THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

The President

Edwards J.

Gearty J.

Record No: 83/2019

Neutral Citation Number: [2021] IECA 57

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

H.V.

APPELLANT

JUDGMENT of the Court delivered on the 1st day of March 2021 by Ms. Justice Gearty

Issue on Appeal

1. This appeal addresses the disparity in sentencing that may arise when a single attempted rape is committed in circumstances where the sentencing judge is also considering multiple sexual offences against the same victim.

Background Facts

2. The Appellant was convicted of 22 counts of oral rape and sexual assault. The victim in each case was his daughter. He was also convicted of one count of attempted rape. The offences took place every week between October of 2009 and July of 2011, at a time when his victim was between 13 and 15 years old. The facts are set out in full in the judgment of Ni Raifeartaigh J., delivered on the 23rd of July 2020, refusing the Appellant's appeal against conviction. Of note for the purposes of the sentence hearing was the background history in respect of this family which was one of regular and frightening physical violence on the part of the Appellant towards the victim's mother, including a specific threat to the victim not to reveal the sexual abuse or she and her mother would be killed.

3. Before the verdicts, the Appellant had given an undertaking not to bother the complainant or her mother again, in any way. The evidence of violence and fear was not disputed, and the undertaking was given in that context and not by way of admission to sexual offending. A letter of apology for the violence only was offered by the Appellant, who continues to maintain his innocence in all other respects. He has a small number of previous convictions, none comparing with the offences under consideration.

Grounds of Appeal

4. The Appellant confines his argument to the sentence imposed on the count of attempted rape. He argues that, on three different grounds, the sentence of 12 years with 6 months suspended was unduly severe. The Appellant was sentenced to 10 years in respect of the counts of oral rape and 8 years in respect of the sexual assault offences. A headline sentence of 12 years was identified in respect of the attempted rape and six months was suspended to reflect the mitigation put forward by the defence.

5. Firstly, he submits that the offence of attempted rape, while very serious, is not as serious as the completed offence would be. If this proposition is correct, it is argued, the headline sentence of 12 years is too high for a single inchoate offence and disproportionately higher than the 10-year sentences imposed in respect of the oral rape offences, which sentences are not appealed.

6. Secondly, it is argued that the suspended portion of the sentence was inadequate given the mitigation in the case which included the fact that the Appellant had desisted from his attempt to rape his daughter when she screamed, that he had undertaken to leave his wife and the victim alone before the verdicts were delivered by the jury and that he had done well in prison and had undertaken an anger management course. The Court was also asked to consider the mitigating effects of a written apology from the Appellant to his daughter in which he expresses his sorrow for the violence to which he subjected her and her mother. The letter is silent as to the sexual offending as he does not accept that this took place.

7. Thirdly, it is submitted that the learned Sentencing Judge erred in failing to take into account a period spent in custody by this Appellant while awaiting trial on a separate and unrelated offence but in circumstances where an EAW had issued for his surrender in that regard and a request to prosecute these offences could not be processed until after that prosecution concluded. The Appellant had been acquitted in that earlier trial and, it was argued, this period in custody ought to have been put to the credit of the Appellant, so to speak, given that even before that EAW had issued, the investigation of these offences was complete and, had it been processed quickly it could have formed the subject matter of the same EAW.

Rape and Attempted Rape - Inchoate Offences

8. This Court agrees that, as a matter of principle, the completed offence of rape is more serious than an attempted rape in all but the most unusual circumstances. The penetration of the woman's vagina is not only a more physically invasive and traumatic event than an attempt to penetrate would be, rape also carries biological and cultural repercussions for the woman who is raped. There is a fear of impregnation and a cultural and historical view of the act as one that somehow brings shame to the woman, illogical though this may be. The additional psychological pain which is inflicted by the crime of rape on victims is a complicated psychological, historical and social issue a full discussion of which is beyond the scope of a sentencing judgement. Suffice to say that our recent social history, including sexual abuse revelations and platforms allowing victims to speak more publicly about their experiences, tells us that the lasting and severe effects of sexual offences on child and adult victims are only now beginning to be understood. There is better understanding of the fact that victims can find some offences more difficult to disclose than others. Often, the more serious the psychological effects, the longer it takes for the victim to process the offence and disclose it. And while there is a hierarchy of seriousness, both in terms of moral culpability and of general impact on the victim, each offence must be considered on its facts having acknowledged the fact that the completed offence is generally more serious than the inchoate act.

