THE COURT OF APPEAL

[283/2017]

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

P K

APPELLANT

Judgment (ex tempore) delivered on the 29th day of March 2019 by Ms. Justice Kennedy

1. This is an appeal against severity of sentence. The appellant pleaded guilty to thirteen sample counts concerning the sexual abuse of two boys over a period of six years. The representative counts comprised eleven counts of sexual assault, one count of attempted sexual assault, and one count of sexual exploitation. An effective sentence of nine years' imprisonment was imposed in respect of the counts before Dublin Circuit Criminal Court on the 13th December 2017.

2. The breakdown of the counts was as follows:-

Counts numbers 1-20 were sample counts concerning the sexual assault of CC between July 2009 and March 2015 when CC was between thirteen and nineteen years of age. Counts 21-23 were counts of sexual assault of BC between February and July 2015 when BC was fifteen years of age and counts 24 and 25 were counts of sexual exploitation of BC on dates in February and July 2015.

Background
3. By way of background, the appellant was in a relationship with the mother of the complainants. The appellant regularly gave the complainants money and provided lifts to them. He also procured alcohol on occasion for CC and his friends.

4. The first incident occurred in respect of CC in July 2009 when he was fourteen years of age. On that occasion, CC was staying at the home of the appellant following a disco and he woke to find the appellant's hand on his penis. At the time, CC believed the incident was a mistake and shrugged it off.

5. The next incident occurred at Halloween 2009, where CC had gone to the appellant's house in order to buy fireworks from him and the appellant proceeded to masturbate the complainant. CC told the appellant to stop and began to cry and was told to "stop being a baby, it's nearly over"

6. The appellant began staying regularly in the home of the complainants and often went to CC's bedroom where he would masturbate CC. Between 2009 and 2013, there were over fifty incidences of such abuse. The abuse also occurred on two occasions in the complainant's sitting room and in the appellant's van. There were also three incidences of oral intercourse which included ejaculation on the part of the complainant, which the complainant found particularly upsetting.

7. Whilst the offending mostly consisted of the appellant masturbating CC, there were two occasions when the appellant placed his penis between the cheeks of his bottom whilst trusting but without penetration. On one of those occasions, the complainant was very frightened and was screaming at the appellant to stop.

8. In order to cope with the effects of the abuse, CC began to use drugs heavily and would often be out of the house and as a result of this, the abuse levelled off. There were three more incidences of abuse, the final of which was in May 2015, with the total number of incidences in the region of approximately 80.

9. In 2014/2015 when BC, the younger brother of CC, was aged between fourteen and fifteen years, the appellant began texting him. The texts were of a sexual nature and often involved the discussion of masturbation and offers to buy alcohol and give money in exchange for sexual favours. There were two incidences of sexual assault, one of which occurred in the home of the appellant and one in the bedroom of BC respectively. These involved the appellant masturbating BC. The final attempt at sexual assault occurred in July 2015 in the complainant's sitting room and was interrupted by CC.

10. At that point, CC suspected that the appellant had begun to abuse BC. This caused him much distress and led to an attempted suicide. Following this, he confided in his girlfriend and was convinced to go to the Gardaí. He and BC reported the abuse to the Gardaí and the appellant was arrested in September 2015. In the course of his detention he made partial and qualified admissions concerning the texting of BC and he was later released from custody.

11. Subsequently, in February 2015, the appellant made a voluntary statement to the Gardaí in which he accepted that he had carried out the acts described by the complainants. He was later charged and pleaded guilty to the thirteen samples counts. Evidence was also adduced in the course of the hearing as to the effect of both victims by way of a victim impact report and the effect was understandably severe.

Personal Circumstances
12. The appellant is 51 years of age. He was born on the 14th September 1967. He is originally from Ballyfermot, County Dublin, and he is a man with no previous convictions. He has worked in the printing business for a period in excess of thirty years. He suffers from Diabetes and at the time of sentencing, the appellant was attending therapy sessions with the organisation "One in Four".

Ground of Appeal
13. The appellant puts forth the following ground of appeal: -

The sentencing judge erred in law and in fact in the manner in which he imposed the sentence in failing to identify a headline sentence and in failing to give any or sufficient weight to the matters offered in mitigation.

The Sentence
14. The sentencing judge delivered his sentence as follows:-

> "Now, the only mitigation in the case, I think, is that he pleaded guilty. I also have to take into account that he has no record of conviction in deciding the appropriate sentence. I also take into account, to some degree, that he has a work history and I also take into account that I think Mr K can reform himself and rehabilitate himself. I am satisfied that he has taken steps on that course. I think it will be good for society if he kept up that type of behaviour or engaged with whatever service he can obtain while in custody to help himself when he emerges from incarceration.
>
> Now, these types of offences are serious, even if there's only one incident of such abuse, but in this case there was multiple and therefore Mr K, I'm afraid, deserves a severe custodial punishment by reason of his gravely reprehensible behaviour and I am going to sentence.
>
> In relation to count no. 1, I'm going to impose upon Mr K, a term of imprisonment of nine years. I am going to take all the remaining counts in relation to CC into account. In relation to the first, the BC allegations, and their criminal convictions now, in relation to BC in relation to count no. 21, I am going to impose upon him a five-year custodial sentence and in relation to count no. 25, that's the exploitation, I am going to impose upon him a four-year custodial sentence. Now, those are to run concurrently and therefore Mr K is facing an effective sentence of nine years' imprisonment."

