THE COURT OF APPEAL

[169/16]

The President
Edwards J.
Whelan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JH

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 15th day of October 2019 by Birmingham P.

1. The matter before the Court involves an appeal against severity of sentence. The sentence appeal arises in circumstances where an earlier appeal against conviction was dismissed.

2. On 9th March 2015, the appellant was sentenced to a term of 15 years imprisonment in respect of rape offences and to lesser concurrent sentences in respect of other counts that had appeared on the indictment. He was sentenced by the late Mr. Justice Carney.

3. The sentence hearing took place against a background of a contested trial which had taken place in February 2015, which had resulted in convictions. The trial related to offences that were committed between 31st December 1984 and 31st December 1988. The injured party in the case was the appellant's niece and she was aged between 7 and 11 years at the time of the offences. The case involved three rapes, an attempted rape and a number of counts of indecent assault. The offences occurred at different locations in Limerick. One rape occurred in a particular dwelling, on a washing machine, another in the same dwelling on a sofa in the sitting room, those were in the years 1984 to 1985, another in a garage linked to the appellant's home also dated from the same period. There was an attempted rape in the vicinity of a tyre factory which was close by and there were a number of incidents of indecent assaults at various locations, these included one at bath time, one which saw the injured party going to bed with her aunt and the appellant then returning to the house, getting into bed and proceeding to indecently assault her on the vaginal area – this also involved him blocking her mouth. Another offence occurred in a motorcar.

4. In terms of the appellant's background and personal circumstances, he was 61 years of age at the time of the sentence hearing and so he is now 66 years old. He has lived for significant periods of his life in England and was in England when these matters came to light. He cooperated with the investigation, making himself available for interview, and at a later stage, voluntarily returned, in the sense of not resisting his return, on foot of an EAW request.

5. By way of background, he comes from a very large family; he was one of 23 children. He himself is married with three children, but is separated. He has a number of previous convictions recorded. These include offences both of a sexual nature and non-sexual nature, but it must be said that these offences were not of the same order of seriousness as the Court was required to deal with in this case. One prior sexual offence, one of indecent assault, was dealt with in Ireland by the imposition of a six-month sentence – that was in 1973. A sexual offence in England was dealt with by way of a probation order in 1974. Subsequent to the offending with which the Court was concerned, in 1995 and 1998, convictions in England are recorded for indecent assault. These involve both males and females. Of concern, is that there are more recent convictions in England, in 2007, 2009 and 2013, for failing to observe the terms of a supervision order, the failure to observe involved living in a house where children were present.

6. When passing sentence, the judge in the Central Criminal Court indicated that he saw the appropriate sentence as one of 15 years imprisonment. He then commented that he found nothing of substance in favour of the appellant. He is criticised in this regard, but, being of that view, the judge then proceeded to impose that sentence, which is, of course, the sentence that is now the subject of this appeal. The appellant says that the judge erred in saying that there was nothing in substance in favour of the appellant. It is accepted in that regard that there was not a plea of guilty or the expression of remorse, but it is said there were other factors present, such as the cooperation with the investigation and the fact that the surrender under the EAW was not contested. It is said that these are matters that are to the appellant's credit, as was the fact that he did not seek bail. In that regard, it is the situation that the sentence imposed was backdated to 6th December 2013 to take account of the period of time spent in custody when bail was not sought.

7. The appellant has pointed to a number of cases by way of comparators and suggests that the present sentence is out of line with those sentences. In responding, the DPP, for her part, points to a number of cases which, she says, that similar sentences have been imposed in respect of what she says were similar offending. On behalf of the appellant, it is said that his case is distinguishable from the cases on which the DPP places reliance, in that, in those cases, while broadly similar sentences were imposed, in those cases, the Court was dealing with sample offences, whereas here, the Court was dealing with individual offences.

8. On a number of occasions, this Court has made the point that before it can intervene, something of the nature of an error in principle must be identified. Before the Court would

be minded to intervene, it will have to have emerged that the sentence imposed was one that fell outside the available range. In this case, the Court acknowledges that the sentence that was imposed was a severe one. However, the Court has not been persuaded that it fell outside the available range. In the Court's view, the offending here was very serious. The factors that make it serious are self-evident. The fact that the offending occurred over a significant period of time, some four years, albeit that the rape offences were within a narrower time period, the fact that the offender was very much older than his victim, the young age of his victim – between 7 and 11 years – the breach of trust involved, uncle and niece, to refer to just some of the factors present. There is also the fact that, somewhat unusually, there are relevant previous convictions, albeit not convictions of the same level of seriousness. The Court has not been persuaded either that the judge was in error in concluding that there was nothing of substance that would justify or require a departure from the sentence identified as the appropriate starting or headline sentence. It is the case that there were factors present which were somewhat to the credit of the appellant, but the Court does not feel that the judge was obliged to treat those as being of such substance and of such magnitude as to compel a departure.

9. Overall, the Court's view is that while the sentence imposed was a severe one, it was one that cannot be said to have fallen outside the available range. No error in principle has been identified and the Court must dismiss the appeal.