



THE COURT OF APPEAL

Record No. 223/2017

Birmingham J.
Mahon J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

K.L.

APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered on the 23rd day of April 2018 by Mr. Justice Mahon

1. The appellant pleaded guilty and was convicted on the 9th December 2016 at Wicklow Circuit criminal Court of eight counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended. A further seventeen counts on the Indictment were taken into account. The appellant was sentenced on the 26th July 2017 to eight five year concurrent prison sentences, with the last two years suspended on conditions for a period of two years post release.

2. The sole injured party is the appellant's niece. The offences are dated between 1994 and 1998. At their commencement the injured party was seven years old and the appellant was twenty five years old. The assaults took place in the home of the injured party's grandmother, (and the appellant's mother), on occasions when the injured party was visiting her grandmother's home. The offending took various forms, including the appellant having the injured party touch his penis both inside and outside his trousers and touch herself outside her clothing. He also touched the injured party's vagina through her clothing. He showed her his sperm and on one occasion phoned a sex line in her company.

3. The appellant has no previous convictions. He was forty seven years old at the date of the sentencing hearing. He was born and reared in Ascot in the U.K. and moved to Ireland with his parents, who are Irish, when he was about seventeen years old. Both his parents are now deceased. The appellant married when he was thirty two years old, sold the family farm and brought a house elsewhere. His partner left him after approximately five years. He lost his job and came under significant financial pressure. He met his current partner approximately ten years ago and has assisted in parenting her three children. He and his partner also have a five year old daughter of their own. The appellant suffered a stroke approximately three years ago and has other health problems. He is unemployed and is in receipt of a disability allowance.

4. The appellant's grounds of appeal are as follows:-

(i) the learned sentencing judge erred in principle and in law in imposing a five year custodial sentence in respect of the eight counts as such was unduly harsh and not proportionate in the circumstances;

(ii) the learned sentencing judge erred in principle and in law in determining that the offences specified in all counts were within the highest range on the scale of gravity in respect of sexual assault offences;

(iii) the learned sentencing judge erred in not factoring rehabilitation into the sentence imposed and in not referring to same until after he had imposed sentence;

(iv) the learned sentencing judge erred in principle and in law in failing to properly assess the mitigating factors specified below in coming to a proportionate sentence;

(a) the early plea of guilty;

(b) co-operation with the investigation;

(c) the expression of remorse;

(d) the accused's poor health;

(e) the accused's good work history, and

(f) the accused was at a low risk of re-offending.

(v) the learned sentencing judge erred in principle and in law in failing to give adequate credit to the previous and subsequent good character of the accused as evidenced by the absence of previous / subsequent convictions and complaints, save for two road traffic Act convictions;

(vi) the learned sentencing judge failed to take into account the obvious evidence of self rehabilitation that has consequently occurred in the years between the commission of the offences and the date of sentencing;

(vii) the learned sentencing judge erred in principle and in law in failing to take proper account of the lapse of time between the commission of the offences and the date of sentencing, and

(viii) the learned sentencing judge erred in principle and in law in failing to take proper account of the declining health of the accused and the effect incarceration might have upon a person in such health.

5. Grounds (ii) and (iii) were, the court was told at the outset of the oral hearing, the main focus of the appeal.

6. The learned sentencing judge identified as aggravating factors the systematic and exploitative nature of the offending, the fact that the appellant was in a position of trust in relation to his victim and what he described as "*the serious nature of the offences*". He also referred to the appellant as having acted as a *predator*, and having robbed the injured party of her innocence and her childhood. On the mitigation side, the learned sentencing judge noted the pleas of guilty, the appellant's full co-operation, the expression of his apology and remorse. He spoke of the extent to which the appellant had displayed insight into his offending and his willingness *to undergo any further rehabilitation to ensure that he does not re-offend in respect of sexual matters*. He noted the absence of any previous convictions and the low risk of re-offending. He also noted that the appellant had indicated that he was a well qualified person with a very strong work history. He also referred to the appellant's *very poor health as a result of his diabetes* and how he now finds *it difficult to walk and experiences memory lapses*. He was particularly fulsome in recognition of the extent of the appellant's co-operation with the gardai following his arrest. He said:

"When he was interviewed, he certainly couldn't cooperate more fully. He deny - he actually didn't deny any allegation. He accepted the truthfulness of T's allegations and he, even at that stage, he did apologise for his offending behaviour in respect of T."

7. The learned sentencing judge also referred to the offences as carrying a maximum sentence of five years imprisonment. On the gravity scale he considered the offences were "in the highest level in respect of each count". He proceeded to impose the maximum sentence of five years in respect of each count, but suspended the final two years.

8. The impact on the complainant was particularly serious. The following brief extracts from her Victim Impact Statement, which was read to the court below, usefully serves to emphasise the consequences for the complainant from the appellant's conduct:-

"...If I was to sum it up, I would say what happened to me took away many years of my life. It took away my trust in people..which in turn resulted in me putting my guard up and not getting too close to people....It took away my confidence in myself and how I value myself. I have always had a massive fear of not being believed and because I have been feeling that way since I was a teenager, it started to translate into all aspects of my life - would anyone believe in me for anything I do? This is still something I struggle with every day and is probably the biggest side effect it's had on my life...ultimately, years were lost and that cannot be gotten back and that, to me, is unforgivable."

9. A particular focus of the appellant's appeal was the criticism of the learned sentencing judge's view that the offences were at the highest level in terms of their gravity. However, that view has to be considered in the context of the fact that the maximum sentence for each of the offences was just five years which, having regard to the range of offending covered by this offence, most people would regard as especially lenient and inadequate. This relatively low maximum sentence does have the inevitable consequence that the type of activity which occurred in this case quickly propels the offending into the upper gravity scale because it involves serious sexual misconduct. It is difficult to place this offending at any way below the 75% mark in terms of its gravity. That places the appropriate sentence, at a minimum, in the range of four years imprisonment, or more, before mitigation. It certainly could not be said that a five year headline sentence was outside the discretion available to the learned sentencing judge.

10. In any event, what is important is the net custodial element of the sentence. At three years it represents a little short of a 50% discount off the headline sentence. That level of discount generously reflects the mitigating factors including the issue of rehabilitation. Arguably, and having regard to the suggested low risk of re-offending, such rehabilitation as was likely to occur has taken place over the eighteen year period between the date of the last offending and the prosecution of the appellant.

11. By any measure, a three year net custodial term represents a very lenient outcome for the appellant. The sentence was in effect the result of a global approach to sentencing on the part of the learned sentencing judge. Had he chosen, for example, to impose relatively low sentences for each offence but on a consecutive basis, the final custodial term would likely have been significantly greater and interference with that outcome by this court would not have been guaranteed.

12. In this court's view a net three year custodial sentence does not represent an error of principle. The court will therefore dismiss the appeal.