9. That this is so in respect of the crime of rape has already been acknowledged in the judgment of this Court, delivered by Birmingham P., in the case of *J.F. v DPP* [2016] IECA 390, which case is discussed further below. Significantly, this view is informed by the actions of the victim in this case in the sequence of her disclosures to her mother. She first disclosed that her father had touched her inappropriately and then that he had orally raped her. It was over a year later and after she had spoken to a counsellor that she was able to reveal that he had also tried to rape her vaginally. This confirms the Court's view

that it was the attempted rape that was the most serious of the offences committed, as the learned Sentencing Judge specifically recognised.

10. It was also argued in this context that the difference between an attempted vaginal rape and a completed oral rape is not sufficient to justify a 2-year disparity in sentence. There was, in the view of the Sentencing Judge, a difference between the penetration of the mouth and the penetration of the vagina. This Court shares that view. The latter is, in and of itself and speaking generally, the more serious offence. This does not suggest that an oral rape is anything but a serious, penetrative offence but to acknowledge that the nature of the act is different. The biological and cultural effects of the acts are different, the woman's perception of each act is different. Again, the view of the victim as to which was the most serious offence in this case is clear from the sequence of events set out above.

11. All depends on the surrounding circumstances as to where on the scale the appropriate sentence lies, before taking mitigation into account. Both offences, oral rape and attempted rape, can clearly attract lengthy custodial sentences and the circumstances will determine what headline sentence is appropriate for each offence. If the surrounding circumstances are the same, ordinarily a penetration of the vagina by the penis will attract a more severe penalty than the penetration of the mouth. The same distinction can also justify an attempted penetration of the vagina by the penis as attracting a more serious penalty than the penetration of the mouth.

Rape and Attempted Rape – J.F., the Comparator

12. The case of *J.F. v DPP* [2016] IECA 390 was used as a comparator in this appeal but, as the Appellant acknowledged in written submissions, the case was a very different one. Comparing the two cases gives a good illustration as to the rationale for the sentence

imposed in the instant case and explains why the headline chosen accurately reflects the seriousness of the offending behaviour.

13. In *J.F.*, the appellant uncle of his young victim pleaded guilty to sexual abuse over a period of years, including an attempted rape. The headline sentence of 12 years for the single count of attempted rape was reduced by this Court to a sentence of 9 years and half of the sentence was then suspended. Superficially, one can see why this case was used as a comparator: the period of offending appeared longer and there was a similar breach of trust. The victim was particularly vulnerable as she had intellectual disabilities. The headline sentence imposed by this Court in that case was considerably lower and, it was argued, rightly so, as this reflects the fact that there was no penetration of the young victim's vagina.

14. However, the period of offending in *J.F.* was not one during which there was a continuum of offending. There were 4 separate instances of sexual assault in that case as opposed to over 18 months of weekly sexual assaults in this case, including frequent oral rapes. More significantly, the background in *J.F.* was not one of violence but comprised opportunistic assaults on his young niece when she was in that appellant's home.

15. As set out in the Supreme Court case of *DPP v F.E.*, [2019] IESC 85 when the background to a sexual offence involves violence and domination, a sentencing court must acknowledge that the gravity of the offence may be affected by such a background, quite apart from the impact such violence may have on the victim. This is not to punish the offender twice or to sentence him for assaults on the victim's mother, for instance, but to acknowledge that this violence is part and parcel of the sexual violence and the deliberate intimidation of the victim is an aggravating factor in respect of the index offence.

