



**THE COURT OF APPEAL**

**Record Number: 131/2021**

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

**BETWEEN/**

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

**RESPONDENT**

**- AND -**

**TMcC**

**APPELLANT**

**JUDGMENT of the Court delivered (*ex tempore*) on the 20<sup>th</sup> day of March 2023 by Ms. Justice Isobel Kennedy.**

1. This is an appeal against severity of sentence. The appellant was convicted of two counts on a six-count indictment, namely, count 3; rape and count 5; sexual assault. A sentence of four years' imprisonment was imposed on count 5 with count 3 taken into consideration.

**Background**

2. The appellant is the older brother of the complainant. The offending, the subject of count 3, occurred between 1995 and 1998, when the appellant was aged between 12 and 14 years old and the complainant was aged between 8 and 10 years old in a bedroom of the family home. The appellant called her to his bedroom, pushed her onto a bed and raped her. She pleaded with him to stop. This incident was interrupted by the complainant's older sister who grabbed her from the bed and took her out of the room.

3. The sexual assault occurred between March 2004 and November 2004, when the appellant was 21 years of age and the complainant was 16 years old in the sitting room of the family home. The complainant was asleep on the couch and awoke to the appellant pulling her pants down to her knees. She believed he was attempting to do more and having managed to fight him off, she left the house and made a disclosure to a friend.

**Sentencing Remarks**

4. The sentencing judge identified the most serious aggravating factors as the breach of trust

and the complainant's young age at the time of the offending.

5. In terms of mitigation, the judge had regard to the appellant's young age at the time of the rape offence, the time that had elapsed between the commission of the offences and the appellant's trial, the absence of previous convictions, that he has led a blame free life since the offending and that he is a good and loyal partner and a good father.

6. The judge nominated a headline sentence of seven years' imprisonment on count 5, considering this to be the more serious count, given what had previously occurred, and then on foot of mitigation, he reduced the pre-mitigation sentence to one of four years' imprisonment. Count 3 was taken into consideration.

### **Grounds of Appeal**

7. The appellant appeals the severity of his sentence on seven grounds as follows:-

*"1. That the learned Trial Judge failed to give adequate weight to the mitigating factors including not giving adequate credit for the subsequent good character of the accused as evidenced by the absence of previous or subsequent convictions and complaints.*

*2. That the learned Trial Judge failed to take into account the obvious evidence of self rehabilitation that had consequently occurred in the years between the commission of the offences and the date of sentencing.*

*3. That the learned Trial Judge erred in principle and in law in failing to take proper account of the lapse of time between the commission of the offences and the date of sentencing.*

*4. That the learned Trial Judge erred in principle and in law in imposing a four year custodial sentence in respect of Count 5 as such was unduly harsh and not proportionate in the circumstances.*

*5. That the learned Trial Judge erred in principle and in law in failing to properly assess the accused's good work history and that the accused was at low risk of reoffending.*

*6. That the learned Trial Judge erred in principle and law in failing to give sufficient weight to the accused's age at the time of the offences.*

*7. That the learned Trial Judge erred in principle and in law in failing to take into account whether the accused was under the influence of an older sibling at the times of the offences."*

### **Submissions of the Appellant**

8. Reliance is placed by the appellant on the judgment of McKechnie J in *People (DPP) v Begley* [2013] 2 IR 188 which sets out general sentencing principles. These principles were summarised by the Supreme Court in *Ellis v Ministry for Justice and Equality* [2019] IESC 30 as follows-

*"Turning to the essential principles of sentencing law, as set out by the Court of Criminal Appeal in D.P.P. v Begley cited above, at a level of generality they require consideration of the following four matters to determine an appropriate sentence: (1) the gravity of the offence; (2) the circumstances in which it was committed; (3) the personal situation of the accused and (4) mitigating factors."*

9. *People (DPP) v TD* [2021] IECA 289 is cited as authority for the proposition that a sentencing court is required to consider the youth and likely immaturity of an offender when assessing his culpability. Reference is also made to *People (DPP) v JH* [2017] IECA 206 in which

case it was held that a sentencing court is required to assess an offender's level of maturity at the time of the commission of the offence and to accordingly measure his culpability as of that time. It is submitted that the sentencing judge erred principle and in law in failing to give sufficient weight to the accused's age at the time of the offending and, further, that no consideration was given by the sentencing judge as to whether the accused was under the influence of an older sibling at the time of the offences.

