THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.
169/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

S.D.

Appellant

JUDGMENT of the Court delivered on the 13th day of October 2016 by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence under appeal is one of ten years imprisonment with the final eighteen months suspended that was imposed in the Central Criminal Court on the 26th June, 2013, in respect of a case of sexual assault.

Background
2. The background to this case is an incident that occurred on the 29th May, 2010. A little girl (KC) then aged four years was the victim of a serious sexual assault. The background is that the victim was the grandniece of the appellant's partner. KC was living in Birmingham, England, but in May, 2010 she came back to Ireland to spend time with her family, which involved staying with her grandmother. On the day of the incident, the victim had been on a shopping expedition with her aunt and the appellant. They returned to her grandaunt's home. At one stage, KC's grandaunt left the room where they had all been and went upstairs for about fifteen minutes in order to pack for a trip that she was about to make. This left the accused/appellant, who was then aged 48 years, and KC, the four year old, downstairs. There had been some form of game going on which involved KC and the accused tickling each other with a feather duster that was nearby. However, when left alone with KC, the accused took the feather duster and inserted the handle of it into the vagina of this little girl. This seems to have gone on over some minutes.

3. There was some sense that the behaviour of KC over the following days was a little out of the usual, but she returned to her home in Birmingham at the end of the week as scheduled. On her return to England, it was noted that there were some aspects of her behaviour, such as touching herself, which seemed odd. Then, on the 18th June, 2010, KC made a disclosure to her mother about what had happened. Her mother immediately contacted the authorities including the police, and KC was interviewed by specialist interviewers. Contact was made with the gardaí, and this resulted in the accused being arrested on the 23rd June, 2010. During the course of detention, Mr. D was interviewed on four occasions. In the first two interviews he denied having committed any offence and did so in a very vehement manner indeed. However, in the third and fourth interviews there was a complete change of position, and significant admissions were made. Moreover, the appellant became vey emotional, distressed and cried a great deal. It appears the trigger for a change of heart on the part of the detainee may have been that it was put to him that his partner had provided a statement to the effect that she had left him alone with KC.

4. Despite the admissions, the accused sought a trial date and the trial was scheduled to begin on the 21st May, 2012, but that was vacated on the application of the defence. A new trial date was then fixed for the 15th April, 2013, just a year later. On that occasion a jury was sworn, but the case was not actually due to start until the following Thursday, at which stage the accused pleaded guilty to a count of sexual assault.

5. In terms of the background and personal circumstances of the accused, he was 51 years old going on 52 years old at the time of the sentence hearing. He had been married, but was separated with two adult children, a son in his late 20's and a daughter in her teens. He had no previous convictions and indeed, as it was put, had never come to the attention of the gardaí in any shape or form.

6. The sentencing court was told that he had a good work record. After this offending behaviour, he had been treated for depression. At an earlier stage after his marriage broke up, he had also suffered depression for a two year period approximately.

Victim Impact Report
7. A victim impact report was read to the court by the mother of the complainant. That evidence was very powerful, and she explained how so much had changed for her little girl following this incident. Prior to the assault, she was an outgoing, friendly three year old with lots of friends, but that a year on and the same little girl played on her own, had poor social skills and cried a lot. Her mother commented that no one had turned up at her daughter's birthday party, then she asked rhetorically "but then who wants to be friends with a girl who poo's herself".

The trial judge's sentencing remarks
8. The sentencing remarks of the judge were quite brief, and they can conveniently be quoted in full:-

> "Mr. D, I cannot find words that adequately describe the horrendousness of your offensive behaviour or of the revulsion that it must evoke in the minds of every right thinking member of society. When you were arrested in relation to this matter, you sought to brazen it out with the Garda Síochána, effectively calling your victim a liar throughout the course of two interviews with the Garda Síochána. The second which was certainly a lengthy interview extending almost three hours and the first interview being one that extended for almost an hour and it was only in the course of the third interview when the Garda Síochána confronted you with the fact that evidence contradicting your account was available to them that you changed your attitude and thereafter effectively grovelled before the Garda Síochána in relation to your behaviour seeking forgiveness in the matter. Thereafter, having been charged with the matter and having come before this Court on two separate occasions, you again sought to brazen matters out. I am told that the reason for that was your failure to come to terms with your offensive behaviour and the fact that you are receiving medical treatment in respect of both anxiety and depression. In the matter in passing sentence I have to have regard in the first instance to the gravity of your offence and there is no doubt but that yours is an extremely grave offence. You have destroyed the innocence of a young child. You have scarred her for life and she will live with the memory of your behaviour throughout

her life and in the normal course of events I can see no reason why the offence itself should not carry a sentence of ten years. However, I have to balance against your offensive behaviour, your own personal circumstances and I have to look to see if there are circumstances in which I can mitigate that sentence downwards. In the present instance I am told that the admissions that you made to the Garda Síochána were of some assistance to them. I am told that although your plea came late in the day it again was of some assistance to the Garda Síochána. I am told, though I have grave reservations in that regard, that you are remorseful as regards your offensive behaviour and you are a person who comes before the courts with no previous convictions to it."

The judge then proceeded to impose the sentence at issue in the appeal, i.e. one of ten years imprisonment with the final eighteen months suspended.

