



THE COURT OF APPEAL

Record No. 6/2017

Birmingham J.  
Mahon J.  
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

CQ

APPELLANT

**JUDGMENT (*ex tempore*) of the Court delivered on the 29th day of January 2018 by Mr. Justice Mahon**

1. This is the appellant's appeal against ten year concurrent prison sentences imposed on the 16th December 2016 at the Central Criminal Court in relation to seven counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. Three further counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s. 37 of the Sex Offenders Act 2001 were taken into consideration.

2. In September 2014 the complainant, a niece of the appellant, made complaints of sexual abuse against the appellant. The complainant alleged that between 2007 and 2014 she was subjected to a number of incidents of sexual assault and rape at the hands of the appellant. At the time the complainant was aged between seven and fourteen years, while the appellant was aged between just short of sixteen years and twenty three years. The details of the sexual abuse varied from kissing, inappropriate touching of the complainant's private parts, to oral, anal and vaginal sex. When arrested in December 2014 the appellant made significant admissions, even beyond the complaints made against him. He did not dispute any of the detail provided by the complainant. In due course he pleaded guilty to the offences. He has no previous convictions.

3. A victim impact statement was provided by the complainant in which she described the seriously adverse affect on her as a result of her uncle's sexual abuse. She described feelings of anger, betrayal and guilt.

4. The appellant's grounds of appeal are that the learned trial judge:-

(i) erred in fact and in law in assessing the offences as being of such severity that they warranted a sentence of imprisonment of fifteen years before any mitigating factors were taken into consideration;

(ii) erred in fact and in law in that he failed to attach any or any sufficient weight to the significant mitigating factors in the case, mentioning only his plea of guilty and his remorse in reducing the headline sentence of fifteen years to one of ten years. In particular he had insufficient regard to the appellant's youth at the time of the offending;

(iii) erred in fact and in law in failing to have any or any sufficient regard to the aim of rehabilitation, either by recognising the efforts of the appellant in this case, or by acknowledging the importance of such an aim by imposing a partially suspended sentence in order to encourage such efforts in the appellant's case and /or generally in such cases;

(iv) erred in fact and in law in imposing a further five years of post release supervision on the appellant in addition to the ten year custodial penalty imposed rather than in substituting for part of the term of imprisonment;

(v) erred in fact in imposing sentences which were excessive in all the circumstances.

5. The learned sentencing judge provided a detailed sentencing judgment. At the outset he referred to the detail of the sexual abuse of the complainant by the appellant in the course of which he referred to "*the extent of the depravity*". It is useful to quote the following extracts from his carefully considered and well constructed judgment.

6. In relation to the appellant's age at the time of offending, the learned sentencing judge stated:-

*"...I accept that the accused, when he commenced his offending, was himself, in point of law, a child; that is to say he was under 18. But, the offending took place on a lengthy and extensive basis, not only when he was under that age, but also when he was much older..."*

7. In relation to the discrepancy in age between the complainant and the appellant, the learned sentencing judge state:-

*"..there was a considerable discrepancy in age and even though the accused was a child in point of law and the accused was extremely young when the extreme forms, I think it's fair to say, of abuse commenced. Now, as I've said, there was a break for a relatively brief period before the end of the offending, which was 30th September 2011. So, we have a period of offences of a number of years, approximately four, with a modest break of several months in an intervening period which is really, frankly, in the larger scheme of things, of little significance."*

8. In relation to a breach of trust which is evident in the case, the learned sentencing judge said:-

*"Now, I haven't mentioned that so far, but it is clear to me that there is a breach of trust involved in this case, because he was a resident in her grandparents' house, he played with her in the normal manner, so to speak; he allowed her to use his video games and so forth, and indeed there is a suggestion that this indicates a pattern of grooming. But undoubtedly there was a breach of trust and there was also a betrayal."*

9. The learned sentencing judge also referred to the manner in which the allegations of sexual abuse made against him were met by the appellant when initially confronted with them:-

*"The accused, I should say, when these accusations were made - was ultimately, when arrested by the gardaí, someone who made the fullest and frankest admissions and indeed, relatively shortly thereafter, he began to submit to treatment in the One in Four institution or organisation, which deals with sexual abusers, the organisation as we know, having in the first instance been established for the purpose of dealing with the victims of sexual abuse."*

10. The learned sentencing judge specifically referred to a number of mitigating factors when he said:-

*"...the accused had genuine remorse, was a person who had a certain naivety in his outlook, and also that it seemed that his attempts at rehabilitation and his desire to avoid future offences were legitimate. It seems to me that the factors involved accordingly are, from the accused's point of view, that he pleaded guilty; that he has shown remorse; that he made admissions which are indicative of remorse; and that it was an early indication of a plea of guilty; that he is a person who, it is accepted, may have a degree of naivety in his personality or makeup; that he, of course, will suffer from the fact that the family has broken up or broken down in so many ways; he is also a person who has a degree, so to speak, of contribution, perhaps in a modest way, in terms of his interest in art, a degree of contribution to make to society and of course, the earlier offences occurred when he was a child."*

