THE COURT OF APPEAL

Birmingham P
Edwards J.
McCarthy J.

Record No: 257/2017

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

RESPONDENT

V

S. L.

APPELLANT

JUDGMENT of the Court delivered on the 2nd day of July 2020.by Mr. Justice Edwards

Introduction

1. On the 19th of October 2017 the appellant was convicted by a jury of eleven counts of indecent assault contrary to common law and as provided for by s. 6 of the Criminal Law (Amendment) Act 1935 ("the Act of 1935"), being counts no's 1, 2, 3, 4, 5, 6, 14, 15, 16, 17, 18 and 25 respectively ("the first group"); eight counts of indecent assault contrary to common law and as provided for by s.10 of the Criminal Law (Rape) Act, 1981 ("the Act of 1981"), being counts no's 7, 8, 19, 20, 21, 22, 23 and 24 respectively ("the second group"); and one count of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990, being count no 26 on the indictment.

2. On the 27th of October 2017 the appellant was sentenced to twenty months imprisonment in respect of each of the offences in the first group with the exception of count no 25. The appellant received a sentence of sixteen months imprisonment on count no 25. The appellant was also sentenced to seven years imprisonment in respect of each of the offences in the second group. Finally, the appellant was sentenced to three years and six months imprisonment on count no 26. All sentences were to run concurrently.

3. The appellant has appealed against the severity of the sentences imposed upon him for the offences in the second group, namely the eight concurrent sentences of seven years imprisonment imposed on counts 7, 8, 19, 20, 21, 22, 23 and 24, respectively. He also appeals against the severity of the sentence of three years and six months imprisonment imposed on him in respect of count no 26.

The circumstances giving rise to the appeal against some sentences but not others.

4. This Court has already delivered a judgment on the 8th of May2020 in respect of an appeal by the appellant against his convictions, which appeal was dismissed. That judgment contains a detailed review of the evidence, and the present judgment should be

read in conjunction with that judgment. The twenty-one counts of which the appellant was convicted related to offences involving three complainants, all of whom were sisters and neighbours of the appellant. Their father was a first cousin of the appellant, and the appellant lived within 200 yards of the complainants' home. Nineteen of the twenty-one counts related to complainant "F", one count related to complainant "M" and one count related to complainant "E".

5. There is no appeal against sentence in respect of count no 25 which related to the complainant "M"., and we need not be concerned with the evidence in so far as it related to "M". There is, however, an appeal against sentence in respect of count no 26 which related to the complainant "E". The remainder of the appeals against sentence relate to eight of the nineteen sentences imposed for offences in respect of the complainant "F", i.e., those in the second group. To appreciate why this arises it is necessary to state that while all of the counts of which the appellant was convicted relating to offences against "F" charged indecent assault of a female contrary to common law, eleven of those charges (i.e. those in the first group) were in respect of incidents pre-dating the coming into effect of s.10 of the Act of 1981. The maximum sentence available in respect of those offences in the first group was one of two years imprisonment, as provided for by s.6 of the Act of 1935. However, s. 10 of the Act of 1981 repealed s.6 of the Act of 1935 with effect from the 6th of June 1981, and further provided for a new maximum sentence of ten years imprisonment for the offence of indecent assault (whether of a male or a female) contrary to common law. This new maximum sentence applied to the second group of offences relating to "F", in respect of which the concurrent sentences of seven years now appealed against were imposed.

The offending conduct

6. With respect to the evidence relating to the offences involving "F", the reader is referred to this Court's earlier judgment. It is sufficient for the purposes of this judgment to summarise by saying that in qualitative terms the nature of the indecent assaults, which were all very similar, was essentially the same whether occurring before and after the coming into effect of s.10 of the Act of 1981, in that they all involved instances of genital touching of an initially pre-teenage, and latterly teenage, girl inside her clothing, with penetration of her vagina by the appellant (mostly digitally, but in one instance with his tongue), and coerced masturbation of the appellant by the victim, frequently to the point of ejaculation. The offences involving "F" all took place on one or other of the farm properties owned by the appellant's family or the victim's family.

