



THE COURT OF APPEAL

[237/19]

**Edwards J.
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECTIONS

RESPONDENT

AND

J.M.

APPELLANT

JUDGMENT of the Court delivered on the 19th day of October, 2020 by Ms. Justice Ní Raifeartaigh

Introduction

1. This is an appeal against severity of sentence. The appellant was sentenced on the 18th October 2019, having pleaded guilty to a number of sample counts on the indictment on a "full facts" basis. On the three counts of "s.4 rape" (counts 16, 20 and 25: Rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act 1990) he received a sentence of 10 years imprisonment on each count (to run concurrently) with the final two years suspended on conditions. The sentence was backdated to the 23 July 2019. The conditions were that he undergo an assessment while in prison for the Better Lives Programme; engage with the prison-based psychology service upon release; be under the supervision of the Probation Service for a period of two years upon his release; complete victim-focused work as directed by the Probation Service; and address all aspects of his offending behaviour as directed by the Probation Service.
2. The remaining counts were "taken into account" by the sentencing judge (counts 1, 2 and 3: Indecent assault contrary to Common Law and as provided for by s.62 of the Offences Against the Person Act 1861; counts 10, 15, 26, 30, 36 and 44: Sexual Assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990.)

Factual Background

3. The appellant is the older brother of the injured party by almost 4 years. He carried out the offences over a period of 10 years, from 1988 to 1997. The appellant was almost 14 years old when he started sexually assaulting his younger brother, and almost 24 when he stopped. The injured party was almost 10 years of age when the abuse started and almost 20 years of age when it ended.
4. The injured party made a statement of complaint to Gardai in which he described the sexual abuse as having taken place between 1988 and 1993. The offending behaviour took place at the family home in Cork City, in the sitting room or the shared bedroom of

the appellant and the injured party. He said that there was rubbing of the genitals and that he was subjected to performing oral sex on the appellant and vice versa. He said that on a few occasions the appellant attempted to anally penetrate him but was unsuccessful. He said that it was very frequent over the period; "It would have been happening a few times a week sometimes, but I can say it was regular and consistent over a number of years... I think it happened a lot. I know it did. It went on too long, whenever he got a chance. When people were in bed, it happened a lot. It didn't matter whether it was day or night."

5. He also said that on one occasion the appellant performed oral sex on him at his uncle's bar (sometime between July 1990 and January 1991).
6. The appellant was interviewed on a voluntary basis at Mayfield garda station on the 5th August 2017 where he made full admissions, and again on the 28th January 2018 on a voluntary basis, when he made further admissions. His admissions covered incidents of abuse disclosed by him during an interview in the context of a Tusla investigation (the interview being conducted by Mentor Forensics), which amounted to admissions that he had continued to abuse his brother by masturbating him while he was asleep during the period 1993-7. His brother, the complainant, had only been aware of the abuse during the period 1988-1993.
7. Having fully co-operated with the Garda investigation and, as noted, having brought to light certain offences which were not previously known even to the injured party, the accused entered an early plea of guilty.

Victim Impact Statement

8. The evidence established that the effect of the offending behaviour on the injured party was profound. A victim impact statement was read aloud by the injured party detailing the very severe effect the abuse had on him. At the time of the proceeding, the injured party was 41 years old and recently married. He stated that the abuse by his brother was "a long, horrendous and sometimes surreal journey" which he had been on for the last 30 years of his life. He said that when he was a toddler his brother was his hero, but then he became the "biggest villain" who had used him as a sexual object. He told the Court that his life went on a "rapid downhill spiral". He said that the offending behaviour made him feel sick and that he turned first to drugs and then to self-harm as well as alcohol. He hated and blamed himself for what his brother was doing. He began to pull away from family and friends and had a horrible secret that he could not tell anyone and felt very alone. He was violent to his mother and in the family home and was screaming out for help in the wrong ways. He said that he had felt like his head was full of thoughts and voices and disgusting flashbacks and confusion and he imagined drilling a hole into his head to release the pressure. He also said that he wanted to die and had suicidal thoughts. He had scars on his wrist from suicide attempts which were constant reminders of the bad times
9. The injured party then explained that when his son was born, it was the happiest and proudest time of his life but that his happiness did not last long because he was afraid to

touch his son, to bathe him or to give him a kiss. The sexual abuse by his brother had distorted his thinking. The injured party said that he had to overcome addictions but was now clean and sober for fourteen years and had support from counsellors, friends and members of the family. He said that the love from all these people and his wife and his son had kept him going and brought him to a new place in his life.