11. In relation to his determination of the appropriate sentence to impose on the appellant, the learned sentencing judge said:-

*"What then is the appropriate starting point? Sentencing is not an exercise in vengeance, that is of course fundamental but - and one sentence in the case in hand for the offences at hand this accused, not some notional or theoretical accused. One has regard of course also, lest there be any doubt, in addition to the factors to which I've referred, the ill effects on the victim of a crime... I think the appropriate starting point is one of 15 years imprisonment. The ordinary reduction for a plea of guilty is between a quarter and a third of any such sentence. It's not a mechanical process, but it seems to me, the appropriate approach here is to reduce the number of years by a third and accordingly, I impose a sentence of 10 years imprisonment on the accused on each of the counts of rape and contrary to section 4, which it seems to me is the - and also, we'll call it the rape simpliciter. Those sentences will run concurrently, with the permission of the Director of Public Prosecutions, the Director's permission is required now. I propose to mark the other counts as taken into consideration."*

12. The focus of the appeal is that even in circumstances where the headline sentence of fifteen years was appropriate, which is not accepted by the appellant, the reduction of five years for the impressive mitigating factors was entirely inadequate.

13. Foremost, it is argued, of those mitigating factors is the early plea of guilty and the early frank admissions made by the appellant. Ms. Gearty SC, counsel for the appellant, reasonably described these admissions as being 'more than full'.

14. Ms. Gearty has argued with equal force that inadequate consideration was afforded by the learned sentencing judge to the appellant's young age at the time of offending and the very real evidence of the level of rehabilitation already achieved.

15. While it is undoubtedly the case that the sexual abuse by the appellant commenced at a very young age, that is just short of his sixteenth birthday, it is of importance that it continued until he was twenty three years old. Much of the offending therefore occurred when the appellant was an adult and unquestionably aware that such activity was entirely wrong.

16. Cases involving the sexual abuse of children by abusers who themselves are very young are especially difficult in the area of sentencing. Clearly, a perpetrator of sexual abuse who is himself or herself also a child in law is usually required to be dealt with in terms of sentencing quite differently and more leniently than if he or she was an adult at the time of offending. A suitable adjustment in sentencing will also normally be called for when the abuse commences at a time when the abuser is a child in law but continues into his or her adulthood. Also relevant in such cases is the duration of the abuse which can be attributed to the abuser's adult years.

17. Coincidentally, this similarly constituted court heard and determined an appeal in a case not entirely dissimilar to the instant case last Friday, *DPP v. Butler*. However, an important distinguishing factor is that in *Butler* the appellant perpetrated the abuse when he was aged between fourteen and seventeen years old. In *Butler* this court determined that the appropriate headline sentence was eight years imprisonment. Because of the varying mitigating factors including the plea of guilty, the court in that case imposed a sentence of six years imprisonment with the final two years suspended to incentivise rehabilitation.

18. In the instant case, while the abuse commenced well within the appellant's childhood, it not only continued into his adulthood but it did so for a considerable period, and to an age when even allowing for a degree of immaturity often associated with young men in their late teens, the appellant must shoulder a high degree of culpability.

19. The details of these offences placed them into a relatively high point on the severity scale. Their seriousness is well reflected by the extent of the severe and long standing effect they have had on the complainant, and especially the damage inflicted on her childhood and which can never be put right irrespective of any punishment imposed on the appellant. The recent letter to this court from the complainant further emphasises the extent to which these offences have caused long term distress and trauma to her.

20. Notwithstanding the seriousness of these offences and their continued duration after the appellant had in law reached adulthood, the court is satisfied that the headline sentence imposed in the court below, being fifteen years, was excessive. A headline sentence of fifteen years would certainly have been appropriate had the appellant been an adult for the duration of the offending. However, the fact that the offending commenced when the appellant was only fifteen years old requires a lower headline sentence. The appropriate headline sentence, in the court's view, is one of twelve years. The court however agrees with the approach of the learned sentencing judge in significantly discounting the headline sentence because of strong mitigating factors. It will therefore reduce the headline sentence of twelve years imprisonment to one of nine years imprisonment. It will further suspend the final twelve months of that nine year term to incentive rehabilitation having noted the fact that the appellant has actively sought a transfer to Arbour Hill prison to more quickly access a Sex Abusers Programme available at that location.

21. The sentences will therefore be concurrent nine year sentences of imprisonment with the final twelve months of each suspended on terms similar to those imposed in the court below.

