THE COURT OF APPEAL

[233/17]

The President

Edwards J.

Hedigan J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

f.R.

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 26th day of July 2018 by Birmingham P.

1. On 27th March 2017, the appellant was convicted of counts of rape and sexual assault.

2. Subsequently, on 7th July of that year, he was sentenced to a term of 10 years imprisonment in respect of the rape counts and to concurrent terms of imprisonment in respect of the sexual assault counts.

3. By way of background, it should be explained that the appellant had faced 10 charges. These related to two different complainants: AC and SC. On the morning of the trial, he pleaded guilty to three counts of sexual assault on a child, AC. The remaining counts went to trial and the outcome was that he was then convicted of three counts of sexual assault on the second complainant, SC. He was convicted of two counts of rape of AC, and two further counts of rape of AC that he had been facing resulted in verdicts of not guilty. Mr. R, it should be explained, is the granduncle of the two complainants.

4. At the sentence hearing, a sentence of 10 years was imposed in respect of the rapes; sentences of 5 years imprisonment in respect of the sexual assaults against SC and a sentence of 4 years in respect of the sexual assaults against AC. All sentences were concurrent and provision was also made for a period of two-year post-release supervision. He appealed against his conviction for the rape offences and appealed against the severity of all sentences imposed and both matters were listed before the Court this morning. However, after the appeal was opened, he withdrew the appeal against the conviction, so what remains before the Court at this stage is the sentence appeal. There was some element of confusion as to just what stand was taken by the appellant in the Central Criminal Court when called on to plead. The written submissions on behalf of the appellant had referred to the entry of pleas to three counts of sexual assault in respect of AC and to one count in respect of SC. However, the respondent, in her submissions, refers to pleas of guilty only in respect of AC.

5. A perusal of the transcripts suggests that the respondent Director is correct. It does seem, though, that there may have been some confusion as evidenced by the fact that the accused responded guilty when a count of rape was put to him before being corrected by his counsel: he pointed out that this was a rape count. It seems clear in that regard that the intention was always to contest the rape counts, but that a more nuanced approach was being taken in relation to the allegations of sexual assault. In that context, when the allegations were put to Mr. R after he attended a Garda station by arrangement, he made admissions of inappropriate behaviour in the case of each complainant, and indeed, that position was maintained to the extent that at the sentence hearing, prosecution counsel indicated that in the case of one offence involving SC, that the then accused, taking what was described a qualified position, in that he was accepting that he had committed the offence, but not in the manner described by the complainant.

6. The parents of the two children had considerable alcohol difficulties. That resulted in the two complainants being taken into care and it was when the complainants were in care and when they had been placed with foster carers that these matters began to emerge.

7. The first sexual assault involving AC took place in the flat of Mr. R when the complainant had just made her First Communion. She describes how she was wearing her Communion dress. Other offences occurred at the girls' home address after Mr. R moved in there. A feature of the case is that Mr. R had come into money, in that he had received an award from the Residential Redress Board. He was facilitated in moving into the girls' home by access to funds and, when there, he would give sums of money to the parents of the complainants, who, having got the money would then go out to drink with it. The abuse would then occur in their absence.

8. In relation to the personal circumstances and background of the appellant, he was in his late 60s at the time of the sentence hearing. He was a single man; he had a very troubled childhood indeed. His father had passed away before he was born, and thereafter, he was resident in a number of industrial schools including Artane and St. Joseph's, Clonmel. Arising from his period in the industrial schools, he received the award from the Residential Redress Board, to which reference has already been made. While a

resident in those schools, he was himself a victim of sexual abuse. He left school, functionally illiterate. He is an alcoholic. At one stage, he was employed in the timber industry for some 30 years. He has a history of cardiac difficulties which go back to 1992 and he underwent open heart surgery in 2015. He has no previous convictions.

The Judge's Approach to Sentencing

9. The judge assessed the rape offences as meriting 12 years and then mitigated from there down to 10 years. She assessed the sexual assaults at 7 years mitigating to 4 years in terms of the offences involving A and to 5 years in the case of the sentences involving S. One criticism that is made of the judge is that she did not differentiate between sexual assaults in a situation where some of the incidents described fell obviously at different points in the on the spectrum, ranging, as they did, from the touching of the leg to acts of digital penetration.

10. In addressing this appeal, the approach of this Court is to focus on the effective sentence to be served and whether that is excessive. It goes without saying that we are dealing with very serious offending, offending that was targeted at victims of primary school age. It is clear from the two victim impact reports that were put before the Court by Gardaí on behalf of the victims that they were affected and indeed are affected to a very significant extent. The offending involved a number of aggravated factors including, but by no means limited to the young ages of the victims; the particular vulnerability of the victims, given their parents difficulties and the use of money to get himself into the girls' home and then to get the parents out of the home.

11. The appellant says that the judge erred in failing to suspend any element of the sentence to incentivise rehabilitation. It said the judge's approach of providing only for post-release supervision was not an appropriate response. On the other hand, the point is made by the DPP that this is a case where the sentencing judge might have considered the option of consecutive sentences, but did not.

12. The Court has made the point, time and time again, that it is not sufficient for it to intervene, that it would have imposed a somewhat different sentence had it been called on to sentence at first instance. Still less would it provide a basis for intervention that one or more members of the Court, if called on to sentence, might have considered a somewhat different sentence. The question is whether the sentence falls outside the available range. In that regard, the Court feels that the effective sentence, the sentence of 10 years with the concurrent sentence to which reference has been made, cannot be said to fall outside the available range having regard to the gravity of the offences in issue here. We cannot identify the sentence imposed as representing an error in principle.

13. We must dismiss the appeal.