THE COURT OF APPEAL

[261/2017]

Birmingham P.
Edwards J.
Hedigan J.

BETWEEN

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

RESPONDENT

AND

A.B.

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 23rd day of July, 2018 by Mr. Justice Hedigan

The Appeal

1. This is an appeal against the sentence imposed on the appellant in the Central Criminal Court on the 6th of November 2017. After entering a plea of guilty the appellant was sentenced to seven years' imprisonment in respect of rape, contrary to s.2 of the Criminal Law (Rape) Act, 1981, and to three years imprisonment in respect of indecent assault contrary to Common Law ordered to run consecutively. Thus, a total of ten years imprisonment was imposed against the appellant. The appellant now appeals against severity of sentence.

Background

2. The complainants in this case were both daughters of the appellant. The appellant pleaded guilty to committing rape and indecent assault against his eldest daughter, "complainant X", and to indecent assault of his younger daughter, "complainant Y", while they were children. The offences took place over a five-year period, beginning in 1980 when complainant X was eight years old and ending in 1985. Against complainant Y beginning in 1987 when she was eleven years old and continuing until 1993. The offending started in a residential premises, "house A", where the family was living at the time.

3. The offending commenced by the appellant getting his daughter, complainant X, to sit on his lap, when he would touch the area outside her underwear. He then started to place his hands inside her underwear and would digitally penetrate her. He then began to take his daughter to an upstairs bedroom where we would remove the lower halves of both of their clothing and commit the act of rape. The complainant would attempt to resist at times but as a young child she was limited in what she could do in this respect. The appellant would often make comments to the effect that it "would only be for a little while", or that he would stop if she was in pain, but the complainant says that he never did so. The complainant indicated that the offences were not violent but that they caused her pain. The offending against complainant X ceased when she was approximately twelve years of age.

4. In respect of complainant Y, the offences took place at an address, "house B", to which the family moved in or around the year 1986. The offending would generally take place when the complainant was in bed at night, whereby the appellant would return home from a local pub

and get into his daughter's bed. The complainant indicated that his penis would be erect, and that he would rub himself against her rear. It was indicated by the complainant that she felt he was trying to penetrate her, but it never progressed to that.

5. Both complainants provided Victim Impact Statements at sentencing, outlining the adverse effects their father's offending has had on their lives. Complainant Y explained how she had made a statement against her father at a Garda Station when she was sixteen, but subsequently withdrew the complaint due to pressure she felt from her parents regarding the consequences that making such a complaint would have on their lives.

6. The complainants took up counselling services at a rape crisis centre, after which an investigation by a Health Board took place in 1999. This involved social workers and family conferences, where it was decided that the appellant would move out of the family home. The appellant also attended counselling sessions with a Consultant Psychiatrist. Gardaí were aware of the Health Board investigation but no Garda investigation took place at this time.

7. Formal complaints were made by both of the appellant's daughters to the Gardaí in 2014 which led to the appellant being charged with the offences.

8. On the 21st of July 2017, the appellant entered a plea of guilty to three counts of rape and six counts of indecent assault on an indictment including a total of 78 counts.

Personal Circumstances

9. The appellant was 68 years of age when sentenced. He has been separated from his wife since the late 1900s. He was a soldier in the Army for over twenty years and retired from that in the 2000s. He was engaged in some security work thereafter but retired fully towards the end of that decade. He had no previous convictions and was said to otherwise be of good character. He has had some health issues, those being heart problems and arthritis. He has previously asserted that he has been of suicidal ideation, but this was rejected by a psychiatrist, who asserted that he is not suffering from mental illness. It was accepted that the appellant had himself been a victim of sexual abuse carried out by an adult neighbour when he was approximately ten years of age.

Sentence

10. The sentencing judge imposed a sentence of seven years for three counts of rape to run concurrently and three years for six counts of indecent assault to run concurrently. The sentences are to run consecutively to a total of ten years imprisonment.

11. The judge considered the plea of guilty to be the primary mitigating factor in this case. However, the plea was not entered on arraignment, but was entered on the second day of the trial following an unsuccessful application to sever the indictment. The judge attached modest mitigation to the guilty plea, but noted that the complainants were saved from giving difficult evidence and cross-examination.