7. The evidence was that all three complainants were members of a large family comprising their parents and nine children who lived in a farmhouse in a rural part of Ireland. M was the oldest, having been born in 1966, F was born in 1967 and E was the youngest in the family and was born in 1982.

8. The appellant was born in 1955. His father had died when he was quite young. At all times material to these proceedings he lived in a farmhouse with his widowed mother and four siblings. They were immediate neighbours to the complainants' family.

9. It was common theme in the evidence of all three complainants that their father and the appellant's father had always had a close relationship and that they were more like brothers than first cousins. Both men were dairy farmers and they were constantly helping each other out with farm work such as silage cutting, saving hay, moving cattle and so on. Further, they would lend each other machinery and share farm equipment. They also socialised and went drinking together. Because of their close relationship their respective wider families were also close such that they were in and out of each other's houses regularly and attended each other's family events, such as weddings, baptisms and so on, as though they were all part of one extended family. The complainants' family would also look out for and help the appellant's widowed mother, particularly as she got older and had some health problems. The appellant took advantage of the relationship of trust that existed between both families to perpetrate abuse upon his victims.

10. The evidence in relation to the sexual assault of "E" was somewhat different. She was the youngest in the family and was assaulted at a family event held in a public house in August 1994, whereas her sister "F" had been abused either in the appellant's house or in the family home or in adjacent farm buildings. Again, however, the nature of the assault involved her being genitally touched inside her clothing and then digitally vaginally penetrated by the appellant.

Impact on the Victims

11. In a poignant victim impact statement read into the record at the sentencing hearing, "F" described how for many years, and before receiving counselling, she had minimised the appellant's abuse as a coping mechanism and had buried it. She experiences feelings of low self-worth and has difficulty in trusting men. She has engaged in what she described as "self-sabotage", using alcohol as a means of escaping the pain. She has difficulty in countenancing intimacy and has not been able to maintain a relationship on account of this. She explained that she has had a few relationships over the years but they have never developed into sexual ones. She would break off the relationship once it became apparent that intimacy was expected. She feels she has been robbed of her family as a result of the appellant's abuse.

12. No victim impact statement or evidence of victim impact was received from "E", and it was her absolute entitlement to elect not to provide it. However, in sentencing the appellant the sentencing court would nonetheless have been obliged to have regard to s. 5(4) of the Criminal Justice Act 1993 ("the Act of 1993") as substituted by s. 4 of the Criminal Procedure Act 2010. To the extent relevant, s.5(4) of the Act of 1993 provides:

> *"Where no evidence is given pursuant to subsection (3), the court shall not draw an inference that the offence had little or no effect (whether long-term or otherwise) on the person in respect of whom the offence was committed …"*

The accused's personal circumstances

13. The evidence was that the accused was born in 1955. He had worked as a small farmer all his life and supplemented his income from that by working in various jobs in factories and as a labourer. He is a married man with three sons and a daughter. He had no previous

convictions. A number of positive testimonials were placed before the sentencing court, from family members and also from persons for whom the appellant had worked in the past. These portrayed the appellant as being a good family man who had worked hard and conscientiously to care for his wife and children. A letter from the appellant's GP was also put before the sentencing court which suggested that the prosecution was causing severe psychological distress to the appellant's wife and family. It pointed out that the appellant's wife suffers from depression and had made a serious suicide attempt. The point was made that the appellants incarceration would have adverse effects on his wife's already fragile mental health and that she will need close supervision going forward both from her GP and also from psychiatric care services.

14. The plea in mitigation on behalf of the appellant was presented on the basis that he did not accept the verdict of the jury and was continuing to maintain his innocence. The appellant was sentenced on that basis.

