**THE COURT OF APPEAL**

**[295/2018]**

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

**BETWEEN**

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

**APPLICANT**

**AND**

**ABDUR RASHID**

**RESPONDENT**

**JUDGMENT of The Court (*ex tempore*) delivered on the 8th day of May, 2019 by Mr. Justice McCarthy**

**1**. This is an application brought by the Director pursuant to s.2 of the Criminal Justice Act, 1993 seeking review of a sentence on grounds of undue leniency.

**2**. The respondent was found guilty of a single count of sexual assault contrary to common law as provided for by s.2 of the Criminal Law (Rape) (Amendment) Act, 1990 as amended by section 37 of the Sex Offenders Act, 2001. The respondent was sentenced on November 19th 2019 in the Circuit Criminal Court to eighteen months with the final four months suspended for a period of one year.

**3**. The offence in this case took place in a Mosque where the respondent was providing religious education to children. The offence occurred when the injured party was six years old. The complainant was attending his class. The nature of the offending consisted of the respondent placing his tongue inside the child's mouth and placing his hands under the tights and underwear of the child and rubbing his fingers outside the child's vagina.

**Grounds of Appeal**

**4**. The appellant submits the following grounds of appeal in that the sentencing judge erred:-

(1) In law by setting the headline sentence in this case at 2 years' imprisonment;

(2) in law by not taking sufficient account of the aggravating factors in this case;

(3) in law by placing too much weight on the mitigating factors in this case;

(4) in imposing a sentence which did not reflect the seriousness of the offending.

It seems to us that the grounds of appeal overlap and therefore can be dealt with together.

**Submissions**

**5**. The appellant submits that the sentencing judge failed to give sufficient weight to the aggravating factors in this offence. This placed the offending behaviour at an improper point in the spectrum of this offence, and led to an error in law in the assessment of gravity and the setting of a headline figure of two years' imprisonment, absent mitigation. While it is accepted that the contention that "*Touching of this nature which is not penetrative is generally deemed to come within the lower end of the scale for abuse of this nature*" is correct, it fails to take into account fully the aggravating factors in this particular case, thereby leading to an error in law.

**6**. Reference was made to of *DPP v M.S* [2014] IECA 58, where the accused was convicted after a three-day trial of the sexual assault of a fifteen-year-old girl; the accused was a friend of her father. The assault consisted of rubbing against the victim while she was in bed, kissing the back of her neck, and touching her over her clothing on her breast and groin. Her Victim Impact Report noted that the assault had changed her life forever. At sentencing, the accused accepted what he had done and apologised. The accused was sentenced to three years' imprisonment with the final six months suspended. This Court held that: -

> "*While the court acknowledges that all sexual offences are serious, it is nevertheless this Court's function and obligation to distinguish between different cases and different circumstances. The factor in this case which is of relevance to where the offence ought to lie is the fact that the offence was of very short duration and the appellant touched the victim on the outside of her clothes. The court has considered the submissions in respect of sentence and identifies two years' imprisonment as the starting point*"

M.S, with a two year starting point sentence, shares a number of features with the instant case: a breach of trust, non-penetrative touching, a young complainant, and significant victim impact. However, there are also some differences. First, the respondent in the instant case touched his victim inside her underwear, skin to skin. Second, the victim in M.S was fifteen, the complainant in the present case was six years old at the time of the offence. While both cases involved a breach of trust, the breach of trust in the

instant case was perpetrated by the respondent while he was in a position of authority, a teacher. The appellant submits that the starting point of placing the offending conduct at the lower end of the scale is an error in law, and that the added aggravating factors leave a court dealing with conduct which is not "in the middle end of the low range".