12. In respect of aggravation, the sentencing judge stated that the offences were extremely serious in nature, and noted that the offending behaviour took place over a number of years.

The effects upon the victims were also considered, noting that the offending amounted to the destruction of the complainants' childhoods.

Grounds of Appeal

13. The appellant puts forward the following grounds of appeal; the trial judge erred:

a) In passing sentence on an incorrect factual basis, which was not supported by the evidence in the case and/or interpreted the evidence in a manner not consistent with the maxim *nulla poena sine lege*, i.e. no one is to be punished on a charge for which they have not been tried and found guilty.

b) In failing to attach any or any sufficient weight to the various mitigating factors in the appellant's case.

c) In failing to take into account, adequately or at all, the particular circumstances of the offences and the offender.

d) In failing to attach sufficient weight to the public interest in rehabilitating the appellant.

Submissions of the Appellant

14. The appellant submits that the trial judge's interpretation of the offences of indecent assault in respect of complainant Y was tantamount to an attempt at vaginal and/or anal penetration, which was neither warranted nor justified. Evidence was given by a Sergeant John Sharkey in relation to this offence which went no further than establishing that the complainant herself perceived that there may have been an attempt at penetration. The judge fell into error and effectively imposed a sentence as though the appellant had been guilty of attempted rape and/or attempted rape contrary to s.4. This breaches the principle of *nulla poena sine lege*, which states that no one should be punished for an offence of which they were not tried and found guilty. This was affirmed by the Court of Criminal Appeal in the case of *DPP v Mc Donnell* [2009] 4 IR 105 where Kearns J stated that a convicted person can only be punished for the crimes to which he/she has pleaded guilty or has been convicted of. In this case, the trial judge appeared to take the offences committed against complainant Y as akin or comparable to those committed against her sister. He furthermore stated that those offences warranted in and of themselves, sentences of eight years, which amounted to a sentence two years below the maximum available. This was a significant factor in arriving at an overall sentence of ten years.

15. The trial judge failed to give due regard to a number of factors in the appellant's case, in particular: the long lapse of time since the commission of the offences and his good record since then, the admissions made the appellant during an investigation by Social Services years before a complaint was made to the Gardaí, the advanced age of the appellant, his otherwise good character, and his guilty plea and remorse shown. In the case of *DPP v O'Sullivan* (Unreported, Court of Criminal Appeal, Keane CJ, 22nd March 2002), the Court of Criminal Appeal found that failure to properly consider mitigating factors in sentencing can constitute an error in principle:

"..the sentence as imposed took insufficient account of those significantly mitigating factors...In all those circumstances the court is satisfied that the learned Circuit Court Judge erred in principle in not taking into account those factors..."

The only factors considered to be mitigating in any meaningful way by the court were the plea of guilty and the advanced age of the appellant. The appellant's plea was ultimately of value to both complainants in this case, which was accepted by the prosecuting Garda. This is clearly borne out by the respective Victim Impact Statements provided. The plea was also accompanied by two unreserved letters of remorse to each of the complainants, who were ultimately saved from having to give difficult evidence in a criminal trial. Further, there is a public interest in encouraging guilty pleas in such cases by treating such as mitigating. While the judge did give regard to the appellant's plea, it was, he concluded, a "very modest" factor. Further, by treating the appellant's maintenance of his plea of not guilty until the date of trial as an aggravating factor in the case, the court fell into error. The appellant refers to the following passage from O'Malley's Sexual Offences:

"While a guilty plea is ordinarily mitigating, a decision to plead not guilty must never be treated as an aggravating factor. Every person charged with a criminal offence has a constitutional right to trial in due course of law and that must include at a minimum, the right to require the prosecution to prove every element of an alleged offence to the requisite standard."

Any modest mitigation the court afforded this factor, was presumably off-set by the fact that it appeared to treat the manner in which the plea was entered as aggravating. In this regard, it is submitted that the court engaged in an impermissible process of "double counting". This amounts to an error in principle.

