UNAPPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

[161CJA/22]

Neutral Citation No: [2023] IECA 9

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

C.P.

RESPONDENT

JUDGMENT of the Court delivered on the 19th day of January 2023 by Birmingham P.

1. Before the Court is an application brought by the DPP seeking to review a sentence on grounds of undue leniency. At the outset, we can say that the legal principles applicable to such reviews were not the subject of disagreement between the parties, and in truth, there has been little controversy about those principles since the first such case, that of *DPP v. Byrne* [1995] 1 ILRM 279.

2. The sentences sought to be reviewed were sentences that were imposed in the Central Criminal Court on 25th July 2022. On that occasion, sentences of ten years imprisonment were imposed in respect of each of the three counts of rape and a count of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997, with the final three and a half years of the sentences suspended, with the sentences dating from 7th August 2018. The sentence hearing took place in circumstances where the accused had been convicted by a jury following a nine-day trial.

Background

3. The background to the convictions and the sentence hearing is to be found in events that occurred on 4th February 2018 at two locations in Ballinasloe, County Galway. On the occasion in question, the injured party, who was aged 19 years at the time and who was someone with a mild intellectual disability, had been socialising in the town centre with friends and cousins. They walked her in the direction of her home. On a secluded side street, she encountered the accused. He pushed her against a jeep and raped her. He then forcibly brought her to his residence where he again raped her on two occasions and kept her imprisoned for a number of hours. In all, she was held between 2.30am and 8.30am approximately. In the course of the incident, she suffered injuries to her face, back, breast, arms and leg, the injuries were mainly in the nature of scrapes and abrasions, and there was also bruising to the labia minora and a 2mm laceration in the area of the urethra. The accused was arrested and detained. He initially denied having any contact with the injured party. When the results of DNA analysis became available, he was rearrested, and on this occasion changed his position. He indicated that the solicitor he had originally consulted by phone in the course of his detention had told him to deny everything, and now his position was that he accepted he had been in contact with the injured party and contended that they had engaged in consensual sexual activity.

4. In terms of the respondent's background and personal circumstances, he is 39 years of age. He is from Romania and had come to Ireland in 2017, procuring employment in a Romanian owned carwash. He had a number of previous convictions recorded against him in Romania, which included a conviction for attempted rape and robbery for which he received a sentence of eight years imprisonment, seven years for the robbery and one year for the attempted rape. Also recorded were previous convictions for breaking and entering and what

was described as "anger against public morals, disturbance of the public peace, threatening behaviour" and again, what was described as "community dangerous assault". There was also a conviction for assault recorded in Germany where he had received a sentence of six months. The probation report described him as being at a very high risk of sexual offending in the next 12 months. The probation report notes that throughout the various interviews undertaken with the respondent, he showed no remorse towards the victim of the offence, displayed no empathy towards the victim or understanding of the harm caused by his actions. His view of the victim was, on occasions, derogatory, and he became both angered and frustrated when questioned regarding aspects of his sexual offending as part of the assessment process.

5. The Court was told that the respondent has two children from a previous marriage, aged nine years and eleven years. The trial judge noted there was some ambiguity in the reports as to whether he had one child or two children.

The Judge's Approach to Sentencing

6. In the course of her sentencing remarks, the judge reviewed the facts of the incident, noting that the injured party was brought to specialist interviewers because of her mild intellectual disability. The judge was critical of the fact that the accused was never told by Gardaí of his right to have a solicitor present at interview. Instead, he had a telephone consultation of 10-15 minutes with a solicitor. The judge noted without comment that the DPP had submitted that the offences fell within the category of more serious offences as the categories were laid down in *DPP v. FE* [2019] IESC 85, the range of sentences for such offences being 10 to 15 years. The judge commented that the first rape was accompanied by force and that some physical injuries of a relatively minor nature were sustained, that the rapes in the accused's house appeared to have been no more violent than the act of rape itself, but which the court did not seek to diminish, but those rapes were procured by the sense of