In *DPP v Walsh* [2017] IECA 187, this Court noted as follows: -

> "*13. The assessment of the gravity of an offence involves a consideration of the offender's culpability and the harm done. In assessing culpability the court looks at the generic nature of the offence in terms of: its fundamental ingredients; the range of penalties available to address the various circumstances in which the offence may be committed, the particular circumstances in which the actual offence was committed; whether the offence was committed negligently, recklessly or intentionally; and any case specific circumstances tending to aggravate or mitigate the moral culpability of the offender. In assessing the harm done the court must consider the position of the victim, as well as the requirements of society in terms of the need to deprecate and deter future instances of the offending conduct.*
>
> *14. We readily acknowledge that that the sexual assault in this case was a once off, and was not premeditated. While it was submitted that it was brief in duration it commenced while the victim was asleep in an intoxicated state such that she was extremely vulnerable. It lasted sufficiently long for her to be undressed by the appellant as she slept so that she was naked from the waist down, for the appellant to place his head between her legs, for the appellant to place the victim's legs over his shoulders and to simulate sexual intercourse with her, and for the appellant to touch the victim's vagina. This was all done in the view and presence of a male third party, who to his shame and discredit failed to intervene, and on that account represented an especial humiliation and degradation of the victim. Moreover it is clear from the terms of the victim's impact statement that she was profoundly traumatised by what was done to her and it continues to significantly blight her life in numerous ways.*"

**7**. There, it was held that the sentencing judge had not erred in setting a headline sentence of seven years. In the present case, the victim was a vulnerable young child, alone with a teacher, in a place of religious instruction. The appellant submits that is incumbent upon the courts to take extra care in dealing with society's most vulnerable, including the very young and the elderly; the starting point of two years in this case fails to so do.

**8**. The appellant also submits that the sentencing judge placed too much weight on the mitigating factors in the case. Having set the headline sentence at two years she then went on to apply mitigating factors, being the respondent's background and family history, his psychological vulnerability (which does not now arise as a factor), the fact that he is a foreign national, his lack of previous convictions, the impact on his family, and the fact that he would be placed on the Sex Offender's Register. The sentencing judge allowed for a discount of 25% in mitigation. She then further suspended the final four months of that sentence, presumably to encourage rehabilitation. That left a total of fourteen months' imprisonment, backdated to take into account time spent in custody. In *Walsh*, where the Court had given the accused a discount from the headline sentence of 15% for his plea of guilty and expression of remorse, the headline sentence was reduced from seven years to six. This Court held that held that this discount was appropriate; the plea had come in the second day of the trial, but prior to the victim testifying. In *DPP v S.D* [2016] IECA 285, the mitigating factors included a plea of guilty, albeit late; an expression of remorse (looked upon with some scepticism initially but which seemed to have been borne out by reports), previous good character (the appellant was a first time offence), and someone with a solid employment record: -

> "*For the combination of factors that exist in this case, one would expect to see a discount from the starting sentence of the order of 25% to 30%. In this case the combination of factors that were present met with a suspension of only 15% of the starting sentence, and it has to be said that that is unusually low.*"

**9**. Comparing the respondent in the instant case to the accused in *S.D*, it is noted that both had previous good character and were first time offenders, and while the respondent had worked in the past, there was nothing about his working in recent times; however, his previous work record was recognised by the Court. However, there was no plea of guilty in the instant case, nor any expression of remorse. Further, the fact that the respondent is a foreign national does not justify mitigation of 25%.

**10**. The appellant submits that the sentence imposed fails to incorporate the necessary element of deterrence. The importance of deterrence as one of a number of sentencing principles to be considered has been repeatedly remarked upon by the Superior Courts. In his judgment in *DPP v. Black* [2009] IECCA 91 Murray C.J. remarked: "*Deterrence is just one but an important element in determining the appropriate sentence in any case.*" Further, in *Walsh*, Edwards J. stated: -

> "*In assessing the harm done the court must consider the position of the victim, as well as the requirements of society in terms of the need to deprecate and deter future instances of the offending conduct.*"

**11**. It is also submitted that the sentencing judge erred in law in suspending the portion of the sentence she imposed. It is acknowledged that often the suspension of a portion of a sentence can be a valuable tool in encouraging rehabilitation and in providing for specific deterrence. However, in this case the respondent had not demonstrated that type of rehabilitation or intention to rehabilitate which would warrant the suspension of a portion of the sentence or the portion which was actually suspended. The respondent did not accept wrongdoing and fully contested the trial. Indeed, the respondent seems to have gone some way to further attempt to deny responsibility, when he gave a self- serving, untrue and exculpatory version to the psychiatrist who assessed him.