16. The court failed to give due regard to the large lapse of time between the time of the offences to when the appellant was sentenced, which amounted to a period of almost 30 years. It is accepted that the appellant was of good character during this time, some of which he spent with the Irish Army on deployment overseas. The appellant continued to observe family duties and contribute towards mortgage expenses despite having left the family home as recommended by Social Services. This is a legitimate factor to be taken into account in sentencing, as illustrated by the Court of Criminal Appeal in DPP v J(T) which stated:

"The lapse of time may be relevant in the first place between of the conduct of the accused in the interval.. Here the offending conduct came to an end, according to both the Complainant and the Applicant, at least 10 years ago. He has not offended in that or any other respect since then, is married with a family and was in steady employment. All the evidence points to these having been incidents in his past which he bitterly regrets and which have never been repeated."

This principle was endorsed in the Central Criminal Court by Charleton J in *DPP v H(P)* [2007] IEHC 335, who stated:

> *"In terms of settling on the final tariff of sentence, the offender's conduct in the intervening years will be of particular importance. If there was evidence of genuine repentance of the offending; if the offender had led a good life of family, or friendship, and work; or if the offender had sought in some meaningful way to make up for his abuse of the victims, this should be taken into account.. If he has managed to effect that purpose, in the intervening years between offending and sentence, by his own efforts, then, it seems to me, a discount, perhaps substantial in appropriate cases, of the relevant sentence might be contemplated."*

17. Further, evidence was put before the court that made clear that the offending behaviour had been the subject of an investigation carried out by the Health Board in and around 1999. Where an accused person engages with the relevant authorities and accepts in part at least his role in the offending behaviour at a particular point in time, but no formal Garda investigation takes place until many years later, a factor capable of providing mitigation arises. The appellant cites the case of *R v H*, where the Court of Appeal in England and Wales held in respect to sentencing:

> *"..if the allegations had come to light many years earlier, and when confronted with them, the defendant had admitted them, but for whatever reason, the complaint had not been drawn to the attention of, or investigated by, the police, or had been investigated and not then pursued to trial, these too would be relevant features."*

The same principles apply in this instance.

18. Regarding the advanced age of the appellant, it is accepted that the court did take this into account as a mitigating factor in this case. However, in circumstances in which a reduction of just two years from the headline sentence identified was given in conjunction with the appellant's guilty plea, it is submitted that insufficient weight was afforded to it. Age was considered to be a relevant factor in respect of sentencing by the Court of Criminal Appeal in *DPP v O'Connor*, where Hardiman J stated:

> *"There is also the feature that the applicant is now in his seventies and it goes without saying that any sentence whatever will be a more significant penalty and will occupy a more significant portion of his life than a sentence imposed for example had the prosecution been had in the early 1970s."*

A ten-year sentence would see the appellant being imprisoned into his late seventies. In addition, there was evidence put before the court that the appellant has a history of heart issues and arthritis, which would only make his time in prison all the more difficult. This was not considered to be of mitigating value by the court, which was an error in principle. These matters should have been considered as providing potential mitigation both individually and in conjunction with the age of the appellant.

19. It was accepted that the appellant himself had been abused a child. The appellant made admissions to a Dr. A.S. in the course of therapy sessions in 1999, who stated that his difficulties in discussing, and at times facing up to his own offending behaviour, were likely to be

a protection mechanism as regards the abuse he suffered. This does not appear to have been considered a mitigating factor in respect of sentence by the court.

20. In all of the circumstances of the case, the court failed to pass sentence in a manner which was proportionate to both the level of severity of the offending and the particular circumstances of the appellant. While the offending in this case is undoubtedly most serious, the court placed too great an emphasis on the severity of the offending and gave insufficient consideration to the personal circumstances of the appellant. In so doing, the court failed to achieve the correct balance that the principle of proportionality requires.

21. The court made little to no provision for the possibility of rehabilitation for the appellant, in light of his age, lack of previous convictions, and the time between the cessation of the offending and the time of sentencing. While the court made reference to rehabilitation being a legitimate aim, this was not reflected in the sentence imposed. A period of suspension in the sentence would provide for external motivation to engage with the process of rehabilitation in the context of probationary involvement, with the added incentive of knowing that a failure to properly engage with the recommendations and advice of the probation service would carry with it the very real risk of his being returned to prison.

