THE COURT OF APPEAL

[52/17]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

respondent

AND

POH

appellant

JUDGMENT of the Court delivered on the 13th day of February 2019 by Birmingham P.

1. On 27th October 2015, the appellant pleaded guilty to counts of indecent assault, sexual assault, and a single count of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990. The appellant was sentenced to a term of eight years imprisonment with the final two years suspended. This sentence was imposed in respect of the s. 4 rape count with lesser concurrent sentences being imposed in respect of the other offences. The appellant has sought and has been granted an extension of time within which to appeal. At this stage, he has served the sentences in respect of the indecent assault and sexual assault counts so that the appeal is directed to the s. 4 rape count only.

2. The background to the case is to be found in offending behaviour in which the appellant was involved that occurred between 1989 and 1996. The injured party was the nephew of the appellant and at the time of the offending, was aged between six and twelve years. The accused would have been aged sixteen to twenty-three years at the time. The abuse involved the appellant masturbating the injured party, having the injured party masturbate him, ejaculating in front of him, showing the injured party pornography, teaching him how to French kiss, inserting his finger into the injured party's anus, rubbing his erect penis off his leg, ejaculating on the injured party and forcing him to perform oral sex on him. It was this conduct which was the subject of the s. 4 rape count.

3. The injured party complained in February 2012. The appellant was contacted by Gardaí and attended for interview. He answered all questions put to him, and while stating that he could not recall specific incidents that took place, accepted that they had happened.

4. It is submitted that the Trial Judge erred in imposing a sentence that was disproportionate and excessively severe. Issue was taken with the headline sentence identified by the Trial Judge, being nine years pre-mitigation, and with the sentence ultimately imposed of eight years with two years suspended and therefore six years to be served.

5. Both in the Central Criminal Court and before this Court emphasis has been placed on the fact that the appellant was a very young man at the time the offending started, sixteen years of age, that there were no other recorded convictions, and indeed, he had an entirely unblemished record since the last offence was committed. It was pointed out that this was a case where the guilty plea was of particular value as the injured party was understandably vague about details of when offending occurred and the sequence of events. The appellant highlighted the absence of any specific reference by the Trial Judge to the particular value of the appellant's plea in this case.

The Director's Appeal in DPP v. Counihan

6. In criticising the approach of the Sentencing Judge in this case, the appellant has drawn attention to and contrasted the outcome of *DPP v. Counihan* [2015] IECA 76. In that case, the defendant had been convicted of two counts of rape and two counts of sexual assault, having pleaded not guilty, but ultimately received a fully suspended sentence.

7. There was a successful application by the Director to review the sentence on grounds of undue leniency. The Court of Appeal felt that the appropriate pre-mitigation or headline sentence would be one of ten years imprisonment before ultimately imposing a sentence of five years imprisonment, two of which were suspended.

8. On a number of occasions in recent times, the Court has made the point that considerable caution is required if there is to be reliance on decisions of the Court given in the context of undue leniency review applications when considering appeals against severity of sentence. In that case, the Court commented that the sentence it was ultimately imposing was a quite exceptionally lenient sentence. However, it is the case that there were exceptional factors present there. No doubt, those considerations were what influenced the Judge at first instance to suspend the sentence in its entirety, something which is extremely unusual and almost unheard of in the case of a contested case. One of the exceptional factors is referred to in the course the judgment, that there were

no less than three autistic young boys in the family, aged eight, seven, and four respectively and the appellant was heavily involved in their care.

Discussion

9. In terms of the appellant's background and circumstances, he was born in August 1973. He had been involved in a relationship which had commenced in March 2009 and he married in 2012. He has a son from a previous relationship and has a very good work record, having worked in IT. In the course of her sentencing remarks, the Judge reviewed the facts of the case, that the injured party, the nephew of the accused, was between six and eight years when the first offence occurred and that the balance of the offending occurred when he was between eight and twelve years of age, during his national school years. Offending occurred in the injured party's own home and also in the home of the accused man where he lived with his parents, the grandparents of the injured party. The Judge reviewed the nature of the offending, referring specifically to the fact that the injured party was told by the appellant that there was no reason for anyone to know, that it was their secret.

10. Having identified the headline figure of nine years for the s. 4 rape, which she proceeded to mitigate, first, by reducing the sentence to eight years and then by suspending two years.

11. The question for this Court is whether the sentence imposed, which we would be prepared to accept was not a lenient one, fell outside the available range. As the trial Judge recited, the offending was very serious, involving a major breach of trust, and the offending blighted the primary school years of the injured party. It also took place over a very long duration. On the other hand, as we referred to earlier in this judgment, there were significant factors present by way of mitigation. We have carefully considered the arguments advanced to us, both in written submissions and in the oral presentation of the appeal. We cannot identify any error in the nomination of a headline sentence for the s. 4 rape. From that figure, there has been a reduction of one-third to arrive at the sentence ultimately to be served, six years. We accept that it would have been possible for the Judge to allow somewhat greater discount by way of mitigation. However, we do not believe that the Judge's approach to mitigation and the sentence that she ultimately arrived at involved an error in principle. We are unable to say that the effective sentence of six years for abuse over a period of approximately six years of a primary school pupil fell outside the available range.

12. Accordingly, we will dismiss the appeal.