



## THE COURT OF APPEAL

**Sheehan J.  
Mahon J.  
Edwards J.**

**Record No: CA 60/2014**

**Bill No: GY 14/13**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**- v -**

**J. K.**

**Appellant**

**Judgment (ex tempore) of the Court delivered on the 27th day of July, 2015 by Mr. Justice Edwards**

### **Introduction**

1. The appellant was tried before a Circuit Criminal Court from the 11th December, 2013 to the 12th December, 2013 in respect of sixteen counts of indecent assault contrary to common law and was convicted on all counts by the unanimous verdicts of a jury.

2. On the 18th February, 2014 the appellant was sentenced to two years imprisonment in respect of each of counts numbers 1 to 14 inclusive, to run concurrently and to date from the 12th December, 2013. He was further sentenced to two years imprisonment on count number 15, and that sentence was made consecutive to the sentences imposed in respect of counts numbers 1 to 14 inclusive. He was also further sentenced to two years imprisonment on count number 16, and that sentence was made consecutive to the sentence imposed in respect of count number 15.

3. The appellant now appeals against both conviction and sentence.

### **The circumstances of the offences**

4. During the material period the appellant worked initially as a kitchen porter and kitchen assistant, and later as a chef, in a hotel which was owned by the complainant's family and located adjacent to the complainant's family home. The offences took place from 1976 to 1979 inclusive, when the complainant was between six and ten years of age. The appellant faced one count for each three month period from the 1st January, 1976 to the 31st December, 1979. The offences were committed in various locations, including church grounds, a local school, and within the said hotel and its grounds. Initially it consisted of the appellant masturbating in front of the complainant and having the complainant touch his genital region and his penis; later it progressed to the appellant forcing the young complainant to perform oral sex on him. Abuse at this level continued for a period of about a year. After that initial period, the frequency and severity of the abuse increased and it progressed to acts of buggery. The complainant described the buggery as often being painful and that he would ask the appellant to stop, but to no avail. After some time the appellant began to bring Vaseline with him for use during his abuse of the complainant in that fashion. The complainant also gave evidence that the appellant had boasted to him that he would abuse him in every room in the hotel and he in fact abused the complainant in many rooms of the hotel when the hotel was closed for renovations during a period in 1977. The complainant was threatened by the accused that if he told anyone about the abuse he would be taken away from his adopted family.

### **The effect on the victim**

5. In the course of his victim impact statement the complainant told the Court that he was very fearful as a child arising out of his abuse. At secondary school the complainant didn't like the communal showers that boys had to take after sports practice. He believed that other boys might be able to tell what had happened to him if they saw him naked. Accordingly he sought to avoid sport at every opportunity. As a result he was punished by the school authorities, and teased by other boys, for not participating in sports. He turned into an angry teenager. He started looking for danger and harmful positions to put himself into. He started taking risks and pushing boundaries. After leaving school risk-taking became a regular thing. He drank too much and got depressed. When he started driving his risk-taking took on a whole new level, and he acknowledges that he was fortunate not to have killed or injured another person such as the recklessness of his driving. At home his relationship with his parents deteriorated seriously and there were arguments on a regular basis. The complainant resented what he perceived to be their pre-occupation with the family business, and the fact that he had not been better protected as a vulnerable child. His relationship with his siblings, who were unaware of his abuse and who could not understand his behaviour, also seriously deteriorated. His physical health began to suffer. He developed ulcers and suffered from stress. However, within two years of leaving where he had been abused, all his symptoms cleared. As he got older, he met a young woman and married her and she brought stability to his life. However, he continues periodically to experience a range of emotions related to being abused as a child including depression, mood swings, and rage. He has suffered flashbacks when concerned that his own children might be in a dangerous position. He believes that he effectively lost his home and his relationship with his brother and his sister as a result of being abused, and even now his relationship with his mother is strained. His father passed away without outstanding issues being resolved between them. He stepped down from the family business and felt compelled to leave the locality in which he had grown up, even though he had built a house there. Because of an inurement clause he is unable to sell that house and yet is still saddled with paying the mortgage on it. The complainant eventually felt able to contact An Garda Síochána and report the abuse that he had suffered. However, he and his wife found the subsequent period of almost six years before the case came to trial to be a great burden and a source of pressure and anxiety. The complainant says that he now lives for his children and is trying to move on with the help and support of his wife. He has had counselling in the past and he intends to return to counselling.

