



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

118/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

A.L.

Appellant

Judgment of the Court (ex tempore) delivered on the 8th day of December 2014 by Mr. Justice Birmingham

1. In this case the appellant Mr. L. appeals against the severity of a sentence that was imposed on him on the 3rd May, 2013. The sentence under appeal is one of six years imprisonment with provision also being made for six years post release supervision.
2. The sentence was imposed in respect of one count of sexual assault. That one count referred to two victims. The maximum applicable for the offence was one of fourteen years.
3. The basic facts are that in 2007/2008 the appellant assaulted two young girls that will be referred as EB and OH when both were aged seven years. The situation is that the appellant had a daughter in the same class as the injured parties and these young girls would attend his house to play for a "play date".
4. The appellant had a basement and the children would go there and there the appellant showed the young girls adult pornographic magazines as distinct from child pornography and it appears that he sought to introduce them to the mechanics of the sexual act.
5. He encouraged the young girls to "play games" and as part of the so called game playing he would expose himself and sometimes the little girls encouraged by him would pull down his trousers. He encouraged the little girls to take off their clothes and underwear and it appears that that happened some five or six times.
6. The appellant also admitted putting the girls over his shoulders and then smacking their bare bottoms and that smacking represents the physical act that gives rise to the charge of sexual assault. It also appears that one of the girls was on one occasion asked to use a magnifying glass in order to touch his penis.
7. When the case came to court, counsel for the Director offered assistance to the court by conveying the views of the Director, and the views of the Director were that the offences were at the lower end of the scale but at the upper end of that lower range. The aggravating factors that were seen included the general circumstances of indecency which surrounded the slapping, the breach of trust where these young girls had come to the home of a classmate and a playmate, the extreme youth of the little girls and, as was made very clear by the contents of two victim impact reports, the fact that these two incidents had had a very real impact on the victims.
8. So far as the appellant is concerned, it is the case that he has no previous convictions and it is also the case that, in the significant period between these matters coming to light and the matters coming on for sentence, there was nothing untoward recorded against him. He is 56 years of age and he was married with two children, a daughter aged 14 and a son aged 8. He is a former public service employee working in the public service as a gardener. He is originally from Wexford and he moved from Wexford to Dublin and then to Kerry about four years prior to this incident coming to light.
9. This incident has had significant consequences for him. There have been two arson attacks on his home, he has had to move house. He moved to Wexford and it appears that the HSE, as the predecessor and title of the Child and Family Agency, made contact with the public service body that he worked with because they were concerned that the public had access to the parks and gardens where he was working and as a result of that he lost his employment.
10. The HSE also had made a decision to take his children into care and he was confined to supervised access once a week. The Court was told that he attempted to take his own life.
11. It is the case that the matter was dealt with in the Circuit Court on foot of a plea of guilty. It is not however, the situation that there was an early plea of guilty and if there had been then that would have been a matter that would be particularly of note and would have been particularly taken on board by the court in imposing sentence.
12. There was not an early plea, but there was a plea and the plea was of value because it obviated the necessity for these two young girls to have to give evidence and, whether the giving of evidence was by video or otherwise, that would inevitably have been a stressful occasion for them and the fact that they were saved from having to do that is of value.
13. Counsel for the appellant focuses on the fact that the D.P.P. says that this offence was at the lower end of the scale and he for his part endorses that view and says that physical acts are at the lower end of the scale.
14. It may be that the actual physical acts in the sense of the slapping of the girls bottoms is at the lower end of the scale, but is also the situation that there are a number of the surrounding circumstances that have to give rise to very real concerns. First of all it is the case that these two little girls were very, very young indeed. It is the case that the offences were surrounded with

circumstances of indecency and that of course is a classic definition of a sexual assault or, as it had been labelled, an indecent assault. Then there is the very real breach of trust which occurred when two little girls come to the home of a classmate and a playmate. It is quite clear from the victim impact reports which were prepared with the assistance of the little girls' parents that the offences have had a significant impact on the girls and on their families.

15. Obviously from the perspective of those closest to these little girls it is hard to imagine anything more serious and more disturbing and more unsettling than what has occurred here. Nonetheless this Court has to seek to identify where on the scale of offending these incidents lie. We say incidents, notwithstanding that there was just one count, because the facts that were outlined in the Court on foot of the appeal entered to one count obviously go well beyond a single incident.

16. The Court is of the view that the sentence imposed is a significant departure from the norm and is out of line with sentences that have in the past been imposed in respect of comparable offending and indeed will bring the case into a quite different category of offending. That being so, the Court is of the view that there is an error of principle identified and that the sentence cannot stand, but should be set aside.

17. The Court is therefore required to address the question of sentencing. The Court obviously takes into account the mitigating factors, the consequences that this has had for the appellant, and I have already referred to just some of those, but the Court is also of the view that it cannot deal lightly with the situation where offences are committed against children as young as these were, in the circumstances that had occurred.

18. In the circumstances, what the Court will do is it will set aside the sentence of six years imprisonment and substitute a sentence of three years imprisonment. The Court will also make provision for two years post release supervision. In choosing the figure of two years, the Court is conscious of the fact that the Probation Service said it is most effective when the period required to be supervised is clearly defined and where there can be, as it were, a degree of intensity to the supervision relationship.

19. In summary then, the sentence of the Circuit Court is set aside, and there will be substituted a sentence a sentence of three years imprisonment to date from the same date as the original sentence and there will be provision for two years post release supervision. He will be on the sex offenders register and there will be an obligation to comply with the requirements of the Probation Service on his release from prison. If he were to breach the obligations in relation to the register or the obligations in relation to the post release supervision, then he would be committing a further offence and would face being brought back before the courts with the possibility of receiving a further sentence.