22. Therefore, in all of the circumstances, the sentence imposed was unduly severe and erred in law and principle.

Submissions of the Respondent

23. The respondent refutes the appellant's submission that the court interpreted the offences committed against complainant Y as akin to those in respect of her sister, complainant X. The court is entitled to take into account how the act would have been perceived by the complainant. The court was simply considering how the assaults were perceived by the complainant. This was appropriate in the circumstances and no error in principle was made in this regard.

24. The respondent disagrees with the submission that the court did not give due regard to factors of mitigation when sentencing the appellant. With respect to the appellant's argument regarding the good behaviour of the appellant during the time between the offences and date of sentencing, the respondent notes that it has never been suggested in this case that the appellant poses a threat to the public at large. The offences in question concerned his immediate family only. The appellant left the family home around the year 1999, therefore, the years thereafter are not relevant in this respect. Further, the appellant played a role in causing his daughter, complainant Y, to withdraw the statement she made to the Gardaí aged sixteen concerning the appellant's offences. This prevented the matters from coming to light at that time rather than years later when both complainants came forward in 2014.

25. Regarding the suggestion that the appellant made admissions to the offences during an investigation by Social Services, the respondent notes that the appellant only spoke of inappropriate behaviour with regard to complainant Y. It is understood that no admission for the most serious of the offences, that being rape, was made at this time.

26. It is noted that the court did in fact take the advanced age of the appellant into account at sentencing, making reference to the fact that the appellant would be in his late seventies at the finality of a lengthy sentence.

27. It remains that the appellant was in a position of authority and trust with respect to his daughters and this was abused in a most serious manner. This conflicts with the appellant's submission regarding his good character, regardless of his good behaviour outside the family setting.

28. The court did in fact take the appellant's plea of guilty and his personal circumstances, including his health, into consideration as a mitigating factor, and applied it to the sentenced imposed accordingly, bearing in mind that the plea was entered at a relatively late stage.

29. Regarding the public interest in rehabilitation for the appellant, again, there was never any suggestion that the appellant poses a risk to society at large. The offences took place in a family setting. This amounted to a significant breach of trust by a parent to his young daughters. The particular behaviour of the appellant does not indicate the necessity for rehabilitation upon release.

30. In all of the circumstances of this case, the sentence imposed was appropriate for the offences committed. The court made no error in law or principle and therefore the sentence should not be interfered with.

Decision

31. The offences involved here are among the most serious to have come before our courts. The length of time over which the two children were subjected to the appellant's depraved behaviour is horrifying. Counsel on behalf of the appellant has made an eloquent plea on his behalf that the totality of the sentence imposed was too great. In our view however the appeal is all but unstateable. The plea is focused firstly on the words used by the learned sentencing judge on p. 4 and 5 of the transcript of the 6th November 2017. It is argued that his reference to the offences against complainant Y as being "very closely associated with at least the real possibility of penetration, including possible anal penetration" suggested the learned sentencing judge might have gone beyond the evidence given by Sergeant Sharkey on the 17th October 2017 at p. 6 of the transcript. However the evidence was that his victim thought that that was what he was trying to do although she referred to vaginal rather than anal penetration. However on the 17th October 2017 the learned sentencing judge immediately stated that there was no count against the appellant of that sort. In this light it would appear that the words above were little more than a statement of the obvious. There is in our judgment no ground for believing the learned sentencing judge was in any way sentencing him for another offence. The plea of *nulla poena sine lege* does not arise on the facts.

32. It is pleaded on his behalf that the totality of the sentence of 10 years imposed upon the appellant is too high. We cannot agree. If the sentence is anything other than correct, it is very lenient. The learned sentencing judge took all the mitigating factors he could into account. These were his plea, albeit a very late one, which did however spare his daughters the ordeal of the trial. His age, his health and otherwise good character and the fact that this was his first

time in prison was also considered. His own history of being abused as a child was taken into account although not based on sworn testimony. The learned sentencing judge considered that the headline sentence for the rape offences against complainant X, taking the indecent assaults into consideration was 12 years. He considered that the headline sentence in respect of the indecent assaults against complainant Y was one of 8 years. Making these consecutive brought the total to that of 20 years. To take account of proportionality he reduced the overall sentence to one of 10 years. This by any measure was a generous level of reduction taking account of the mitigating factors and of the need for proportionality. The Court is entirely unconvinced that it should intervene. The appeal is dismissed.