10. *People (DPP) v Hegarty* [2013] IECCA 67 and *People (DPP) v Cotter* [2014] IECA 40 are cited as authorities for the proposition that an offender who has abstained from further offending over a lengthy period of time is entitled to mitigation for that factor. It is submitted that the four-year custodial sentence was excessive in light of the appellant's blame-free life since the offending behaviour and his lack of previous or subsequent convictions. Complaint is also made that the sentencing judge failed to have regard to the appellant's efforts at self-rehabilitation in the intervening years.

11. In terms of where the offending behaviour lies on the *People (DPP) v FE* [2019] IESC 85 scale, the appellant submits that the sentencing judge erred in setting the sentence at the "ordinary" level as opposed to the "below the norm" level.

#### **Submissions of the Respondent**

12. It is the respondent's position that the appellant's age at the time of the commission of the offences was at the forefront of the sentencing judge's mind. Insofar as complaint is made regarding the judge's failure to take account of whether the appellant was under the influence of his older brother at the time of the offending, it is submitted the brother played no part in the offence in respect of which the custodial sentence was imposed.

13. In response to the submission that the sentence imposed was excessive in light of the appellant's blame free life and the absence of previous or subsequent convictions, the respondent submits that the sentencing judge had adequate and appropriate regard to same as follows:-

*"The most significant mitigating factors are his age of 12 to 14 at the time of the rape offence and the fact that the Court is dealing with sentence 25 years on from the rape offence and 17 years on from the sexual assault, those are taken from the earliest dates on the indictment. [The appellant] has no previous convictions and has led a blame-free life since these crimes were committed. He has been a good and loyal partner to [appellant's partner] and a good father."*

14. As regards the treatment of the appellant's efforts at self-rehabilitation it is submitted that the above indicates that the sentencing judge was acutely aware that he was sentencing a man who had lived a blame free life since the offending ceased and that he was not a recidivist offender or a man likely to reoffend. It is noted that no post-release supervision was ordered by the judge.

15. The respondent contends in the circumstances that the sentence imposed was just and proportionate.

#### **Discussion**

16. Mr Cody SC, on behalf of the appellant, takes issue with the headline sentence of 7 years, nominated on the sexual assault count and with the discount of 3 years afforded for mitigation. In fact, the preponderance of the grounds of appeal filed concern the latter.

17. However, it is argued that the overall sentence was disproportionate in circumstances where there was a period of some 7 years or so between the first and second offence and therefore, it is said that there was an insufficient basis to permit the first count to aggravate the second count to the extent permitted by the judge, given that timeframe.

18. Issue is also taken with the nomination of 7 years given the nature of the sexual assault allegation.

19. We have outlined in brief the facts concerning these offences and the aggravating factors are undoubtedly readily apparent. The rape offence occurred within the family home, perpetrated by the injured party's older brother, causing her fear and pain. The event was interrupted by an older sibling who removed the injured party from the bedroom and to her own house. The appellant cannot have been in any doubt as to his wrongdoing in those circumstances, notwithstanding his age, placed between 12 and 14 years old.

20. The second offence occurred when the injured party was 16 years old and the appellant aged 21 years. Now, an adult, he sexually assaulted his sister while she slept on the couch; she awoke to find her brother pulling down her pants and sexually assaulting her, where she believed he was attempting to do something more to her. A fear, well held, given what had previously occurred. Her impact statement eloquently expresses that she felt shame and a sense of worthlessness as a consequence of her brother's actions towards her. These factors all serve to aggravate his offending.

21. The offences took place in the family home, the judge properly identified the breach of trust as an aggravating factor, the injured party was a very young child at the time of the first offence and the appellant was also a young person-between the ages of 12 and 14 years. However, at the time of the sexual assault, he was an adult, but his sister was still a child of 16 years of age.

22. The judge took the appropriate course, in our view, of nominating a sentence in respect of the latter count. He considered the sentencing principles applicable when sentencing adults for offences committed as children but considered the sexual assault to be more serious by reason of the rape offence. It is, in our view, correct that the rape offence served to aggravate the sexual assault and, in those circumstances, and by account of the other aggravating factors, we are not persuaded that the judge erred in the nomination of the headline sentence.

23. Insofar as mitigation is concerned, the judge identified the mitigating factors present and acknowledged the absence of the dual factors of a plea of guilty and remorse. It is true that the appellant was a child at the time of the rape offence and that some 25 years had passed since that offence, that he is a man without convictions and has a good relationship with his wife and is a good father. However, a considerable discount was afforded for the mitigation, reducing the notional sentence to one of 4 years imprisonment.

24. Again, we are not persuaded that the judge erred in this regard, the sentence is proportionate and just in the circumstances and accordingly, the appeal is dismissed.