16. In the words of Charleton J., delivering judgment in that case, at paragraph 11:

> "*A crime is an event and, as such, may take place over an instant or over a stretch of time. It should be analysed as such and in the context of its background. What led to the crime, in terms of what tempted the accused, or the pressures he or she was under, is part of that background as are factors which aggravate the seriousness of the crime or mitigate the individual culpability of the criminal. Sentencing is undertaken by judges on behalf of the community and an approach which reflects the ordinary sense of the crimes as they occur over time and the context that led to the events as reflected in the convictions represents the best approach."*

17. In that case, the offender had raped his wife having threatened her at knife point. He had then kept her imprisoned, effectively, overnight until she agreed that she would not separate from him. This series of events had to be seen as the context in which the rape occurred, and the Supreme Court held that the sequence of events, seen in this context and including the breach of trust involved in a marital rape, justified a headline sentence, albeit for a single count of rape, of 14 years.

18. An attempted rape, carried out in the context of a continuum of offending and against a background of violent domination, must usually carry a heavier headline penalty than might otherwise be expected for a single inchoate offence. When one considers also that the victim in this case was the daughter of the Appellant, the seriousness of his offending is further aggravated. The very closeness of the relationship and the distortion of what should be normal and loving is often more damaging than the pain caused by the sexual offence in and of itself. That this is more culpable in the case of a vaginal rape, even an attempted vaginal rape, than in the case of an oral rape is a reasonable view of these facts. It was the view of the learned Sentencing Judge and there is no reason in principle to disagree with this conclusion.

19. In *DPP v R.A. (No. 1) & (No. 2)* [2016] IECA 110 and *DPP v B.V.* [2018] IECA 253, the other cases relied upon by the Appellant, there was no comparable violence. In *R.A.*, an 11-year sentence was imposed and upheld for a single instance of attempted rape in circumstances where the same victim was also sexually assaulted by the appellant. The aggravating circumstances in this case were numerous and the offending period began with such credible threats to kill her mother that the complainant, when asked directly by her if something untoward had happened, felt she could not tell her mother what was happening.

20. It should be noted that the final sentence in *J.F.* reflected the advanced age of the appellant in that case and his own intellectual disabilities. Neither of these factors arise in this case and *J.F.* was relied upon primarily in considering the headline offence rather than the final sentence imposed.

21. The headline sentence of 12 years for attempted rape was within the range of penalties open to the Sentencing Judge in the circumstances of this ongoing offending on his young daughter, against a background of familial violence and threats, and considering his sarcasm and taunts in the immediate aftermath of the attempt. While an attempted offence usually attracts a less severe sentence than the completed offence, the Sentencing Judge was well placed to gauge where on the scale this particular offence lay and, looking in particular at the facts in *F.E.*, where a 14-year headline sentence was upheld in a marital rape case, it would have been open to the Judge to impose a more severe sentence had the completed offence been committed. In this case, there was no error in principle in that respect and there is no reason to interfere with her decision as to the correct headline sentence.

Mitigation - Desisting in the face of Resistance

22. The Court has considered the argument that the Appellant is entitled to credit for having stopped the attempted rape offence when his victim screamed. The argument is one that pleads for leniency as the Appellant showed mercy in desisting when asked to stop.

23. The evidence was that the victim screamed and pushed him aside. This is not the same as a case in which the man stops because his victim has asked him to stop. There was also evidence that this Appellant on the same occasion taunted the victim that he had taken half of her virginity. The evidence is set out in full in the judgment of Ní Raifeartaigh J. addressing the appeal against conviction. In those circumstances, the argument has very little weight as the apparent mercy shown does not appear to have been due to any sympathy for his victim. It is also difficult to see how desisting from actual rape could be reflected in a sentence for attempted rape, given the Court's determination above that the headline of 12 years was one that was within the sentencing range for an attempted rape. Had he not desisted, for whatever reason, the offence would have been more serious as a completed offence of rape. Logically, it is not a mitigating factor in an attempted rape to argue that it was not a completed rape. The fact does, however, ensure that the lesser of the two offences is under consideration, but that is to distinguish between two serious offences rather than to suggest that desisting is a matter for mitigation; other than insofar as it reduces the seriousness of the offence under consideration.