The Sentencing Judge's Remarks

15. In sentencing the appellant for all of the offences of which he was convicted, including the matters now under appeal, the sentencing judge stated:

> *"JUDGE: Very good. Well, there are three injured parties in this case. In respect of two, E and M, counts 25 and 26, they were convicted by the jury of single offences. The first of indecent assault and the second of sexual assault. Both of these offences are similar in character. The victims were about the same age at the time that they occurred and the impact on each has been outlined. The offence is particularly depraved and brazen, given the age of the victims and the age of the accused and their relative vulnerability. They stand, in the case of M, events at the high side of mid-range on the scale of gravity and in the case of E the high end of the scale of gravity, bearing in mind similar offences. There is no clear evidence of premeditation, although the similarity of the assaults is suggestive of a pattern of conduct. Viewed in isolation this might not be apparent but when viewed with the offending alleged against the accused in respect of each of the victims the evidence implies or is at least suggestive of a system or pattern, thus implying, if not premeditation, then at least a predisposition. The age disparity and the social environment in which both families existed may well have militated against this offending coming to light or being brought to the attention of any person in authority at the time or for a considerable period afterwards but, as is all too common knowledge in this day and age, given the increased and improved level of awareness of the matrix of sexual abuse, this would not in any way be either unusual or unpredictable.*
>
> *The headline sentence in respect of count 25 is 18 months' imprisonment and the headline sentence in respect of count 26 is four years' imprisonment reflecting the place at which I have assessed them to stand on the scale of gravity and that is before I consider mitigation.*

The offences as they relate to F, counts 1 to 8, counts 14 to 24, are of a broader and more serious character. They involved misconduct, sometimes similar to that visited on the two other victims, but conduct that had extended far beyond it in its character over a period of many years involving misconduct that constituted grooming. It was particularly depraved. The victim experienced this and expressed herself as being, at one stage or perhaps at more than one stage, deluded into believing that she was in a relationship with the accused, even at a time when he had married and where abuse was taking place on his property. Her victim impact statement is self explanatory. The degree of premeditation here is extreme and this, together with the compelling evidence of grooming, both are significantly aggravating factors. The headline sentence in respect of each offence reflects the place where each stands on the scale of gravity, very close to the top. In respect of counts 1 to 6 and 14 to 18, 22 months is the headline sentence. In respect of the balance of the counts; 7, 8, 19, 20, 21, 22, 23, 24, eight years' imprisonment is the headline sentence.

Mitigation is extremely limited here. The age of the accused, his relatively serious health issues, his absence of any evidence of previous offending, although the window of the incident offences in this case are very wide the window is very wide, embracing the years from 1976 to 1994. Absence of remorse and an express rejection of the verdict of the jury are not aggravating factors but give rise to a consideration that causes me concern as to the risk or potential risk that the accused may pose to the public as a convicted and unrepented sex offender. It out rules rehabilitation from any consideration in the sentencing process and raises or emphasises or heightens the role of deterrents.

The sentences in respect of count 25 is 16 months' imprisonment. The sentence in respect of count 26 is three and a half years' imprisonment. The sentence in respect of counts 1 to 6 is 20 months' imprisonment. In respect of counts 14 to 18 is likewise 20 months' imprisonment. In respect of counts 7, 8, 19, 20, 21, 22, 23 and 24 the sentence of the Court is seven years' imprisonment. It would be open to me to make some or all of these offences consecutive to each other and it might be argued that the Court should, on the evidence, do so. However, I prefer to approach this sentencing hearing on the basis of the overall sentence or, as is often said, pass a sentence that is in the round a fair and proportionate reflection of the gravity of the offending and at the same time reflecting such mitigating factors that apply. Here I will, bearing this in mind, make all sentences concurrent to each other."

The Grounds of Appeal

16. The grounds of appeal relating to sentence are grounds numbers 18 to 20 inclusive on the notice of appeal, and are in the following terms:

"18. In all the circumstances the sentences imposed on counts 7, 8 and 19 – 24 were excessive.

19. In all circumstances the sentence imposed on count 26 was excessive including in identifying four years as the appropriate headline or starting point and in reducing that sentence by only six months and the learned trial judge erred in law in imposing same.