9. In the course of oral argument on this appeal, two points were made initially: one, that the judge in imposing a sentence of ten years had imposed an inappropriately high starting point; and, two, that the suspension of eighteen months did not adequately mark the factors in the case that were in ease of the appellant such as the admissions, the plea, the remorse, the evidence as to the anxiety and depression that he was experiencing, and the fact that there were no previous convictions. Counsel explained that he saw the evidence as to anxiety and depression as an explanation as to why the admissions that were made at interview were not followed up on with a guilty plea, and also as providing information as to the general background and circumstances of the accused/appellant.

10. In the course of exchanges with members of the Court, counsel accepted that the argument that the ten year starting point was too high was not his stronger point. The Court has no doubt that this was a sensible and indeed necessary concession. There is no substance in the view that the starting point of ten years was too high, indeed a somewhat higher figure might well have been considered.

11. There remains for consideration though the issue of whether a suspension of the final eighteen months of the sentence provided sufficient credit for the factors that were present in favour of the appellant.

12. It must be said that there were indeed significant factors to the credit of the appellant. The admissions made during interview were potentially very helpful to the prosecution, as was readily acknowledged by senior counsel on behalf of the DPP. Absent the admissions, this would have been a very difficult case indeed to prosecute as it would have depended on the interviews given by little KC to the specialist interviewers. The value of these admissions was somewhat undermined, however, when they were not followed up with an early plea of guilty. Instead, a trial date was fixed and then vacated on the application of the defence. On the rescheduled date, KC and her mother had to travel to Dublin, because there was a requirement for KC to be available for cross examination, and a jury was sworn to try the case. Certainly, these factors do not enhance the value of the plea coming as it did very late in the day. Nonetheless, the plea was still of value; it was a form of public acknowledgment of grave wrongdoing. It meant that KC was not required to be made available for cross examination, and the fact that the case was not fully contested meant that there was a saving in terms of court time and resources.

13. While the trial judge, perhaps understandably, was somewhat sceptical about how genuine was the remorse, the behaviour of the appellant during the later interviews and his interaction with the psychiatric services would suggest that there was indeed a degree of remorse present that was genuine.

14. Again, sight should not be lost of the fact that the appellant was of previous good character, and a first time offender. He came before the court as someone with a solid employment record.

15. In a case such as this, where a combination of substantial mitigating factors are present, namely admissions, remorse, a plea of guilty albeit not an early one, the fact the individual before the court is a person of mature years without any previous convictions, and the fact the individual concerned has faced a number of adversities in life, one would expect to see significant discount to reflect these mitigating circumstances. For the combination of factors that exist in this case, one would expect to see a discount from the starting sentence of the order of 25% to 30%. In this case the combination of factors that were present met with a suspension of only 15% of the starting sentence, and it has to be said that that is unusually low.

16. If one takes as the starting point, as the sentencing judge did, a sentence of ten years and applies a reduction of 25%, that would result in a net sentence of seven and a half years, while a 30% reduction would lead to a net sentence of seven years. Either of these sentences is of course less than the net sentence actually imposed.

17. However, this was a truly appalling offence. It is not easy to imagine a worse case of a single incident offence, as distinct from a pattern of sustained offending over a period of time. A starting sentence somewhat higher than that chosen might well have been considered. Had that happened and an appropriate discount been applied, the end result would not be very different from the eventual outcome.

18. The net sentence imposed by the trial judge of eight and a half years does not diverge very significantly from the sort of sentence that would be expected in a case such as this. In those circumstances, the Court has had to consider very carefully whether any intervention is appropriate or necessary. One has to ask oneself whether it is appropriate to intervene: Is the divergence between the sentence actually imposed and the sentence under consideration at the appellate stage such as to justify or require intervention by the court?

19. Applying the 25% reduction to the starting sentence identified by the judge would result in a net effective sentence of seven and a half years against the actual net effective sentence imposed of eight and a half years. Ordinarily, the Court would hesitate before increasing or decreasing a substantial sentence by twelve months. It is appropriate and indeed necessary to afford a margin of appreciation to the sentencing judge and the long-established jurisprudence of this Court and its predecessor indicates that a court cannot intervene simply because the court would have imposed a sentence different to the one that was actually imposed. However, this case gives rise to a serious issue of principle. It was an exceptionally serious offence, but equally there are significant factors present by way of mitigation.

20. The Court finds it necessary to state that where an offence is one of great seriousness such as to require a particularly high starting point and if there are substantial mitigating factors present, then these will still be expected to impact to a significant extent on the ultimate sentence. It is in these circumstances and for that reason that the Court will increase the period of the sentence that is to be suspended to one of two and a half years, thus reducing the net sentence to seven and a half years. In deciding to take this course of action, the Court has had regard to the fact that it has been told that the appellant is willing to participate in the Building Better Lives Programme. In addition to all the other conditions that are routinely applied when part of a sentence is

suspended, in the circumstances of this case, it will also be a condition of the suspended sentence that the appellant will, if offered the Building Better Lives Programme or a similar programme, actually participate.

21. The Court will therefore vary the sentence imposed to the limited extent indicated.