



THE COURT OF APPEAL

Record No. 91/2017

**Birmingham J.
Mahon J.
Hedigan J.**

Between/

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Jack Donohue

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 31st day of July, 2017

by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentences appealed were sentences of two years imprisonment with the last six months suspended that were imposed on the 7th April of this year in the Circuit Court in Wicklow. On that occasion, the appellant appeared before the court in respect of five counts of indecent assault which were said to have occurred between 1st September, 1968 and 11th September, 1969. He entered pleas to two counts at an earlier stage on 19th December, 2016 and he was sentenced in respect of those two counts with the three others being taken into consideration.
2. The background to the matter is that the complainant grew up on a family farm in Wicklow. The appellant was a neighbour of her family and worked on the farm. In addition, he was a family friend and spent much of his time about the house. The complainant's mother cooked his meals for him. When the complainant was aged eight he began indecently assaulting her. The abuse took the form of digital penetration and on other occasions he would take her hand and place it in the pocket of his pants where there was a hole and then place the hand onto his penis and moved it up and down. The incidents of abuse took place both in the home and outside the home. The offending occurred at a time, as I have indicated, when the complainant was eight years of age and the accused would have been in his early thirties at the time.
3. The sentencing judge heard that this abuse has had a very serious and it is fair to say life long impact on the injured party. On one occasion she tried to kill herself and that resulted in hospitalisation and that was put before the court by way of a victim impact report.
4. So far as the accused's personal circumstances are concerned, he has no previous convictions and was otherwise of good character. He leads a quite isolated life. He has never married and he is 82 years of age. A medical report from his general practitioner was put before the court which indicated that he does not enjoy good health. He suffers from chronic obstructive airways disease, from irregular heart rate and cardiac failure, enlarged prostate hernia, osteoporosis, anxiety and depression.
5. The case made on behalf of the appellant is that the sentence is inappropriately long, that it does not reflect the fact that the offending behaviour occurred fifty years ago and that it does not take account of the fact that for an 82 year old man, a sentence of eighteen months, which is the effective custodial element of this sentence, is a very long sentence indeed.
6. This Court is in no doubt about the seriousness of the offending. The impact on the victim has been really very serious indeed and the Court agrees with the sentencing judge in the Circuit Court that it was a case that had to be dealt with by way of a custodial sentence. The Court does not disagree with the selection of two years as the headline sentence.
7. In that regard, it is to be noted that there was some discussion in the Circuit Court as to what was the maximum sentence for the offences with which he plead guilty. Everyone was clear that the maximum sentence for the first offence was two years but the Director was of the view that for the second and subsequent offences the maximum available was five years.
8. As it happened, the judge took the view that the same sentence for each of the offences was appropriate, and imposed upon each offence a starting sentence of two years. Further enquiries would suggest that the maximum sentence, and this was accepted today by counsel for the Director, was, in fact, one of two years for all of the offences. So, while the judge may have been misled inadvertently in that regard and to that extent may have been in error, it was of limited practical significance.
9. The Court is of the view that, insofar as the judge was required to sentence someone who was eighty two years of age and in poor health and obviously frail, that the balance that was struck by the judge between the portion of the sentence to be actually served and the sentence that could be suspended was inappropriate.
10. The sentencing judge decided on a sentence of two years on each of the two counts and suspended the final six months. Given Mr. Donohue's age, his poor health and his frailty, the Court feels that a greater portion of that sentence could have been suspended.
11. To that extent, the Court will intervene and will suspend the final fifteen months of the sentence. The sentence in the Circuit Court will be varied accordingly.