Mitigation – Letter of Apology

24. The learned Sentencing Judge suspended 6 months of the sentence imposed and indicated that she would have suspended more had the Appellant accepted the verdict. This indicates, correctly in this Court's view, that the question of rehabilitation was in his own hands: he cannot attend any suitable course without accepting that he has committed

these offences. While increased potential for rehabilitation was one of the stated objectives of the appeal, it is impossible to rehabilitate yourself if you do not accept wrongdoing.

25. These offences were committed against a background of threats and violence. The defence to the charges was that the victim had made up the allegations because she was angry about the violence meted out to her mother. To apologise for the physical violence in this context and seek anger management help is of minimal assistance in terms of mitigation, particularly when the violence had to be admitted as part of a defence strategy, namely, that the allegations were fabricated as revenge for that violence. The Appellant, therefore, had to concede the violence or he had no motive for what he said were false allegations. Offering to undertake anger management does not begin to address the real problem here which is the repeated and serious sexual abuse of his own daughter. Without that admission, let alone any expression of remorse, the rehabilitative potential in this case is minimal. This Court agrees with the submission of the Respondent that the real value of an apology is that it brings finality. That is absent here in respect of the convictions recorded. More importantly, an apology gives a victim affirmation that what she has alleged actually happened. It vindicates her. There was no such vindication here.

Mitigation – Undertaking to stay away from Victim

26. The promise by the Appellant not to bother his victim and her mother again is worth very little in the circumstances of a sexual offence case. It is hard to justify any reduction in sentence due to him offering to abide by one of the most common conditions imposed as part of a suspended portion of any sentence or, indeed, as part of any sentence generally imposed on rape offenders: stay away from your victim.

EAW Surrender and Time Spent in Custody for unrelated Offence

27. In respect of the time spent in custody, the Appellant spent some time in custody on unrelated charges and submits that he should be given credit for this period of incarceration. The factual background to this argument is that this file was completed in 2014, after the garda interview with the Appellant. The Appellant went into custody in September 2015 on separate charges, was acquitted on some of these charges and was then listed for retrial. He spent 10 months in custody awaiting the first trial, he left the country before the second trial, was extradited and went into custody for a further 20 months. He was acquitted on all charges, ultimately. DPP directions on these charges issued in February of 2017. The Appellant was acquitted in his second trial in May of 2017 and was charged with these offences in August of 2017.

28. The Appellant does not suggest that the Sentencing Judge was required to backdate his sentence to a time before these charges were laid nor does he argue that a sentencing court must allow for time spent in custody even in relation to a separate offence. What is submitted is that a sentence should reflect the time spent in custody, even in respect of a separate offence, on general justice grounds. The learned Sentencing Judge refused to backdate the sentence beyond the time spent in custody on these charges alone, holding that the Respondent's hands were tied in respect of awaiting the conclusion of proceedings arising out of a surrender pursuant to an EAW. The relevant extradition provisions require that a requesting State only try a surrendered person for the offences for which he was surrendered. For any further prosecution, there must be a specific request to the issuing judicial authority for consent to try an accused and this request can only be made 45 days after the proceedings for which he was surrendered have concluded.

29. The function of this Court is to identify errors in principle and, if so identified, the Court can decide to interfere with the sentence. In this case, there is no error in principle and the sentence itself is within the range open to the Sentencing Judge and was backdated

to the 2017 date when he went into custody, charged with these offences. While another judge might have taken some account of some of the time spent in custody on a separate charge, this judge did not. The fact that the file was not processed by the office of the Respondent until after the EAW had to issue for the surrender of the Appellant does not require a reduction in sentence in the circumstances of the case.

30. An argument was made that the Appellant could have been asked by the Respondent for his consent to be charged with the offences the subject matter of these proceedings at an earlier stage but, if this was a concern for the Appellant, it was a matter he too could have sought to process more quickly. Had he not left the jurisdiction when he did, no doubt his case would have been processed more quickly. In all of the circumstances of this case, it is not appropriate or necessary for this Court to interfere with the exercise of the Sentencing Judge's discretion in this regard. As was conceded in submissions, no case can be made that she was required to take into consideration the earlier period spent in custody and this Court will not interfere with that discretion, exercised on the rational basis outlined at the sentence hearing.

Conclusion

31. The overall sentence is within the range of sentencing options open to the court and the application is refused.