



THE COURT OF APPEAL

NO REDACTION NEEDED

[239/19]

**The President
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

A.C.

APPELLANT

JUDGMENT (*Ex tempore*) of the Court delivered on the 21st day of October 2021 by Birmingham P.

1. This is an appeal against severity of sentence. The sentences sought to be appealed were imposed on 29th October 2019 in the Circuit Criminal Court in Dublin. On that occasion, two sentences, each of three years and six months, were imposed in respect of twenty counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990. The sentences imposed were made consecutive to each other so that the effective aggregate sentence was one of seven years imprisonment.
2. The appellant appealed against his conviction and sentence, and in a judgment delivered on 1st April 2021, this Court (differently constituted in part) dismissed the appeal against conviction. The background to the case is dealt with in some detail in the course of that judgment, and it is not proposed to repeat that exercise at this stage. It is sufficient to recall that at issue was offending that occurred between 1st September 1993 and 1st September 1996. The offending occurred in the family home of the complainant. The sentencing court heard that the complainant was aged eleven when he was first abused by the appellant. The appellant is the brother of the partner of the complainant's father. The Court heard that he had come to stay as a visitor at the family home following his release from prison where he had served a sentence. It appears that he was afforded temporary release.
3. At the time of the offending, the appellant was approximately thirty years of age. The evidence was that offending occurred in an upstairs bedroom during the night when the appellant was sleeping in a lower bunk-bed beneath that occupied by the complainant. It

is said that the appellant stretched up with an arm and that he molested the complainant. The evidence was that the abuse came to an end when the appellant suffered a leg injury, in the aftermath of which he was in wheelchair for a period and was unable to ascend the stairs. In summary, the evidence was that during the offending period, the appellant would molest the complainant, would masturbate him and would sexually assault. The complainant first made disclosure to his sister in 2003 or 2007 (there was some doubt about the exact date), and the first complaint to Gardaí was made in 2016.

The Sentence Hearing

4. At the initial sentence hearing on 25th July 2019, a victim impact report that had been prepared by the complainant was read into the record of the Court. The complainant outlined that he had suffered very significantly as a result of the acts of the appellant. He spoke of his fear of the appellant when he came to stay, and spoke of his memory of a physically imposing individual who appeared quite large to him as a young child. He also spoke of his inability to sleep as a child because of his concern as to what would occur when the appellant was staying in the house. The victim impact report refers to the difficulty that the complainant experiences in becoming emotionally involved with his children and with others, and it is indicated that the effects of the abuse are ongoing, and that the complainant is on medication. The complainant referred to depression, anxiety, sleeping difficulty, fears for safety, weight loss, and extreme emotion and agitation. It is accepted that many of the psychological and psychiatric difficulties experienced are likely to be multifactorial.
5. So far as the appellant's personal circumstances are concerned, he was 56 years of age at the time of the sentence hearing. He had 385 previous convictions recorded, of which all but two were from the District Court. The majority of the convictions were alcohol-related, many were for public order, and it is clear that the appellant's life has been blighted by alcoholism and addiction. The two convictions of significance were for robbery and for assault, but there were prior convictions of a sexual nature.
6. The sentencing judge indicated that she saw the aggravating factors in the case as being the seriousness of the offences in and of themselves, and the continuous nature of the offending by a visitor to the house. In mitigation, the judge felt that the appellant's difficult childhood, coupled with his addiction to alcohol and his numerous efforts to detox, were relevant. The sentencing judge said that she saw the offences as being at the "upper mid-range of offending" due to the masturbation and the touching of the nature involved. She also took into account the sustained nature of the abuse, referring also to the ages of those involved and to the vulnerability of the complainant.
7. The sentencing judge said in the absence of mitigation, the appropriate sentence on each count was one of three years and nine months, but that "[i]n truth, there was little of substantive mitigation". However, having regard to such factors as were urged, she reduced each sentence from three years and nine months to three years and six months. The judge felt that consecutive sentences were warranted, but having regard to the principles of proportionality, she made Count 2 on the indictment consecutive to Count 1, and all the remaining counts (counts 3 to 40) were made concurrent to Count 2. The

judge said specifically that she did not regard it as an appropriate case for a partially-suspended sentence.

The Appeal Hearing

8. In the course of the appeal hearing, counsel for the appellant made the point that there should be only sparing resort to consecutive sentences. He acknowledges that it would not be easy to make the case that this was not a situation where the judge was entitled to consider consecutive sentences. However, he says that if there was to be any such resort, then it was essential that the judge would have adequate attention to the personal circumstances of the appellant. This, he says, did not happen. It is suggested that having adequate regard to the personal circumstances of the appellant would have seen a portion of the sentence suspended. It must be said that the decision of the Circuit Court judge not to partially-suspend is a central feature of the present appeal.
9. Counsel for the Director says that the total sentence of seven years imprisonment is both proportionate and in accordance with the totality principle in all the circumstances. It is said that the sentencing judge was within her permissible margin of discretion in imposing and structuring the sentence as she did, having regard to the aggravating and mitigating factors present. It is also submitted that no error occurred in not partially-suspending the sentence in light of the circumstances and in the absence of any specific proposed pathway to rehabilitation.

Discussion and Decision

10. The Court begins its consideration of this issue by observing that this was offending of real seriousness. It was offending that was sustained and persistent, and occurred over an extensive period. It occurred in the complainant's home where a child should be and feel safe. The complainant was a vulnerable child without the level of structured familial support that would be usual, and the fact that the complainant was subjected to abuse by a visitor in his home, to whom help and hospitality at a time of need had been extended, was a significant aggravating factor.
11. In this Court's view, there was no error in the identification of the headline sentence, and in truth, it has not been suggested that there was. We also do not see any basis for concluding that the sentencing judge fell into error in taking the view that the sentence required a consecutive element if an appropriate sentence was to be arrived at. Having so concluded, the judge specifically adverted to the need for proportionality, and in express reference to the issue of partial-suspension, indicated that it was her view that this was not an appropriate case for that.
12. The sentencing judge's decision that there was no basis for partial-suspension has to be viewed in the context that this was a case where no plea of guilty was entered, no wrongdoing was acknowledged, no remorse was expressed (even post-conviction) and, in passing, it may be said that that remains the situation to this day. There has been reference to a life blighted by alcoholism and addiction, and there seems little scope for doubt but that alcoholism and addiction have been a feature of the appellant's life. However, what was not put before the Court was any indication of how, if at all, this had

led to the offending in question. There must be a great number of people with alcohol and addiction issues who do not offend in the way that the appellant did. Insofar as it was presented before this Court and before the sentencing court that alcoholism, addiction and a chaotic lifestyle were factors in the offending, what was absent from the sentence hearing was any indication that this was being addressed in an effective manner. It seems to us that no compelling case for partial-suspension was put before the sentencing court. Indeed, the fact that the offending conduct commenced at a time when the appellant was on temporary release was a factor that served to militate against partial-suspension.

13. Recently, the central role of a trial judge was restated in very clear terms by the Supreme Court in DPP v. FE (No 2) [2020] IESC 5. In his judgment delivered on behalf of the Court, Charleton J. makes the point that a judge who is called on to sentence, having presided over a contested trial, is particularly well-placed to do so, and that, of course, was the situation in the present case. When we step back and view the sentence that was imposed in context, we cannot conclude that there was an error in principle. It seems to us that the sentence imposed was one that fell within the available range, and certainly fell well within the margin of appreciation that has to be extended to the trial judge.
14. In all of the circumstances, we feel obliged to dismiss the appeal against severity of sentence.