THE COURT OF APPEAL

[26/19]

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT

- AND -

M.J

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 13th day of January, 2021 by Mr Justice McCarthy

1. This is an appeal against severity of sentence. On the 15th of February 2019, the appellant received an aggregate sentence of eight years and nine months with the final year and nine months suspended on terms on a number of counts of indecent assault.

2. The facts of this case are set out in full in the judgment of appellant's appeal against conviction, dated July 30th 2020. The appellant was convicted on the five counts of indecent assault against the complainant between the 1st May, 1978 and the 31st August, 1978 at an address in the country. The complainant was born on the 25th February, 1967 and the appellant on the 11th August, 1957. The mothers of the complainant and the appellant were friends, having worked together in England where the complainant resided with his family. The offences occurred at the appellant's home whilst the complainant was temporarily staying there between the dates aforesaid.

3. At the time of sentencing the appellant was 61 years of age, he is divorced and has one adult daughter. During sentencing, the Court heard that the appellant had no previous convictions, he had a strong work history and had acted as the carer for his parents. The appellant has had several health difficulties as set out in a medical report before the trial judge including a cardiac condition, respiratory difficulties and chronic arthritis. A Probation Report was available but merely deals with his background as he still rejects the jury's verdict but it does place him at a low risk of re-offending.

4. At sentencing, the judge identified the aggravating factors as follows:-

"The nature and extent of the assaults are strongly evidential of premeditation and grooming, and the incremental sequence of depravity are factors that aggravate the gravity of these offences, as is the age difference that occurred that existed between the parties at the time. The impact on the victim, including the manner in which the case was defended, are matters that I'm required to take into account in fixing a headline sentence. The impact on the victim as is evidenced in his victim impact statement is consistent. With the age experience of the victim at the time and the psychological impact that these events must have had on him, had on him throughout his teens. His life experience has been unstructured since, fraught with broken relationships; and it is his belief that the early experience of sexual abuse at the hands of the accused in this case significantly impaired his ability to live a normal life. He has been required to engage with mental health services for lengthy periods. To his credit, he has been capable of employment and retraining where necessary and he finds this to be worthwhile. Only he knows how difficult it has been for him to make this complaint so many years down the road and to see it through to the end. He expresses himself as believing that bad and all as it was, it was worth doing. So I note there's nothing in the antecedents of the accused that would require me to aggravate the gravity of already grave offences."

The judge identified the offences as being on the high end of the scale given the maximum sentence of two years, the trial identified a headline sentence of twenty-one months in respect of each count.

5. The judge then approached mitigation. He said that as far as he was concerned there was no readily apparent factor in mitigation. The Probation Report indicated that the appellant did not accept the verdict of the jury. The trial judge did not feel that the appellant's age or innocence were sufficient to warrant mitigation and although the lack of previous convictions may have established that his conduct was out of character, the judge did not accept that prior obedience to the law can act as a mitigating factor in a subsequent criminal conviction. As a result, the trial judge concluded that there was no realistic scope for mitigating the headline sentence.

6. He then referred to the fact that in his view or what he characterised as the depravity of the offending was best reflected by imposing consecutive sentences on each count with the final twenty one months suspended.

7. This appeal is effectively based on the grounds that the judge fell into error because the headline sentences were excessive, that he wrongly exercised his discretion to impose consecutive sentences and he failed to give proper weight to mitigating factors and in particular, there was a failure to have regard to the absence of convictions prior to the offending and his good character over many years since.

8. Insofar as the question of the headline sentence is concerned, in oral submissions, counsel submitted that this was not a case where there was gratuitous violence or threats and that the appellant was not a fully mature individual at the time of the offences. Insofar as the issue of consecutive sentences is concerned, it is freely conceded that the

judge had a discretion so to do; however counsel submitted that it will be a discretion which is exercised relatively infrequently and that what counsel called the 'gold standard' of the approach of a judge when sentencing, namely a warning to counsel that consecutive sentences could potentially be imposed with a view to hearing counsel on the topic, was not adhered to, although this point was not pressed with vigour when it was pointed out to counsel that in the nature of the offences no one could reasonably suppose but that the potential for consecutive sentences had to exist, and that it was a matter for counsel to make submissions as they saw fit having regard to the trial judge's discretion. There is no such obligation.

9. It is obvious that unless the consecutive sentences were imposed the appellant would have been punished in reality not for a sequence of repeated offences but one offence only. The judge was not dealing here with what one might describe as a single transaction which is a classic case where it would be rare to impose consecutive sentences in respect of more than one offence charged arising out of such a transaction.

10. The judge was perfectly entitled to exercise his discretion in the way in which he did. We think that the seriousness of the offences are such that in no circumstances could the headline sentence be less than twenty one months; we must have regard to what must have been the isolation of the complainant in a strange place in the company of persons he did not know when he had no remedy for that to which he was being subjected and that he had been groomed by the appellant. Insofar as the question of mitigation is concerned, in the course of the sentencing remarks the judge said:-

> *"Now, in mitigation, there's no readily identifiable factor. He's not sorry. The probation service take the view from what they've told him that he doesn't accept the verdict of the jury and obviously doesn't accept responsibility and is therefore unremorseful. So he's not entitled to any credit in that regard. He exercised his right to defend, to defend himself, the fact that he was found guilty by a jury doesn't entitle him to any credit nor is he is being penalized for that. He may have a number of health issues, none of which, at least to my mind, amount to mitigation, nor is he old enough that that would be a factor that would enter into my mind in terms of mitigation. While he has no previous convictions, I'm not prepared to take the view that this entitles him to a mitigation. People are supposed to obey the law and I can't see how prior obedience of the law can act as a mitigating factor in a subsequent criminal conviction. I suppose the height of it could be to that say that it is out of character."*

11. We do not find ourselves in agreement that there was no mitigation present. There was no plea of guilty, which would have been the most powerful mitigation but it was the case that the offending was committed by somebody of the order of 20-21 years of age; a very young man. It was committed by somebody who, as of that time, came before the court for sentencing as somebody who had not offended or come to adverse notice in the forty years since.

12. It seems to us that these were factors which had to be considered by way of mitigation. We have asked ourselves whether the sentence imposed by was one that should stand even for what we have identified as an error. However, we feel that the factors which were present require a limited intervention.

13. In the circumstances we propose to deal with the matter by quashing the sentence in the Circuit Court and substituting a sentence which would see the final two years and nine months rather than one year and nine months suspended.