. There were four interviews in total and during the fourth interview, the respondent gave a thorough account of the offending behaviour.

#### **Personal circumstances of the respondent**

6. The respondent is originally from the Philippines. He moved to Ireland in February 2006 with his wife. They have two children. At the time of sentencing the respondent was 38 years old and he has no previous convictions.

#### **The sentence**

7. In imposing sentence, the sentencing judge identified two main aggravating factors: the first being the nature of the horrific offences of grooming, exploitation and sexual abuse of a young child which were of a very serious nature and the second being the breach of trust involved given that the respondent was a trusted uncle who was trusted by the complainant's family and his own family to take care of the children.
8. In terms of mitigating factors, the sentencing judge identified the plea of guilty which came at the earliest stage possible, the respondent's genuine display of remorse and his full and frank disclosure of the offences in question. The judge identified his previous good character and the contents of the probation report. The sentencing judge characterises the report as somewhat of an exceptional nature because it details that the respondent had progressed in understanding the enormity in scale of his wrongdoing and appears willing to engage with the services in order to better understand and address the dynamics of his abusive behaviour. This is further strengthened by the circumstances of the respondent's arrest in that the respondent voluntarily returned from Dublin Airport and presented himself at the garda station. The sentencing judge also refers to the respondent being a foreign national. Moreover, he referred to the period of offending and although he emphasised that this was not a mitigating factor, he did note that the period of offending was shorter than other cases of this nature.

9. The judge identified a headline sentence of twelve years' imprisonment. He then went on to impose a sentence of ten years' imprisonment, with two suspended, to be imposed concurrently in relation to the three section 4 rapes and the four rape charges, with the remaining counts to be taken into consideration.

**Grounds of appeal**

10. The appellant puts forward the following grounds of appeal:-

The said learned sentencing judge erred in principle in imposing the said sentences on the respondent in that the said sentences were unduly lenient having regard to the nature, circumstances and gravity of the said offences and, in particular, the said learned sentencing judge, when sentencing the respondent, erred in principle in;

- (a) Failing to have any, or any adequate regard to the age of the complainant and failed to properly reflect the complainant's age in assessing the gravity of the offence;
- (b) Failing to have any, or any adequate regard to the gravity of the offences and in particular to the fact, that all offences were committed on a child;
- (c) erred in principle in setting a headline offence at twelve years' imprisonment and then imposing a sentence of ten years' imprisonment without giving sufficient justification for such reduction and then further suspending two years of the said sentence, again without giving sufficient justification for a further reduction in sentence;
- (d) erred in principle by putting excessive weight upon the personal circumstances and mitigating factors raised on behalf of the respondent and inadequate weight to the aggravating factors;
- (e) erred in principle by failing to give due and adequate weight to the gross breach of trust of the complainant;
- (f) failing to impose sentences of imprisonment on the respondent which reflected the seriousness of the offences, and the circumstances in which the offences were committed;
- (g) erred in principle in imposing sentences of imprisonment on the respondent to 10 years' imprisonment, while suspending the final two years of the said sentence, and backdating the said sentences to the 18th January 2019, and the imposition of the said sentences is a clear divergence from the norm of sentences which could properly have been imposed upon the respondent having regard to the details of the offences and the maximum penalties available and the personal circumstances of the respondent, and thereby justifies the intervention of this honourable Court;

