THE COURT OF APPEAL

Record No. 328/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

DANIEL MULLAN

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 19th day of June 2017 by Mr. Justice Mahon

1. The appellant pleaded guilty and was convicted at Castlebar Circuit Criminal Court on the 22nd October 2015 to five counts of sexual offences, namely two of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, two of possession of child pornography contrary to s. 6(1) of the Child Trafficking and Pornography Act 1998 and one of attempted buggery of a person under seventeen years of age contrary to Common Law and s. 3 of the Criminal Law (Offences) Act 1993.

2. Sentencing was imposed on the 14th June 2016. In respect of three of the counts, (being one of sexual assault and two of possession of child pornography), sentences of three years were imposed in respect of each, and in relation to the attempted buggery count, a sentence of twenty months imprisonment was imposed. In respect of the second count of sexual assault a sentence of eight years and six months imprisonment was imposed. It is this eight and a half year sentence that has been appealed. All sentences were directed to be served concurrently.

3. The appellant is a seventy eight year old resident of the U.S. who regularly visited Ireland on vacation over a number of years. He has no previous convictions. He became friendly with the complainant's family in 1995 when the complainant was about seven years old. In the year 2000, the appellant sought and received permission from the complainant's father to take the complainant, who was then twelve years old, to a swimming pool facility in the hotel in which he was staying, and which was not far from the complainant's home. On that occasion, while the complainant was getting changed in the swimming pool changing room he was subjected to a relatively minor sexual assault by the appellant.

4. In the following summer, in 2001, the complainant was again taken by the appellant to the same hotel again, on the pretext of being taken swimming. He was brought to the appellant's hotel bedroom where he was sexually assaulted and photographed. The assaults on this occasion were of a significantly more serious nature than that which had occurred in the previous year. He was paid IR£10 by the appellant to expose himself and allow himself be photographed. In the summer of the following year, 2002, the complainant was again taken to the appellant's bedroom in the same hotel. Prior to this meeting there had been telephone conversations between the complainant and the appellant about sexual matters, including the use of vibrators. On this visit to the appellant's bedroom in the hotel, the appellant invited the complainant to watch pornography. On this occasion he was digitally anally penetrated by the appellant. On a further visit to the hotel bedroom a couple of months later, the complainant was again invited to watch pornography on the appellant's laptop and he was again anally penetrated by the appellant. In May 2005, when the complainant was sixteen years old, he was again taken to the hotel bedroom by the appellant and subjected to attempted and anal penetration and oral sex. He was provided with alcohol and invited to watch pornography. The factual detail relating to count six concerns the events of the 8th August 2002, including the anal digital penetration of the complainant.

5. The subject matter of the offences initially came to the attention of the gardaí in 2009, when the complainant was twenty one years of age. A detailed account of the offending was obtained from the complainant with assistance from specialist interviewers. The gardaí became aware that the appellant was visiting the locality on the 7th July 2010 and they arrested him in a hotel bedroom in the same hotel where the various offences had occurred. He was released without charge pending a completion of an investigation file in the DPP. Immediately thereafter, the appellant left Ireland and returned to his home in New York. He was arrested in New York in January 2014 on foot of an extradition warrant and was eventually extradited from the U.S. to Ireland on the 11th September 2014 having spent the intervening nine months in custody in New York. He then spent a further year in custody in this jurisdiction prior to sentence being imposed.

6. A detailed victim impact statement was submitted to the sentencing court on behalf of the complainant. In it he describes the devastation which these assaults have caused to himself and his family. The complainant described how the impact of these assaults has been severe and continues to affect him in all aspects of his life. He described how he feels that the appellant has given him a *life sentence*.

7. In the course of his sentencing judgment, the learned sentencing judge stated:-

> *"…He has no previous convictions and having regard to the careful and calculated grooming which formed part of this series of offences, which is a significant aggravating factor, and the extensive period of time over which these offences were perpetrated, which I also view as an extensive aggravating factor, the headline sentence for each of the following offences is as follows. In respect of count 1, four years. In respect of count 3, four years. In respect of count 5, four years. In respect of count 6, eleven and a half years and in respect of count 10, twenty months imprisonment. …The appropriate sentence in respect of each of these offences is in respect of count 1, three years imprisonment, in respect of count 3, three years imprisonment, in respect of count 5, three years imprisonment, in respect of count 6, eight and a half years imprisonment and in respect of count 10, twenty months imprisonment."*

8. In effect, therefore, the headline four year sentences were each reduced by twelve months, and the headline sentence of eleven and a half years was reduced by three years. It is in respect of this latter sentence that the appellant has brought his appeal.

