



THE COURT OF APPEAL

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

27/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J.C.

Appellant

Judgment of the Court (ex tempore) delivered on the 13th day of July 2015 by Mr. Justice Sheehan

1. This is an appeal against severity of sentence. In November, 2013, following a jury trial at Waterford Circuit Court the appellant was convicted on eight counts of indecent assault on a young girl in the months of July and August in years 1982 and 1983. The young girl was nine and ten years old at the relevant times.

2. The appellant was sentenced to two years imprisonment in respect of four offences to run concurrently with each other and concurrent with sentences of eight years imprisonment with the final two years suspended which were also ordered to run concurrently with each other in respect of the other four counts on the indictment.

3. Counsel on behalf of the appellant contends that the sentencing judge erred in law and/or in principle in:

- (a) failing to impose a sentence proportionate to both the offence and the personal circumstances of the appellant,
- (b) failing to give sufficient weight to the mitigating factors advanced on behalf of the appellant,
- (c) failed to give any adequate regard to the appellant for his acceptance of the verdict and his apology,
- (d) failed to have adequate regard to the appellant's level of risk of re-offending and
- (e) failing to have any adequate regard to the appellant's age and his poor and deteriorating health.

4. Counsel on behalf of the respondent opposes the application and concludes his written submissions by stating that the sentencing judge had correctly considered the substantial aggravating factors as well as the mitigating ones. Counsel also submitted that the sentence imposed was not excessive and was not a substantial departure from the accepted range of the appropriate sentences for the level of offending that had occurred in this case.

5. In order to consider these submissions, it is necessary to set out the background to the offending in this case. The appellant at the time of the offending was in his late 40s and a fisherman. He befriended the victim and her family while they were on their summer holidays and was subsequently allowed to take the victim on fishing trips. The appellant had a caravan on the pier and during the course of these outings he took the victim to his caravan where he got her to masturbate him. He then proceeded to anally penetrate her with his penis.

6. On the same or separate occasions while driving her home he indecently assaulted her by touching her vaginal area, firstly through her clothes and subsequently underneath them.

7. The impact of this offending on the victim was eloquently summarised by her in the introduction to her victim impact statement when she said:

"It is difficult to describe how JC's criminal acts against me affected my life, especially because in truth every aspect of my life was eventually impacted by the crime. The sexual abuse I endured was life changing and would eventually prove increasingly destructive to the very core of my being."

8. The victim then went on to describe how the offending behaviour had affected her life in such an adverse way leading to constant anxiety and serious illness which she describes as almost costing her life. She went on to say that it had an adverse impact on her husband and children and also resulted in her having to abandon a very successful career in nursing, work which she loved and in which she was highly qualified. She had to abandon this work having been a nurse for 20 years.

9. The victim in this case brings home to this Court the importance of ensuring that cases of this nature are prioritised when she concluded her statement by saying that once she had given her evidence, it was as though a new life had been handed to her and a weight lifted from her. She concluded her victim impact evidence in a profoundly moving way by expressing her forgiveness of the appellant.

10. The task of this Court is to review what occurred at the sentence hearing. The essential point made by counsel on behalf of the appellant is that the sentence imposed was excessive given the age and ill health of the appellant. Counsel also emphasised that this was a case in which there was a single victim in comparison to a number of other cases that the courts have had to deal with where the court is obliged to sentence an appellant in a situation where there are a number of different victims.

11. The court has considered the sentencing judge's remarks in the course of a careful assessment of the facts of the case and the submissions made. The sentencing judge noted that the appellant was 78 years of age at the time of sentence and that the offences

had occurred 30 years previously on two successive summers when the victim was nine and ten years old.

12. The sentencing judge identified some of the offending behaviour to be in the most serious range insofar as the scale of offending is concerned and she identified the offending in the car as being in the mid range. She correctly identified the breach of trust the appellant telling the victim not to say anything about what had happened, her young age at the time of the offences and the devastating impact the offending had on her as being the most significant aggravating factors.

13. The sentencing judge also took into account the mitigating factors, including the appellant's expression of remorse following a jury verdict, medical evidence concerning his ill health and also the impact that a prison sentence would have on an elderly person.

14. She also stated in the course of her sentencing remarks that the personal circumstances of the appellant and in particular his lack of previous convictions as well as the character evidence given on his behalf and that he was looking after an older sister, were factors that she has taken into account in considering what the appropriate sentence was.

15. The sentence imposed on the appellant was a substantial one. It is clear from the judge's sentencing remarks that her approach to sentence was careful and considered and this Court holds that there is no error of principle disclosed in the identification by her of a sentence of eight years imprisonment as the appropriate starting point.

16. This Court has had to ask itself whether a very limited reduction of sentence would amount to an impermissible tinkering and failing to afford an appropriate margin of appreciation to the sentencing judge.

17. The court concludes that this not the situation. It takes the view precisely because of the age and health of the appellant. The court in particular notes the medical report which states:

"This man is in very poor health. He suffers from carcinoma of the prostate. All in all he has very poor health with multi system disease."

18. The court also notes that the appellant underwent coronary bypass surgery some years ago and also suffers also from bronchial asthma.

19. The court takes the view that for someone in poor health in their 80th year, each year is likely to represent a significant portion of time that remains to them.

20. Having regard to the gravity of the offence, the most that can be considered by this Court is a further reduction in the part of the sentence that was suspended. Because of his age and health, such a reduction may be of significance. Therefore the court will vary the sentence by increasing the element to be suspended from two to three years and leave in place the original sentence of eight years in view of the gravity of the offending behaviour.

21. Accordingly, the court will set aside the original sentence and impose an eight year sentence with the final three years suspended on the usual terms.