**Submissions of the parties**

**Grounds a & b:**

- (a) *Failing to have any, or any adequate regard to the age of the complainant and failed to properly reflect the complainant's age in assessing the gravity of the offence;*
- (b) *Failing to have any, or any adequate regard to the gravity of the offences and in particular to the fact, that all offences were committed on a child;*
11. The appellant submits that the sentencing judge failed to have adequate regard to the vulnerability of the complainant who was entitled to feel safe in the presence of her uncle and whose childhood was essentially ruined by this repeated behaviour which was, in and of itself, at the upper end of any scale of sexual misbehaviour. The appellant refers to the following passage from O'Malley in Sentencing Law and Practice ( 2nd Ed.) 2006 at p 92:-
- "...in order to comply with the principle of proportionality, a court must first make a judgement on the relative gravity of the offence, bearing in mind that maximum sentences should be reserved for the worst cases. A clear distinction must also be drawn between the gravity of the offence and the personal circumstances of the offender. This raises the question of which factors go to gravity and which are more commonly assessed as offender related circumstances. Offence gravity is commonly assessed by reference to culpability, harm and offender behaviour. When assessing culpability, it is generally useful to have regard to the nature of the mens rea which the offender is found, or appears, to have had when committing the act constituting the crime. Intention to cause harm clearly represents the highest level of culpability and the more harm intended, the greater the blameworthiness. Recklessness, in the sense of a conscious disregard of an unjustifiable risk, comes next and again the greater and more dangerous the risk, the greater the culpability..."
12. In terms of culpability and intent, the appellant submits that the respondent was at the higher end of the scale as envisaged by Professor O'Malley and his resultant culpability was more marked. In support of this the appellant reiterates the age difference between the respondent and the complainant, some thirty years and his various attempts to insinuate that the complainant had initiated the sexual activity.
13. The appellant further submits that the sentencing judge did not give sufficient weight to the impact of the offending on the complainant. The appellant submits that the sentencing judge was obliged to take into account the concerns of the complainant's parents as well as the evidence of the Garda as regards the lasting effects of the offending on the complainant. This he appears not to have done either adequately or at all. The appellant refers to the statutory obligation to consider the adverse effects on the victim as outlined in section five of the Criminal Justice Act 1993.
14. The respondent submits that the age of the complainant was clearly observed by the sentencing judge during the course of sentencing and her age and the pattern of grooming behaviour was clearly outlined in the probation report to which the judge made express reference.

15. The respondent submits that the judge was not entitled to consider a headline sentence of more than fifteen years given that there was an absence of exceptional aggravating factors including serial abuse over many years, several victims, use of threats, violence etc.
16. In terms of failing to have proper regard for the concerns of the victim and her family, the respondent submits that the views of the family were articulated in evidence by Garda Murphy and the sentencing judge stated that he had the benefit of Garda Murphy's evidence to assist him in sentencing.

**Grounds c & g:**

- (c) erred in principle in setting a headline offence at twelve years' imprisonment and then imposing a sentence of ten years' imprisonment without giving sufficient justification for such reduction and then further suspending two years of the said sentence, again without giving sufficient justification for a further reduction in sentence;*
- (g) erred in principle in imposing sentences of imprisonment on the respondent to ten years' imprisonment, while suspending the final two years of the said sentence, and backdating the said sentences to the 19th January 2019, and the imposition of the said sentences is a clear divergence from the norm of sentences which could properly have been imposed upon the respondent having regard to the details of the offences and the maximum penalties available and the personal circumstances of the respondent, and thereby justifies the intervention of this honourable Court;*
17. The appellant submits that the sentencing judge afforded the respondent an extraordinarily high degree of credit for all matters put forward on his behalf by way of mitigation. The headline sentence of twelve years was reduced to eight years' imprisonment, given an effective discount of 1/3 for mitigation.
18. The appellant submits that when you take into account the backdating and the standard remission of 25% the respondent will essentially be serving a sentence of five years for offences at the uppermost scale of offending.
19. The respondent submits that the sentencing judge made clear that he chose to reduce the headline sentence by two years in light of the mitigation present, including one which was "somewhat of an exceptional nature." The sentencing judge was correct in his consideration of the mitigating factors including the plea of guilty and the genuine remorse which was accompanied by letters of apologies written to the respondent's family and the complainant and her family. The sentencing judge also considered the previous good character of the respondent and the probation report. The decision to suspend two years of the ten-year sentence was informed by the probation report and this was imposed on a substantial condition that the respondent engage with certain programmes.
20. The respondent submits that the appellant's reference to remission is erroneous as this is not something to which a sentencing judge can have regard during the course of sentencing. We agree this submission.

**Grounds d & f:**

(d) *erred in principle by putting excessive weight upon the personal circumstances and mitigating factors raised on behalf of the respondent and inadequate weight to the aggravating factors; and*

(f) *failed to impose sentences of imprisonment on the respondent which reflected the seriousness of the offences and the circumstances in which the offences were committed*

21. The appellant submits that there were aggravating factors present to which the sentencing judge did not refer including the fact of premeditation in circumstances where the respondent waited until he was alone with the complainant and the location of the offending which was carried out in what should have been places of safety for the complainant and where the complainant had an expectation that she would be safe in her own home or her aunt and uncle's home. The appellant refers to *The People (DPP) v. Tiernan* [1988] IR 250 where the Supreme Court expressly clarified that premeditation was an aggravating factor.