9. The learned sentencing judge identified the mitigating factors as the plea of guilty, (which he described as being made at a very late stage), his age and physical circumstances and the fact that the appellant was not an Irish national. The learned sentencing judge said he saw no evidence of remorse or any prospect for rehabilitation. He also remarked that in the interest of proportionality, he proposed to give him credit for time already spent in custody in New York awaiting the completion of the extradition process, and subsequently in this jurisdiction, hence the backdating of the sentences to the 17th January 2014.

10. The grounds on which this appeal are brought can be summarised as follows:-

(i) A failure to identify the location of the offence on the scale of gravity.

(ii) Placing excessive weight on aggravating factors.

(iii) A failure or refusal to consider a suspended sentence.

(iv) A failure to consider the mitigating factors, and in particular the appellant's age, health and previous and subsequent good character.

11. In relation to the first ground concerning the location of the offences on the scale of gravity, it was submitted on behalf of the appellant that the learned sentencing judge erred in principle in his reference to an absence of previous convictions and two aggravating factors, prior to identifying the headline sentence.

12. It is certainly the case that the learned sentencing judge did not specifically refer to the lack of previous convictions in the mitigating factors identified by him. He did however refer to them in the course of the opening remarks of his sentencing judgment. It is therefore unlikely that this important mitigating factor was ignored by him in the formulation of the sentence as ultimately imposed.

13. While the learned sentencing judge did not identify where in his view the seriousness of the offending should rank on the severity scale, it is nevertheless clear that he ranked it at a significantly high level having regard to the headline sentence of eleven and a half years. This court, in general terms, also considers that the offending was very serious indeed. It is evident that the appellant groomed and very seriously sexually abused the complainant while a young boy and a teenager over a number of years in the course of short visits to Ireland in each year in question. The offending, in the court's view, falls into the higher end of the gravity scale, albeit at the lower end of that category. In the court's view, the appropriate headline sentence is one of nine years rather than the eleven and a half years imposed.

14. In his sentencing judgment the learned sentencing judge properly recognised the appellant's advanced age, poor health and non-Irish nationality as being mitigating factors, and together with the other mitigating factors decided to discount his headline sentence by in excess of 25%.

15. The sentencing of elderly or medically challenged offenders can pose difficulties for the courts. It is well recognised that such factors, where they exist either separately or together, require particularly compassionate consideration and where appropriate a downwards adjustment of the custodial element of the sentence that might, in their absence, be appropriate. The prison environment is a particularly difficult one for an elderly person and that difficulty is exacerbated where the elderly person has significant health problems. In the often quoted passage from the judgment of Barron J. in *DPP v. McCormack* [2000] I.R. 356, it is stated (at p. 359):-

> *"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependant upon those two factors."*

16. While the concept of providing for greater discounts in sentencing of offenders who are elderly and / or are in poor health may understandably cause upset and resentment of the part of their victims, it is nevertheless an aspect of sentencing which must be respected by the courts in the interests of justice.

17. To return specifically to the instant case, the appellant will be seventy nine years old in August of this year. He suffers from a range of serious medical conditions which has greatly impaired his ability. He is now largely wheelchair dependant. It is undoubtedly the case that prison life causes him difficulties of the most severe type, and far greater than are experienced by younger and healthier prisoners. It is the Court's view that the learned sentencing judge did not adequately provide for these factors in sentencing the appellant by his decision to only discount approximately 25% of his headline sentence.

18. As already indicated, the Court has set the headline sentence at nine years. Taking account of the various mitigating factors and particularly the appellant's age and his poor health, the Court will impose a custodial sentence of five years imprisonment, back dated as directed in the court below. Had these particularly factors been absent, the net custodial sentence is likely to have been in or about eight years.