The Respondent's Personal Circumstances

10. The appellant was in his forties at the time of the guilty pleas, his date of birth being the 6 January 1974. He is a separated father of two children and works as a mechanic. He has no previous convictions but had another case of sexual abuse pending at time of sentence, relating to matters occurring in 1988. He had pleaded guilty to eight counts of indecent assault at Cork Circuit Criminal Court in the May sessions of 2019 and was awaiting sentence at the time of the present case. Those offences were in relation to a five-year-old boy who lived in the same estate as they did, and the offences came to light around the same time as this case.
11. As a result of his disclosures, he was removed from the family home and his wife subsequently separated from him.
12. A report was put before the court from a forensic psychologist. This report indicated that the appellant had only in recent times acknowledged to himself that he was homosexual in his sexual orientation. It noted that he attributed his abuse of his brother (and the other boy) to his confusion or difficulties around his sexuality. He had engaged in a number of heterosexual relationships in his life and indeed had married but was now separated from his wife. He was aware of his sexual orientation or tendencies at a very young age but was ashamed to acknowledge them. The psychologist said that his current coping method was ineffective, and he was susceptible to being overwhelmed and at risk of emotional collapse. His level of intellectual function falls within the borderline range and his overall thinking and reasoning abilities are exceeded by 75% of his peers. The risk assessment placed him at average risk for future sexual offending for reasons including his failure to appreciate the power differential between himself and his younger brother at the time of the offending and his difficulty in identifying and expressing his emotional needs together with "chronic low self-esteem". The psychologist recommended that he should participate in a Building Better Lives programme, which the respondent was willing to do.
13. The court directed a probation report. Among other things, this report noted that he had said that while he was also a child when committing some of the offences, "he always knew his actions were wrong". It also commented: "Despite some expression of remorse in relation to his actions, he displays little victim empathy, choosing to believe his brother has forgiven him and moved on with his life. This is despite his awareness of the difficulties his brother endured in relation to addiction issues and emotional distress". Earlier in the report, it noted: "while he knew what he was doing was wrong, the sexual gratification he received superseded everything else". It also noted that "he states his primary reason for sexually abusing his brother was due in the main to his confusion in relation to his own sexuality". It notes that he said the abuse continued for 10 years and

“only ceased for a short period when [he] was contacted by the Gardai in relation to the sexual abuse of young boys in the neighbourhood”. He was fully aware of his brother’s problems with alcohol and drugs but “did not link these with his abuse of his brother” and “never saw any outward signs his brother was suffering as a result of his abuse” and that “if at any point his brother had asked him to stop he would have done so”.

The Sentence

14. The sentencing judge noted the following mitigating factors: an early plea of guilty; the acknowledgement to the injured party of the very serious harm that the appellant had inflicted upon him; his youth at the time of the offending, particularly the fact that during some of the offending behaviour the appellant himself was a child, although he said that one would “expect from 16 years of age on, that he would be very conscious of the serious criminal activity that he was engaged in.”
15. He outlined the aggravating factors as being: the length and continuous nature of offending, during which it is accepted that the offending behaviour was regular throughout the period of time; the breach of trust involved because he was the older brother of the injured party; and the impact on the injured party.
16. He identified a headline sentence of 13 years but reduced it to 10 years and then suspended the final 2 years on the conditions described above, having regard to the mitigating factors identified.

Submissions on Appeal

The appellant’s submissions

17. Counsel for the appellant submits that the sentencing judge erred in setting a headline sentence of 13 years; and that he erred in reducing the headline sentence of 13 years by three years only. However, the main complaint is centred on the selection of the headline sentence of 13 years in the first place.
18. Counsel submits that he gave insufficient weight to the mitigating factors, including:
 - i) the fact that the appellant’s admissions precipitated the criminal complaint;
 - ii) his admissions made at interview under caution; including the volunteering of information about offences of which the authorities were otherwise unaware;
 - iii) his co-operation during the investigation;
 - iv) the early indication of guilt and plea of guilty;
 - v) the factors set out in the reports laid before the court.
19. Counsel submits that, having regard to the authorities, and in particular the decision of the Supreme Court in *F.E.*, this could not be said to fall into the higher range of such offending. At paragraph 57 of his judgment in *F.E.*, [2019] IESC 85, Charleton J. said: “*There is a category of rape cases which merit a headline sentence of 10 to 15 years*

imprisonment. What characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust." Counsel submits that the concept of 'breach of trust' is somewhat problematic in the present case, when for a period of the offending, the appellant was a minor himself, particularly when this was the period of the more serious offending. Not only were the offences committed when he was older not as serious, they were also the offences which would not have come to light had not himself volunteered the information that he had masturbated his brother while asleep.

The respondent's submissions

20. Counsel for the respondent submits that the headline sentence was appropriate and that the ultimate sentence could not be considered a substantial or a gross departure from what would be an appropriate sentence in the circumstances. He submits that the offending behaviour in this case fell squarely within the category identified by Mr Justice Charleton in the *WD* case [2008] 1 IR 308 as "severe", referring in particular to paragraphs 37, 49 and 50 of that judgment, where factors identified included the fact that offending went on over a period of time, that there were multiple counts, and that there was a breach of trust; and further submits that the same factors feature in Charleton J's analysis of the 10-15 year range of sentences in the later *F.E.* case. He submits that appropriate weight was given to the mitigating factors.

