



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

Record No: 2017/30

**THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS**

Respondent

V

J.S.

Appellant

JUDGMENT (ex tempore) of the Court delivered 4th December 2017

by Mr. Justice Edwards

Introduction

1. This is an appeal against the severity of a sentence of 16 months imprisonment imposed on the appellant by the Dublin Circuit Criminal Court on the 15th of February 2017 in respect of his conviction by a jury on a single count of indecent assault, contrary to common law.

The evidence at the sentence hearing.

2. The complainant was the niece of the accused and was either nine or at most ten years old at the time of the offence. The offence occurred on St. Stephen's night in either 1980 or 1981. There was a large number of family members gathered together at an address in a Dublin suburb. A number of children were sleeping in a room upstairs. The complainant awoke to find the appellant kneeling over her, with his hand inside her underpants and rubbing her clitoris. She cried and told him to stop, he rubbed his hand up to her chest and brought it back down into her underwear and rubbed her clitoris again. She was crying and told him to go away. He left but about 20 minutes later he returned and came to the door of the room where he started masturbating himself. The children in the room were crying and screaming and the older children were trying to cover the eyes of the younger ones. The complainant told her mother about the assault when she was eighteen, and subsequently made a complaint to An Garda Síochána in 2014. The appellant was interviewed and denied the offence although accepted that he had stayed in the house that night.

The impact on the victim

3. The victim said that she believed that the appellant caused irreversible damage to her and her family, that he took away her childhood and her innocence. She said she was a normal, happy nine/ten year old girl and he changed that with his actions. She became withdrawn from her family and friends, she felt ashamed of her body, and felt different to her peers. She was unable to trust any male person after the incident, and felt all males had alternative motives and would take advantage of her. She had huge problems with all her relationships with males afterwards. She states that her family unit was fractured as a result of the incident and will never be the same again. She says her own children never had the freedom she enjoyed as a child prior to the incident, because she trusts nobody as a result of the incident. She has suffered mental torture and had flashbacks to the night of the incident.

4. The complainant was unable to bring herself to complain for many years out of fear that she would fracture the family, and also that she wouldn't be believed. The complainant had counselling in 2013 and it was following this that she went to An Garda Síochána.

The appellant's personal circumstances

5. The appellant was born on the 8th of November 1952. Accordingly, he is now 65 years of age, and he was 28 or 29 at the time of the offence. He has no previous convictions and the prosecuting Garda accepted in cross-examination that there is nothing else pending against him. Moreover he had come to the Garda station voluntarily, and he comes from a very respectable family.

6. The appellant was a carpenter by trade and had worked for most of his life as such, both in employment and also for a period in self employment. However, due to the economic downturn in 2008 he had found himself unemployed and remained unemployed at the date of his arrest.

7. The appellant is a married man, with two children and four grandchildren. His daughter (Ms C) gave evidence at the sentencing hearing and by all accounts he has been a good and caring father and grandfather.

8. Numerous testimonials were provided to the sentencing court from friends and colleagues of the appellant, and from members of his community. These referees provided these references from an informed position where they had all been made aware of the appellant's conviction, and they testify to the fact that, apart from this offence which each referee deprecated and did not seek to condone, the appellant has been otherwise of good character and has contributed positively to his community.

The sentencing judge's remarks

9. The sentencing judge in the first instance rehearsed the facts as established in evidence, and noted that under the law in force at the time of the offence a sentence of two years imprisonment was the maximum available sentence for an offence of this nature, as opposed to fourteen years imprisonment which is the maximum potential penalty today for sexual assault on a child. She indicated her acceptance of a submission that had been made to her by defence counsel that she was bound to sentence the appellant according to the law and sentencing parameters that applied at the time of the offending conduct.

10. She indicated that the fact that the complainant was a child at the time significantly aggravated the offence. It had taken place in the presence of other children and had gone on for some minutes, maybe five or ten. She felt that it was also aggravated by the obscene conduct of the accused in the aftermath of the indecent assault on the complainant. It was further aggravating that the

complainant was vulnerable and that there was a familial relationship between the complainant and the appellant, particularly that a significant position of trust had been abused. The sentencing judge went on to refer explicitly to the emotional and psychological upset and fear caused to the complainant, and the impact it had had on her.

11. All that having been said, the sentencing judge noted specifically that the assault was committed on one night only, and that this was not a case of systematic abuse over a protracted period of time.