threat which the victim felt under throughout her time in the accused's house. The judge commented that while the victim was a vulnerable young woman, there was no evidence that the accused at the time was aware of her vulnerability or sought to exploit that. Had there been such evidence, that would have been a serious aggravating factor, but the accused had not met the complainant previously. What occurred appeared to have been a chance encounter and the language barrier was such that it would not have allowed the accused to identify her vulnerability. The judge commented that an aggravating factor is the fact of the accused's criminal history which involved at least two incidents of violence. Somewhat surprisingly beyond this somewhat generic reference to incidents of violence, the judge did not refer specifically to the previous conviction for attempted rape. The judge referred to the argument advanced on behalf of the now respondent that the court should take into account that as a Romanian national with limited English, that serving a sentence in an Irish prison was harder for him than it would be for an Irish prisoner. The judge endorsed this submission, saying that the court considered that this was undoubtedly true. In the almost four years of his incarceration, the respondent has had no visitors other than his solicitor. His family did not have the means to visit him. The judge referred to certain medical difficulties involving abdominal, ear and, most particularly, haemorrhoid problems. A somewhat unusual feature of the sentencing remarks is that the judge stated specifically that the court thought it appropriate to take into account the deficit that occurred in notifying the accused of his right to legal advice and the provision of access to same. The judge made this observation notwithstanding that there was no issue at trial about the admissibility of what was said at interview. In that regard, this was a retrial, another jury having failed to reach a verdict, but again, it appears that at this earlier trial, the question of the admissibility of the contents of interviews was not in issue.

7. The judge then indicated that having regard to all of the matters that were being taken into account, the respondent was being sentenced to ten years imprisonment on each count, but the final three and a half years were suspended. What the judge said merits quotation:

> "Taking all of these matters into account, the court sentences CP to ten years on each count but suspends the final three and a half years on the basis that each day served by CP is the equivalent in terms of hardship of perhaps one and a half days served by a local prisoner. So, the court will suspend the final three and a half years for a period of three and a half years."

8. The grounds of application for the undue leniency review are as follows:

(i) That the trial judge erred in attaching excessive weight and mitigation to the fact that the convicted person is a non-national serving a term of imprisonment in an Irish prison, in effect, giving a discount of 35% on the sentence which is more than is often given for a plea of guilty.

(ii) That the trial judge erred in identifying as a ground of mitigation deficiencies in relation to access to legal advice during the convicted person's detention at the Garda station, which are matters for the substantive trial and should not have any bearing on sentence.

(iii) The combined effect of settling a bare minimum sentence of ten years, the lowest point in the "more serious" band of offending identified by the Supreme Court in *DPP v. FE*, together with the excessive mitigation identified above, have led to an error in principle, and the final tariff of imprisonment imposed on each of the rape counts is unduly lenient and does not take adequate account of the seriousness of the offending, and in particular, the use of violence and the sequential nature of the offending, involving three separate rapes and one false imprisonment over several hours.

Discussion and Decision

9. In our view, the sentence of ten years arrived at represented the absolute minimum that could have been considered. A starting sentence of 12 or 12 and a half years might well have been identified. Leaving to one side the fact that the respondent is a non-English speaker, he really had very little going for him in terms of mitigation. He had a significant prior criminal record, including, most notably, a conviction for attempted rape, a fact on which, surprisingly, little emphasis was placed by the trial judge. There was no plea of guilty or expression of remorse. What the probation report has to say about his attitude to his victim is very disturbing. In deciding on the ultimate sentence, the judge appears to have been influenced by the fact that she is critical of the Gardaí for not informing the respondent that he was entitled to have a solicitor present for his interviews. In circumstances where the admissibility of what occurred during the course of interviews was not in issue at trial, we do not believe that the question was a relevant one when it came to the imposition of sentence.

10. There remains for consideration the fact that the respondent is a non-English speaker. We agree with the trial judge that the fact of being a non-English speaker would make the sentence more difficult for the respondent, as does the fact that it is not possible for family members to make visits. This provided a basis for some reduction in sentence, but we are firmly of the view that the reduction proposed by the trial judge was, to a considerable extent, excessive. We are of the view that a reduction of one year to one and a half years would be more appropriate.

11. In the circumstances, being of the view that the ultimate sentence from the Central Criminal Court of six and a half years was, to a significant extent, unduly lenient, we will quash that sentence and substitute therefor a sentence of ten years imprisonment but with the final year and a half of the sentence suspended on the same terms and conditions as had

applied in the Central Criminal Court. Likewise, as in the Central Criminal Court, the sentence will date from 7th August 2018.