**12**. The respondent submits that during the sentencing hearing, the court heard full and complete evidence with respect to the aggravating aspects of the charges before it and was aware of the necessity to consider fully the position of trust which the respondent had occupied. Further, the sentencing judge clearly considered and evaluated the Victim Impact Statement, the complainant's age, the psychological effects of the respondent's actions upon her, the trauma caused to the complainant, and acknowledged the evidence given by the both the complainant and her mother during the trial: -

> "*...this trust was given to him by the complainant's parents as persons of the Muslim faith who wished for their child to be brought to be taught about their faith and its practices. This trust was very quickly abused by Mr Rashid by what can only be described as opportunistic and abhorrent behaviour towards a very young girl.*
>
> *The Court considers the following aggravating factors to be of significance. While there was no physical violence or threats of violence used in the actual assault itself, the actions of the accused man amounted to a gross exploitation of the innocence of a very young child. It also gave rise to emotional and psychological upset to the victim.*

…

*Taking into account all of the aggravating factors, the Court is of the view that absent mitigation the offending conduct within the middle end of the lower range of offending of this nature and would warrant a sentence of two years' imprisonment absent mitigation."*

**13**. The respondent submits that the sentencing judge conducted a comprehensive evaluation of the aggravating factors and carefully balanced these against the mitigating features. Further to that, the sentencing judge had adjourned the finalisation of the sentencing matter to allow further time for the respondent to produce a psychiatric report since concerns were noted on the first sentence date. Ultimately the respondent did not rely upon this evidence, explaining to the court that no psychiatric conditions were evident. Therefore, it is submitted by the respondent that the inclusion of the psychiatric report as an unexplored aggravating feature, is an anomalous addition to the applicant's submissions to this Court and can have no relevance since it was not relied upon by the applicant at the sentencing hearing.

**14**. It was submitted that the Court is obliged to consider the personal circumstances of the accused, as held in *DPP v M* [1994] 3 I.R 306, and restated in *DPP v McCormack* [2000] 4 I.R 356: -

"*Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.*"

The respondent submits that the sentencing judge in the present case correctly took the mitigating factors and personal circumstances of the respondent into account: -

"*By way of mitigation I take into account the various reports which while indicating that the accused does not have a psychiatric disorder is psychologically vulnerable. Secondly, he is a Bengali national and the Court takes this into account, i.e. that this may make prison life more difficult for him. I also take into account his lack of previous convictions. I take into account his personal circumstances. He has a wife and family and these are innocent victims in relation to the accused's conduct and those relationships must be collaterally damaged by reason of the trial and conviction of the accused. I also note that the accused man will now be placed on the sex offenders' register and the Court weighs this into the balance in determining the appropriate sentence.*"

These mitigating features were weighed against the background of the absent mitigating factors together with the previously addressed aggravating features; no error can be identified.

**15**. In relation to the suspended portion of the imposed sentence, the respondent submits that the sentence of eighteen months' imprisonment, with four months suspended for one year, must be seen in the light of the possible activation of the suspended portion. Reliance is placed on the cases of *The People (A.G.) v. Michael O'Driscoll* (1972) 1 Frewen 351, and *The People (DPP) v McCormack*, where it was held in those cases that a custodial sentence is not always necessary, and that the purpose of sentencing is not simply to deter but to encourage the accused to lead an honest life.

**16**. The respondent submits that in the present case, the relevant statutory provisions were opened and considered by the Court. It is submitted that once this has been done it is a matter for the trial judge to consider the appropriate length of the custodial sentence to be imposed given the individual circumstances of the accused and the circumstances surrounding the commission of the offence.