Submissions of the appellant
15. On appeal, the appellant submits that the sentencing judge failed to identify a headline sentence and failed to give adequate weight to the mitigating factors. In submissions before this court today, Mr Guerin, SC on behalf of the appellant argues that the judge placed the sentence at the highest level, which position should be the preserve of the most serious offending and that this is no one of those cases.

16. Secondly, that forced physical contact with the appellant was not a feature of the case and thirdly, the acts were not accompanied by acts of violence. Moreover, it is submitted in the written submissions that there are circumstances present worthy of significant mitigation including the early plea of guilty, the cooperation and admissions made to the Gardaí, the lack of previous convictions and the rehabilitation undertaken. The appellant refers to *The People (DPP) v. Tiernan* [1988] I.R.250, where the Supreme Court endorsed the value of such admissions and pleas in respect of rape cases.

17. The appellant submits that the sentencing judge failed to apply the principles of proportionality in circumstances where there was no apparent discount given for the mitigating circumstances and no deduction from the notional sentence.

18. The appellant accepts that in the case of multiple counts, the judge was entitled to impose the appropriate sentence on one count to reflect the gravity of the offending in total. The appellant refers to *The People (DPP) v. FC* [2018] IECA 23, where the Court held that :-

> "It is the actual sentence arrived at which must be the main focus for this court".

However, the appellant notes that in *FC* a headline sentence was nominated thus allowing the court to weigh the appropriate level of both the headline sentence and the mitigation.

19. The appellant submits that if one were to extrapolate the notional sentence from that actually imposed, this sentence would be unduly severe. It is submitted that the mitigating factors allow the appellant a reduction of over 1/3 which would leave the headline sentence of 14 years which is clearly unduly severe.

Submissions of the respondent
20. The respondent submits that the sentencing judge had due regard to all the mitigating circumstances in the case including the guilty plea, his work record, lack of previous convictions and attempts at rehabilitation. It is submitted that even in due regard of such mitigating circumstances, an overall sentence of nine years' imprisonment is not so severe as to amount to an error in principle given the gravity of the offending behaviour.

21. It is further submitted that there were a number of aggravating factors present in this case which place the offending in the highest band of gravity and as a result, the sentencing judge did not err in imposing sentence which was proportionate and not excessive.

22. Finally, the respondent submits that the argument of the appellant that the headline sentence to be extrapolated from the nine-year sentence imposed suggests an unduly severe sentence of 14 years is incorrect because it relates to a number of offences. The respondent submits that the sentencing judge took a global approach to sentencing in this case which involved 25 sample counts of sexual assault and sexual exploitation over a period of six years.

Discussion
23. The suggestion is raised, that the judge, in failing to identify a notional or pre mitigation sentence, departed from sentencing principles. We have often stated that the optimum approach is a two tier one, however, it is not the only approach. The very experienced Circuit Court judge took a global approach to sentencing in the instant case. There were many aggravating circumstances present. There were two victims groomed by the appellant, who were vulnerable boys of a young age. His abusive conduct was over a prolonged period of time, over a period of six years in respect of one boy, a lesser timeframe in respect of the other boy. The appellant was in a position of trust and he abused that trust and there was understandably a severe impact on both victims.

24. The pleas of guilty were entered to counts on a representative basis. The offences being 23 of sexual assault and two of sexual exploitation, the total number of offences being 25 offences. Representative counts or sample counts are often representative of

extensive sexual misconduct on the part of an accused person, and this is so in the instant case.

25. The maximum penalty for an offence of sexual assault on a child under the age of seventeen years is one of fourteen years, some of the offending took place when one of the complainants was over seventeen years in which instance the maximum penalty is one of ten years' imprisonment and the maximum penalty in respect of the sexual exploitation of a child is one of life imprisonment.

26. Ultimately, we must focus on the actual sentence imposed which was one of nine years' imprisonment on a count of sexual assault in respect of one complainant, five years in respect of the offence of sexual assault of the second complainant, and four years in respect of a count of sexual exploitation.

27. The balance of the counts were taken into consideration by the sentencing judge and were specifically stated to be so taken into account by him in the imposition of sentence. It is important to note that the appellant was not sentenced for a single offence in which instance there might be merit in the appellant's submission that the notional sentence was in fact maximum sentence permitted by law for sexual assault.

28. This was, however, a sentence of nine years' imprisonment, post mitigation, for a serious of offences concerning a young boy, a sentence of five years for an offence of sexual assault on the second boy and four years for the offence of sexual exploitation of a child. The sentence is to run concurrently and with, as I have said, the balance of the counts on the indictment to be taken into consideration.

29. The offending was over a prolonged period of time in respect of two vulnerable young boys, perpetrated by a grown man who groomed the boys from a position of trust. In some instances, providing money or alcohol and in one instant, fireworks in return for sexual activity. It was on any analysis, very serious offending indeed. The impact on the victims is understandably severe, with one boy almost witnessing his brother's abuse.

30. Furthermore, the appellant also had a child protection role in his parish in respect of which, he underwent child protection training, this goes to his moral culpability.

31. We are satisfied that the sentence imposed was one within the discretion of the judge and therefore there was no error in principle. In fact, if the sentencing judge had chosen to impose consecutive sentences, this would not have been in any way surprising. He did not do so.

32. The approach of sentence was a global one, imposing a post mitigation sentence in total of a period of nine years' imprisonment to reflect the gravity of the conduct with due discount for mitigation.

33. The appeal is dismissed.