22. It is further submitted that child sexual abuse offences may also be rendered more serious by grooming of victims or other planned steps taken by offenders to secure opportunities to abuse. The appellant refers to *The People (DPP) v. WD* [2008] 1 IR 308 where the Court said:-

"The courts have placed particular emphasis on the harm that rape does to the victim and where there is especial violence, more than usual humiliation, or where the victim is subjected to additional and gratuitous sexual perversions, these will have a serious effect on the eventual sentence. Abusing a position of trust, as with a person in authority, misusing a dominant position within a family, tricking a victim into a position of vulnerability or abusing a disparity in ages as between perpetrator or victims also emerge as aggravating factors. Abusing a particularly young or vulnerable victim increases the already serious nature of the offence of rape."

23. The respondent notes that the appellant refers to *The People (DPP) v. Tiernan* [1988] IR 250 and *The People (DPP) v. WD* [2008] 1 IR 308 to support the proposition that premeditation and breach of trust should feature in the consideration of aggravating factors and yet the appellant refers to a failure to take these matters into account in reducing the sentence from the headline. This, it is submitted, shows that the criticisms of the judge are misconceived.

24. The respondent submits that at the outset of his consideration of the aggravating factors present the learned sentencing judge referred to the "...horrific offences of grooming, exploitation and sexual abuse of a young child which were of a very serious nature."

**Ground e:**

(e) *erred in principle by failing to give due and adequate weight to the gross breach of trust of the complainant;*

25. In support of this ground of appeal, the appellant refers to a number of comparator cases. The first of these is *The People (DPP) v. RK* [2016] IECA 208. Here the victim was six years of age at the commencement of the abuse and nine years of age when it stopped. The abuser was 18 – 21 years old. The appellant was sentenced to eighteen years' imprisonment with the final five years suspended and when imposing sentence, the judge outlined the aggravating factors as:- (i) The horrendous breach of trust, (ii) The very young age of the victim, (iii) The progressive nature and regularity of abuse, (iv) The profound and continuing effect on the victim. The Court held that it would have been more appropriate to reduce the sentence of fifteen years, first considered, to one of twelve years in order to take account of the plea of guilty as well as the other factors in favour of the accused, such as his relative youth, family circumstances and work history. In addition, given his professed determination to avail of all the services open to him while serving his sentence of imprisonment, it was this Court's view that an appropriate sentence would be one of twelve years' imprisonment with the final two years suspended. The Court was of the view that a starting sentence of fifteen years, rather than one of eighteen years, was more in keeping with sentences that have been imposed in other cases.
26. In *The People (DPP) v. DW* [2018] IECA 143, a headline sentence of eighteen years was identified which was reduced to twelve years. This case involved the sustained sexual abuse of an eleven-year-old complainant by her step-father, causing her to become pregnant. On appeal, the Court held that while the headline sentence of eighteen years was at the outer limits of the judge's discretion, it was not erroneously excessive and no error in principle was identified.
27. In *The People (DPP) v. TV* [2017] IECA 323, the appellant received a sentence of fifteen years in relation to 25 counts of rape. The complainant was the daughter of the appellant and she was between the ages of seven and eleven at the time of offending. The Court identified the serious breach of trust involved in the abuse of a young child and it is submitted that a similar destruction of childhood occurred in the present case.
28. Sentences of a similar nature were also imposed in *The People (DPP) v. FG* [2014] IECA 42 where a sentence of eight years was increased to fourteen years for the rape and sexual assault of a neighbour's daughter. In *The People (DPP) v. LD* [2014] IECA 53 a sentence of fifteen years with three years suspended was upheld in respect of the rape and sexual assault of the appellant's two daughters. In *The People (DPP) v. Griffin* [2011] IECCA 62, a sentence of life imprisonment for the repeated rape of a complainant from the age of eight to sixteen was reduced to fifteen years.
29. The appellant further submits that the sentencing judge failed to take into account the circumstances of some of the offending where the complainant would be taken to a different room at night-time in order to be abused.
30. The respondent submits that the headline sentence imposed is in line with the guidance given in *The People (DPP) v. FE* [2019] IESC 85 and it cannot be said that the offending

in this case falls within the upper end of the nine to fourteen-year category envisaged by the Supreme Court.