12. The sentencing judge concluded:

"So taking into account all of these aggravating factors the Court is of the view that absent mitigation it comes within the upper midrange of offending, and bearing in mind the prescribed sentencing limitations, would warrant a sentence of 20 months, absent mitigation. Now, in this case there is no mitigation by way of a guilty plea, which would have spared the complainant the ordeal of going to court. However, the Court notes that the accused through his counsel has accepted and acknowledged the verdict of the jury, and even at this late stage this is of particular weight in offences of this nature, as it validates the victim. An acceptance of the guilty verdict gives rise to some mitigation, even at this late stage. The Court also takes into account the lack of previous convictions of the accused. He was 28 years old when this offence took place. He is now 64 years old, and over that 36 years there has been no other offending, and it is clear from the testimonials that he was a person of good character. The accused also clearly comes from a loving and supportive family, and that is apparent from his daughter's evidence to the Court, Ms C's evidence to the Court. It is clear that the accused has also suffered a significant loss of reputation whereas he was previously held in high esteem, which is apparent from the numerous testimonials, all of which describe him as a trusted friend, a good neighbour, a person of trustworthy character, and an honest family man. And all of the testimonials describe him as such. The Court also notes that the accused also has the burden of being placed on the sex offenders' register, and the Court weighs this in the balance in determining the appropriate sentence, although it does not serve to reduce the sentence in a significant way, being a consequence of the conviction. The Court also take into account the accused's wife's and family's circumstances, and unfortunately it seems to the Court that they must also be collaterally damaged in their interfamilial relationships with their in-laws, with the extended S family, and indeed the younger members with their aunts and cousins by reason of this trial and the accused's conviction. That is said by way of comment, not by way of mitigation, but I do take into account his personal circumstances. Taking into account all of the mitigating factors I consider a sentence of 16 months custodial to be the appropriate sentence.

The grounds of appeal

13. In comprehensive written submissions, and a succinct oral submission to the Court, senior counsel for the appellant makes two complaints about the sentence imposed. He complains firstly that the headline sentence of 20 months placed the offence at a point that was just 15% from the top of the available range, and says that this was excessive.

14. Secondly, he complains that there was insufficient discounting for mitigation in the circumstances of the case in circumstances where there was acceptance of the verdict (albeit that the trial had been contested), that it was 36 years since the offence was committed, the appellant had no previous convictions and was indeed a first time offender, the appellant has been otherwise of good character and has contributed positively to his community as evidenced by the many positive testimonials provided.

15. It was submitted that this was perhaps a case where the fact of conviction was to be regarded as of more importance than the length of the sentence to be imposed.

The DPP's response

16. Counsel for the DPP has argued that the final sentence of sixteen months was appropriate to the offence and that there was no error of principle.

Decision

17. We agree with counsel for the appellant that the headline sentence of 20 months was too severe in the circumstances of this case, having regard to the law at the time, and the range available. It has to be remembered that at that time the two year range was required to accommodate all forms of indecent assault including indecent assaults of especial degradation, those involving defilement of children, and those accompanied by violence, as well as matters such as oral and anal rape. Today, the possibility exists of charging offenders in these categories with a wide range of more specific offences, such as aggravated sexual assault, sexual exploitation and defilement of a child, and rape under s.4 of the Criminal Law (Rape)(Amendment) Act 1991, all of which carry substantial potential penalties greatly in excess of two years imprisonment and in some cases up to life imprisonment. Compared to such cases, the offending conduct in this case, serious as it was, was much less grave. Despite this, the sentencing judge in fixing the headline sentence at 20 months placed it at a point that was just 15% below the top of the range, even though he characterised it correctly as belonging towards the upper end of the mid range.

18. If the matter is approached on the basis that there is a low range from 0 to 8 months, a mid range from 8 to 16 months and an upper range from 16 to 24 months, it is clear that a sentence in the upper end of the mid range should attract a headline sentence falling somewhere between 12 and 16 months, but certainly not 20 months. We therefore find that the headline sentence was excessive and that that represented an error of principle.

19. We are not satisfied to uphold the appellant's second point, and consider that there was in fact an adequate discounting for mitigation.

20. In circumstances where we have found an error of principle we will quash the sentence of 16 months imposed by the court below, and proceed to re-sentence the appellant.

21. We consider that the appropriate headline sentence should have been one of 16 months imprisonment, and we would discount from that by 3 months to reflect the mitigating factors in the case leaving a net sentence of 13 months imprisonment, to date from the 15th of February 2017.