### **The appellant's circumstances**

6. The appellant was 58 years of age at the time of sentencing. He is married but at the time of sentencing he had been separated for fifteen years. He has two grown up children, a boy and a girl. His daughter gave character evidence for him at the sentencing hearing, stating that she was speaking, not just on her own behalf, but also on behalf of her brother and her niece. She described him as a great father and grandfather, and stated that everyone in his family was prepared to stand by him. She had returned from abroad so that she could be with him.

7. The appellant has no previous convictions.

**The grounds of appeal against conviction**

8. The appellant contends that the conviction of the jury herein was unsafe and was against the weight of the evidence in the case.

9. Further, the appellant contends that the trial judge misdirected himself in law by failing to charge the jury properly.

**The suggestion that the verdict was against the weight of the evidence**

10. The Court has no hesitation in rejecting this ground. The complainant gave clear and detailed evidence of the appellant masturbating in front of him and having the complainant touch his genital region and his penis; of being required to perform oral sex on the appellant and of being buggered by the appellant regularly and over a period of years. The complainant stood his ground under cross-examination. Moreover, there was no contradictory evidence other than the appellant's bare denials when interviewed by Gardai.

11. The Court is not therefore disposed to uphold this ground of appeal

**The alleged misdirections in the charge**

12. There is, in essence, a single main complaint in that regard. It relates to what the trial judge told the jury at page 24 of the transcript from the 12th December, 2013, between lines 28 and 34. The appellant contends that what was said amounted to a misdirection of the jury regarding the presumption of innocence.

13. What the trial judge said was as follows:-

"The accused has pleaded not guilty to each of the charges. He comes to court an innocent man and remains innocent unless you decide otherwise. It's a basic fundamental constitutional right that every person coming before the criminal courts in Ireland enjoy. It runs throughout the entire trial. An accused never has any obligation to prove that they're innocent. It's for the prosecution to prove guilt. An accused person is under no obligation to say anything, explain anything, make any case or give evidence on their own behalf in the course of a trial, and you're not entitled to criticise an accused or make any adverse finding against them if they do not. In this case the accused has chosen not to testify, as is his absolute right."

14. It was submitted that the trial judge erred in failing to advise the jury in clear and simple terms that the appellant enjoyed the status of being not guilty at all times in the trial and until such time as the jury determined otherwise to the standard of beyond reasonable doubt. It was submitted that the trial judge misdirected himself by defining the presumption of innocence as being that of the difference between guilt and innocence and that the jury's deliberations were to decide whether the appellant was guilty or innocent.

15. The Court is satisfied that in the quotation complained of above the trial judge gave a completely proper and correct direction. It is not correct to suggest that he, in effect, stated to the jury that their task was to decide between guilt or innocence. On the contrary, the jury were expressly told that an accused never has to prove their innocence. However, it is a correct statement of the position, and he was correct in telling the jury, that the accused had come to court an innocent man and would remain with that status unless they, that is the jury, by their verdict were to decide otherwise.

16. Contrary to what was suggested, the jury could not have been under the impression that in some way the appellant was under an obligation to prove his innocence in the course of the trial. It was stressed by the trial judge several times that the verdict that the jury was obliged to bring in was one of guilty or not guilty.

17. The Court is not therefore disposed to uphold this ground of appeal.

18. The Court, having rejected both grounds of appeal against conviction, is satisfied that the appellant's trial was satisfactory and that his conviction is safe. The appeal against conviction is therefore dismissed.

**The appeal against severity of sentence.**

19. Counsel for the appellant was asked to identify what he contends were the errors of principle in the sentencing of the appellant.

20. The case advanced suggested that the sentencing judge erred in failing to make any ostensible allowance for the absence of previous convictions and for the appellant not coming to adverse attention again since the offending conduct.

21. It was also suggested that there was a further possible error in failing to suspend a portion of the sentence to incentivise rehabilitation.