31. In terms of the cases referred to by the appellant, these can be distinguished from the present case. In *The People (DPP) v. TV* [2017] IECA 323, the abuse took place over four years and the conviction followed a contested jury trial. In *The People (DPP) v. FG* [2014] IECA 42, the abuse occurred over three years, and concerned acts of particular depravity and perversion. In *The People (DPP) v. LD* [2014] IECA 53, the charges were fully contested by the appellant, and concerned two complainants who had been abused for over a decade. In *The People (DPP) v. Griffin* [2011] IECCA 62, the charges were fully contested and involved abuse spanning eight years. In *The People (DPP) v. DW* [2018] IECA 143, the period of offending was far more protracted, the appellant was violent towards his victim and he impregnated her.

### **Discussion**

32. The jurisprudence in this area clearly establishes that nothing save a substantial departure from the appropriate sentence will justify an intervention by this Court on an application by the Director of Public Prosecutions. A sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender. In the present case there were significant aggravating features, some of which were specifically identified by the sentencing judge.
33. Ms. Lawlor SC on behalf of the Director of Public Prosecutions contends that the judge erred both in the assessment of the gravity of the offence and in giving, what is said to be excessive discount for the mitigating factors. The focus of the Director concerns the headline sentence.
34. The respondent on the other hand says the sentence is proportionate and in accordance with the jurisprudence, in particular it is said that the cases referenced by the Director, may be distinguished from this case, as the abuse was of a shorter duration in the present case.
35. We are of the opinion that this is a very serious case, indeed it is said that the respondent's conduct was heinous, involving the insidious grooming of a very young child, followed by consistent abuse over a period of two and a half months. It is apparent that the respondent engaged in a cold, calculated campaign of abuse of this young child.
36. While it is the position that the abuse did not continue for such a prolonged period as in other cases of this type, there are significant features which make this case very serious. The abuse was of an intense nature, involving three incidents of rape, four of oral rape and three of sexual assault. The fact that the respondent engaged in a premeditated campaign of abuse with the concomitant element of control is very grave indeed. Moreover, the indication in interview with the respondent that the child knew what to do because he had taught her is deeply disturbing.

37. Reference is made to the Supreme Court decision of *The People (DPP) v. FE* [2019] IESC 85, where Charleton J. in his consideration of cases requiring up to life imprisonment, states that the comment in *The People (DPP) v. WD* [2008] 1 IR 308 at para. 49 continues to accord with recent practice:

“Abusing a position of trust, as with a person in authority, Mis- using a dominant position within a family, tricking a victim into a position of vulnerability or abusing a disparity in ages as between perpetrators and victims also emerge as aggravating factors. Abusing a particularly young or vulnerable victim increases the already serious nature of the offence of rape. Coldly engaging in a campaign of rape shows a particularly remorseless attitude which is not necessarily mitigated by later claims of repentance.”

38. As can be seen from that quotation, there are many of the factors identified by Charleton J. present in the instant case.
39. It is true to say that there are significant mitigating factors, the early plea of guilty, and the genuine expression of remorse carry considerable weight. The fact that the respondent demonstrated an insight into his offending conduct and a willingness to further that, is also important.

#### **Conclusion**

40. We are satisfied that the sentence in this case was lenient, the question is, of course whether the sentence is so lenient so as to justify intervention by the Court. We are of the opinion that the elements of dominion, control, premeditation, the abuse of trust and the fact that the respondent ensured compliance on the part of the child render this case particularly grave and we are persuaded that the judge erred in his nomination of the pre-mitigation sentence of twelve years. We do not find fault with the discount afforded for the significant mitigation in the case. Consequently, we will quash the sentence and re-sentence the respondent.

#### **Re-Sentence**

41. In that respect the only additional information we have received is that the respondent is doing well while in custody.
42. In light of the aggravating factors we have identified, this case merits a headline sentence at the very upper end of the range identified by Charleton J. in *The People (DPP) v. FE* [2019] IESC 85 for cases which fall into the category of serious offences. Therefore, the appropriate pre-mitigation sentence is one of fifteen years' imprisonment.
43. We are satisfied that the reduction for mitigation is correct and so we reduce that sentence by 1/3 and will substitute a sentence of ten years' imprisonment for that imposed by the sentencing judge.
44. The respondent remains subject to the requirements of the Sex Offenders Act 2001.

45. We do not consider that it is appropriate to suspend any element of the term of imprisonment but we do consider that five years post release supervision is appropriate from the date of his release. The following conditions apply: -

- That he keep all supervision appointments with his probation officer;
- That he advise the probation officer of his address for receipt of letters regarding supervision appointments;
- That he advise the probation officer immediately of any change of address;
- That he attend for assessment and any treatments as directed by the probation officer.