**Discussion and Decision**

**17**. It seems to us that this is an offence of considerable gravity. The appellant was in a position of authority and was the victim's religion teacher. She was only six years old. He kissed her in a manner which had a sexual importation and touched her under her clothing in the vaginal area. She must have been very shocked at the time inasmuch as she had an incident of incontinence of urine. On the day after the incident she began to have nightmares, a phenomenon which persisted for some time. She began to bed wet and to suffer from stomach pain – the latter continued for about a week. She was diagnosed as suffering from anxiety by her General Practitioner. Her doctor attributed her symptoms to the traumatic event. She was worried that the appellant would remove her from her home or school. She was worried also that she might become diseased because of the kiss and about attending school. It was necessary for her to attend counselling to help deal with post-traumatic issues over a period of two years. The offence has had an adverse effect on the victim's family, especially her mother – whilst she cannot be described as a victim in point of law, the effect on her family must have an indirect adverse effect upon her daughter.

**18**. The mitigating factors are modest. Though the respondent has lived in Ireland since 2001, and has had a history of work, we are told (for what it is worth) that his English is somewhat limited, although we note that he qualified as a teacher in his native Bangladesh. He attended a primary medical centre at Mohill and at Sligo/Leitrim Mental Health Service, with a period in hospital. Whether by coincidence or design, his alleged minor short term mental health difficulties which allegedly occurred in February 2017, in excess of a year after the offence. Dr. Mullally, Consultant Forensic Psychiatrist at the Central Mental Hospital has his records and says that there is no record of any sustained evidence of cognitive impairment or concerns regarding his intellectual functioning during his admission to hospital, that there was no formal discharge diagnosis recorded for him, that he is not suffering from any mental illness, and, to put the matter shortly, that he was malingering when examined. The height of his condition appears to be that he reported (for what that it is worth) periods of Acopia, which are described as having been time-limited and related to acute stressors – presumably, though it is left unsaid, including the stress caused by the consequences of his crime. The episodes are described as appearing consistent with a diagnosis of adjustment disorder. He does not require psychiatric treatment.

**19**. A report has also been prepared by Ms. Anna Campbell of Forensic Psychological Services. She purported to diagnose mental illness, which of course she is not qualified as a psychologist to do. It appears that when she examined him all relevant information was obtained from the appellant's daughter. She described him as presenting as "*highly distressed. He was incoherent and unable to participate cohesively in the interview process*". We think that this report carries little weight. No information seems to have been obtained by her about his attitude to the offence in question. He gave an exculpatory version of events to Dr. Mullally. It is not submitted on his behalf that he has or had any relevant psychological or mental health difficulties, in any event, (and rightly having regard to those reports)

**20**. To us, the mitigating factors must accordingly, be confined to the facts that, firstly, the respondent is not of Irish birth and though here since 2001 - he has settled here permanently - it may be somewhat more difficult for him in prison than it might be, say,

for an Irish Caucasian, although as a minimum he has some degree of competence in English as he taught the religion class of which the victim was a member in that language and his family live here, secondly, he is of previous good character (he has no previous convictions of relevance) and, thirdly, he has a reasonable work record.

**21**. We think that the learned trial judge fell into error in fixing the headline sentence at two years. The threshold which must be met for intervention by this Court when asked to review a sentence on the grounds that it is unduly lenient is high, but has been met. We think that this offence falls at the lower half of the middle range for offences of this type, the maximum being of course 14 years in the case of someone of the victim's age. We think, accordingly, that the appropriate headline sentence is 5 ½ years' imprisonment. We think that should be reduced not merely because of the mitigating factors which we have identified but, in accordance with the jurisprudence of this Court, by virtue of the fact that a higher sentence than that imposed by the trial judge is now imposed. We accordingly quash the order of the Circuit Court. We take the view that the post mitigation sentence should be one of 4 ½ years. In lieu of suspending any portion thereof, we think that it is appropriate also that the respondent be subject to post-release supervision. We accordingly direct such supervision for a period of two years after his release. The term which we impose upon him in that regard is that he will abide the directions of the probation and welfare services during that period.