22. No complaint was made as to the manner in which the Court utilised the option of consecutive sentences to arrive at what it considered to be a just and appropriate sentence in circumstances where the maximum available sentence for any individual offence was two years imprisonment.

23. Counsel for the respondent has submitted that the offending behaviour in this case was at the highest end of the scale of seriousness, having regard to the nature of the abuse itself and aggravating features in the case such as the grooming of the victim, the breach of trust, and the physical and psychological threats used. This Court agrees with that submission.

24. The Court has considered the remarks of the judge at sentencing where he said:-

"Now, the accused man was tried and convicted of 16 counts of indecent assault last December following a fairly and carefully conducted trial. I'm furnished with a probation report, a helpful document which recounts and confirms that this man has no previous convictions and no subsequent convictions. He is viewed by the probation and welfare service in the circumstances outlined by them as at a low risk of re-offending. However, I note that there is no acknowledgement of responsibility, no element of remorse, no offer of an apology and a consistent maintenance of innocence on the part of the accused. These are offences that took place a long time ago between 1976 and 1979, and each of these offences carries a maximum sentence of two years' imprisonment. The offences, each and every one of them, involved invasive sexual assault in varying degrees of severity on a young boy. The nature of the offences were universally explicit and were very serious; about as serious as a sexual assault can get. The gravity of the offences warrant a sentence of imprisonment of two years on each count."

Now, the sole mitigating factor that I can identify is the conclusion of the probation and welfare service that the accused is at a low risk of re-offending. There are a number of factors, however, that aggravate the gravity of the offences. There was obvious pre-meditation. These offences went on over a considerable period of time. There was a pattern of conduct that could be viewed as grooming. The account was reflective of a situation where the accused was in a position of trust which he abused. The sexual assaults at various times were accompanied by threats of the most insidious kind aimed and bound to have the effect of making his victim both reluctant and fearful of revealing what was being done to him revealing this to his adoptive parents. The impact of the abuse on the victim was eloquently and painfully recorded in his statement to the Court today and in his evidence to the Court in the course of the trial. The symptoms he recounts are without any doubt foreseeable consequences of the type of abuse that was perpetrated on him. The consequences are alive for him today and, as an expression of hope on my part, that the conclusion of this trial may offer him some degree of closure.

Sentencing aims to be proportionate to the gravity of the offence and should reflect the circumstances of the offender and must take account of the circumstances and effects of the offending on the victim. It involves both punishment and deterrence and, where possible, rehabilitation. No single offence of the 16 warrants a prison sentence of less than two years. That's given the mitigating factor I have identified and bearing in mind all the circumstances of the accused as have been properly submitted by his counsel. Given the gravity of the offences, it seems to me that a concurrent sentence of two years on each offence would result in a sentence that viewed in the round would be unduly lenient. On that basis, I propose to make, that is, to impose on each of the counts a sentence of two years' imprisonment. The last three of these will be consecutive. So, the first 13 will be concurrent with the 14th and the 15th and the 16th will be consecutive, giving, in the round, a prison sentence of six years, which, in my view, is proportionate to the gravity of the offences and bearing in mind the other matters that I've outlined."

25. This Court finds no error of principle in the manner in which the trial judge dealt with the case. The accused was not in the circumstances of the case entitled to any significant reduction for previous and subsequent good character in circumstances where the course of offending took place over a number of years and in the aggravating circumstances outlined in the evidence. This was not once off or aberrational offending or offending that was out of character. This was sustained abuse of a child on a prolonged basis, and merited a custodial sentence of the order determined upon by the sentencing judge.

26. Moreover, in circumstances where the trial had been contested, there was no manifestation of remorse or acceptance by the appellant that he had done wrong and no proposal to engage with a sex offenders' programme or any other programme of rehabilitation. Accordingly, there was no basis on foot of which the trial judge could have considered suspending some or all of the sentence to incentivise rehabilitation. For any possible rehabilitation to work an offender must be open to being rehabilitated and there was no evidence of any such openness in this case.

27. In circumstances where this Court can find no error of principle in the sentencing of the appellant, the appeal against severity of sentencing is also dismissed.