20. The learned trial judge erred in failing to take into account adequately or I told the mitigating circumstances."

Submissions

17. It has been submitted on behalf of the appellant that a sentence of seven years imprisonment is disproportionate and excessive for the offences in the second group. In response, the respondent maintains that the sentence imposed was proportionate and within the margin of appreciation available to the sentencing judge. It is further maintained that the sentence imposed by the sentencing judge was proportionate and accurately weighed the aggravating factors and mitigating factors in the matter.

Discussion and Decision

18. Counsel for the appellant makes the point in respect of the offences in the second group that between the enactment of the Act of 1981 and the enactment of the Criminal Law (Rape) (Amendment) Act 1990 ("the Act of 1990") a single sentencing range existed running from non-custodial options up to imprisonment for ten years in respect of an undifferentiated class of offences qualifying as indecent assault but embracing conduct now differentiated as either sexual assault, aggravated sexual assault and rape contrary to s 4 of the Act of 1990, in respect of which there are now separate and different sentencing ranges. Counsel's point is that while the nature of the offending conduct in this case was grave, it was an error for the sentencing judge to have characterised it as "*very close to the top*" of the scale of gravity and to have fixed a headline sentence of eight years, because it left insufficient margin for the wide range of even more egregious offending that was not committed in this case but which might be committed in another case. In counsel's submission this was mid-range offending in the context of the range that was available.

19. While we consider that counsel for the appellant makes a valid point in so far as it goes, we think it could only validly extend to a situation in which an isolated instance, or small number of instances, of the offending conduct in question was under consideration. An isolated incident of penetrative sexual assault committed in breach of trust and in circumstances of a significant age disparity between perpetrator and victim would constitute mid-range offending. However, that was not the situation in this case. A major aggravating circumstance in this case is that there were numerous instances of this offending conduct committed as part of a protracted campaign of serious abuse that went on for a number of years, which destroyed the childhood of "F" and caused her profound and lasting psychological and emotional damage. The sentencing judge was entitled to regard the gravity of the offences in the second group as very serious. The reference to "*very close to the top*" was arguably somewhat hyperbolic, but regardless of that characterisation the sentencing judge's actual starting point at 80% along the scale was justified in our view.

20. In so far as we are concerned with the sentence imposed for the sexual assault of "E", while this was an isolated incident (in so far as "E" was concerned, although not in the overall context of the appellant's offending), and would have fallen to be located at mid-range had the undifferentiated 10 year scale for indecent assault been applicable, it was clearly at the high end of the range now applicable for sexual assault contrary to s.2 of the Act of 1990. This was a sexual assault of a young girl in her early teenage years, involving digital penetration, and again in breach of trust by a perpetrator who was much older than his victim. We find no error on the part of the trial judge in characterising it as "at the high end of the scale of gravity", and for nominating a headline sentence of four years imprisonment, that figure representing a starting point that was 80% along the available scale.

21. It should also be borne in mind in considering the sentencing judge's overall approach that while it would have been legitimately open to him to have structured his sentences entirely differently and using consecutive sentences, it is unlikely that, had he done so, it would have been to the advantage of the appellant or that it would have resulted (even after application of the totality principle) in a more lenient overall sentence. There were three victims in total (although we are only concerned with two in terms of the appeals before us) and it would certainly have been open to the sentencing judge to have made the sentences in respect of the first and second groups of offences (i.e., those involving "F") concurrent *inter se*, but to have made the sentence imposed for count 25 (involving "M") consecutive to those in the second group, and the sentence imposed for count 26 (involving "E") consecutive to the sentence on count 25, and then, having done so, to make an appropriate adjustment for totality.

22. In circumstances where he did not opt for consecutive sentencing, but opted instead for concurrent sentences in all instances, it was particularly important that the sentences for the second group (i.e., the longest sentences) should have adequately reflected the gravity of the offending conduct involved. We are satisfied that the sentences imposed for the offences in the second group did adequately reflect the gravity of the offending conduct involved, that there was no error on the part of the sentencing judge and that the sentences ultimately imposed were both just and appropriate.

23. In those circumstances, the appeal is dismissed.