The Court's view

21. There is no doubt that there were some strong mitigating factors in this case. The first was the co-operation with the Garda investigation, including admissions to criminal conduct of which even the injured party himself was not aware, given that he was asleep while he was being abused. In the same spirit, the appellant pleaded guilty at an early opportunity. He also expressed remorse and displayed some insight into the impact his actions had had upon his younger brother. However, it is clear from the probation and psychological report that this insight is very limited and that much work would have to be done to enable him to fully address and grasp the impact his actions had upon his brother's adolescent development, his descent into drug and alcohol addictions, and the long shadow they had on his adult life.
22. A central submission on behalf of the appellant was that he was only 14 when he had started offending, and that the trial judge had insufficiently factored this in when choosing a headline sentence of 13 years. It was submitted that it was not appropriate to say that his offending involved a "breach of trust" as such, unlike cases such as parent, step-parent or a significantly older sibling. This, the Court was urged, meant that the single factor which might have brought the case into the 10-15 year category identified in the *F.E.* case (the alleged breach of trust) was not present in any real sense. Allied to this submission was the submission that the more serious offending had taken place in the earlier part of the 10-year period of offending when the appellant was relatively younger, and the less serious offending had taken place when the appellant was older.

23. It is true that there is a difference between the abuse of a child by an adult such as his parent or step-parent, and a person who was a minor himself for some of the offending, as was the case here. There is no question at all that an appalling breach of trust is present in the former case, where the offender is an adult from start to finish. The present situation is undoubtedly more nuanced. However, the Court would make the following observations. First, the appellant knew what he was doing was wrong. It is important to note that the Gardai came to their house on foot of complaints about his interfering with other boys in the neighbourhood, apparently when he was still a young teenager. This stopped him (on his own account) from sexually abusing the other children but he resumed his abuse of his brother. The Garda visit would have left him in no doubt that what he was doing was wrong, and his resumption of abuse in respect of his brother reveals an exploitation of an easier target who the appellant clearly knew was less likely to complain. Indeed, he told the probation officer that he always knew that what he was doing was wrong but that he did it for his own sexual gratification. There is no suggestion, as there is in some cases, of the offender having himself been subjected to sexual abuse which 'normalised' the behaviour for him while he was young or that he did not understand that it was wrong. Secondly, the prolonged period during which he continued to abuse his younger brother shows that the passage of time had no effect upon his attitude to the offending. The abuse continued for 10 years. Thirdly, by the time he finished offending, he was 24. Whatever about the merits of considering that at age 14 or 15 his criminal responsibility might be attenuated, there is little reason to take this view once he reached the age 16. Fourthly, the abuse recollected by the injured party was described as regular and frequently involving oral sex (i.e. section 4 rape). On simple arithmetic, this form of abuse must have continued until the appellant was 19 (five years of offending from age 14). The serious charges include a period when the offender was aged 16-19. Fifthly, while the age differential is undoubtedly not the same as in the case of an adult such as a parent or uncle, a period of 4 years between two brothers is not insignificant either, particularly when they are young. There is a big difference between a 10- and a 14-year old; and between a 14- and an 18-year old. Inevitably the younger child looks up and admires the older child; inevitably there is a power differential; inevitably there is something destroyed by the abuse that is absent from a "stranger" abuse case. Whether one calls it a breach of trust or not – the Court is of the view that the phrase does apply – the point is that there is an exploitation of a power differential within a family dynamic, which in the Court's view (together with the serious and prolonged nature of the abuse) places it within the 10-15 year category identified in *F.E.*.
24. For all of those reasons, it seems to the Court that the sentencing judge did not err in choosing a headline sentence of 13 years. The case involved prolonged and serious sexual abuse of a younger brother by an older brother on a regular basis in his own home, which had devastating consequences for the younger brother's psychological development and subsequent life. This falls within the serious category identified in *F.E.*
25. As noted above, there were some very significant mitigating factors; particularly the volunteering of information over and above admissions to allegations; the early plea; and some limited insight and remorse coupled with a desire to engage in psychological work

suggested by the psychologist and probation service. To take account of mitigation, the trial judge adjusted the headline sentence from 13 years to 10 years (which amounted to a little less than 25%; a full 25% reduction would have yielded a sentence of 9 years and 9 months). He then suspended the final two years on the conditions already described.

26. Thus, the sentencing judge reduced the headline sentence of 13 years in two ways: (i) by deducting 3 years from the actual sentence of imprisonment imposed; and (ii) by suspending a further 2 years of the sentence on conditions. Thus the custodial component of the sentence was 8 years which came to more than 38% reduction of the custodial aspect of the sentence if one takes the starting point as 13 years. Of course, the suspended portion of the sentence is a very real part of the sentence, and one would not expect the appellant to find complying with the conditions of the suspension easy. Reviewing severity or lenience does not consist merely of examining the custodial part of the sentence. Nonetheless, that aspect of matters is something to be taken into account and it is noteworthy that the judge went from 13 years to 10 years, and then to 8 years, in terms of the actual custodial part of the sentence.
27. The part-suspension with conditions was appropriate in light of the reports before the court, and the content of the conditions was rationally and proportionately connected with the contents of those reports.
28. The Court is of the view that these two adjustments to the headline figure of 13 years, taken together, constituted a significant discount from the headline sentence of 13 years, particularly in view of the limited insight shown by the appellant, and sees no reason to interfere with the sentence imposed by the sentencing judge. Accordingly, the Court will dismiss the appeal against severity of sentence.