THE COURT OF APPEAL

Irvine, J.
Sheehan, J.
Mahon, J.

[Appeal No. 11/2013]

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Peter Clarke

Appellant

Judgment of the Court (ex tempore) delivered on the 12th December 2014 by Miss Justice Irvine

1. The background to this application is that on 30th October, 2012, the appellant pleaded guilty to two offences contrary to s. 2 of the Criminal Law (Rape) (Amendment) 1990, as amended by s. 37 of the Sex Offenders Act 2001.

2. Consequently, on 10th January, 2013, in the Circuit Criminal Court, the appellant was sentenced to a term of imprisonment of five years in respect of each offence. His term of imprisonment was backdated to 11th September, 2011, that being the date upon which he was taken into custody. On his release he was directed to fully engage and co-operate with the Probation Services for a period of seven years. The appellant now seeks to set aside that sentence on the grounds that it was unduly severe.

The circumstances of the offences

3. The first offence was committed on 12th May, 2011, on the main street in Carrickmacross town in the early afternoon. The victim, a fifteen year old school girl, was walking down the street when the appellant came up behind her. He grabbed her shoulder with his right hand, touching her hair and neck. With his left hand he felt her stomach and down as far as her vagina, which he then squeezed and felt for, according to himself, about two minutes.

4. In the course of his interview with Garda Gibbons on 12th May, 2011, that being the day of the offence, the appellant immediately admitted his assault. He said that the reason he had let his victim go was that there were a lot of people around. If there had not been, he stated, he would have pulled her trousers down and got on top of her, provided his penis was working. The appellant admitted picking on his victim because she was on her own. He said he knew that she was a child of fifteen years of age and that what he wanted to do was wrong, but he had wanted sex that day. When asked how he thought his victim had felt about the assault, he said he knew that she was afraid. As to why he carried out the assault, he said he did it for the buzz. When asked if he had anything additional to say, he said he wanted to offer his victim a couple of hundred euros. When asked if he would do it again, he said he did not think he would.

5. As for the victim of the assault, Garda Gibbons told the Court that when she attended the garda station with her father, she was very shocked, distressed and angry.

6. The second assault occurred on 10th September, 2011, and occurred outside St. Joseph's Church in Carrickmacross. The appellant saw ten to fifteen people standing outside the church, including a ten year old girl. He went up to her and, according to himself, "caught her by her bum and private parts". He put his hand on her vagina, touching her outside her jeans. When asked if he would like to have taken things further, he replied in the negative, stating that there were loads of people around.

The personal circumstances of the appellant

7. The appellant was born in 1944 and was sixty eight years of age at the time the sentence was imposed. He was a single man living with his sister. He had never been married nor in a long term relationship. He had a number of previous convictions, including one count of theft, one count of breach of the peace, two counts of indecency and one count of sexual assault – the last of those offences had been dealt with in the District Court in 2007.

8. At the time of the second offence the appellant was taking an anti-androgen drug to reduce his sexual impulses. Also relevant to his personal circumstances was the fact that he had a medical history and the trial judge had been referred to a number of medical reports which had been obtained on his behalf. In chronological order, these were firstly the report of Dr. Conor O'Neill, a consultant forensics psychiatrist attached to the Central Mental Hospital; secondly the report of Dr. Andrew Eustace, consultant psychiatrist; and thirdly the report of Dr. Nick Kydd, who is a clinical physiologist and neurophysiologist.

9. Because these reports were relevant to the circumstances of the appellant, in terms of assessing his culpability, the Court will briefly refer to their content. Dr. Eustace was satisfied that the appellant had a history of exposing himself to women for many years but that this sexual activity had escalated in the last three to four years. He could not say whether the cognitive difficulties, which the appellant demonstrated, arose as a result of a head injury in earlier life or whether they had been there from birth. However, he was satisfied that the appellant was disinhibited sexually and unlikely to respond to rehabilitation. Dr. Eustace felt that it would be unlikely that any nursing home would be willing to take the appellant, following his release from prison. He would need a male only environment and his medication compliance would have to be supervised.

10. Dr. Conor O'Neill advised that on psychological assessment in February, 2012 the appellant was found to have a border line IQ and evidence of some frontal lobe deficit. A CT brain scan in 2007 showed atrophy only and an MRI scan of the brain was reported as normal. A subsequent CT scan in January, 2012 showed no specific abnormality. The appellant told Dr. O'Neill that he had started touching girls and exposing himself to young women at around the age of forty. Dr. O'Neill reported that the appellant's behavior may have become more apparent in recent years and may have been adversely affected by his mother's death in 2012. However, his sexually inappropriate behaviour had become less apparent since his commencement of fortnightly anti-androgen medication while in prison. The appellant, according to Dr. O'Neill, had been seen by the psychiatric services in 2007, at which stage he had been assessed as not suffering from any acute psychiatric illness. He was recorded as being aware of his actions and being in control of them. At that time, he reported that he had been exposing himself since the age of forty and that he was obsessed by sex. While he knew it was wrong to expose himself, it made him feel good.

11. Following his committal to prison, the appellant continued to make suggestive sexual remarks and gestures towards female staff, according to Dr. O'Neill. He referred to the report of Dr. O'Mahony, of the Irish Prison Service Psychology Unit, who was of the opinion that the appellant had limited control over his inappropriate sexual behaviour and that there was no likely treatment available to enable him to live independently and safely within the community. Dr. O'Neill concluded that the appellant had no mental illness, but

was of low border line IQ, suggesting front lobe dementia. He did not state that there had been any objective evidence in terms of deterioration and merely noted that his behaviour was getting worse. He anticipated that, while on medication, the appellant's sexualised behaviour would likely be reduced.

12. Dr. Kidd said his examination did not suggest that the appellant was cognitively impaired and he considered him border line in terms of intellectual functioning. His profile suggested a deterioration in his intellectual function when compared with his pre-morbid intellectual level. Nonetheless, Dr. Kidd felt that the appellant was then functioning within the mild range of intellectual disability. He was satisfied that the he had some difficulty with memory and executive function. He advised that the type of behavioural change demonstrated by the appellant was often associated with a deterioration of front lobe functioning. He said that while the appellant might express an awareness of his actions, he might find it difficult, because of his neuropsychological state, to regulate his behaviour.

13. Dr. Kidd concluded that the appellant needed an increased level of structure to discourage this disinhibited behaviour.

The appellant's submissions
14. Mr. Greene S.C. on behalf of the appellant, made five points:-

> (i) Firstly, he asserted that the trial judge failed to have any proper regard to the plea of guilty, given that he referred to the appellant in a very disparaging way in the course of his sentencing. On several occasions he referred to the appellant as a 'dirty old man' and it cannot therefore be accepted that he did actually pay full regard to his plea of guilty.
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> (ii) Secondly, he submitted that the trial judge erred in principle in considering the gravity of the offence, because the trial judge said that he would have given the appellant the maximum sentence, had he not pleaded guilty, and that this clearly amounted to an error in principle.
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> (iii) Thirdly, he stated that the trial judge did not give proper consideration to the medical evidence when considering the nature and gravity of the offences and that the appellant's medical condition was a considerable factor in his offending.
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> (iv) Fourthly, he maintained that the trial judge misunderstood the medical evidence when he concluded that the accused seemed to be proud and boastful of his actions. The appellant's conduct in this regard should not have been taken into account as an aggravating factor.
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> (v) Fifthly, he said that the trial judge erred in principle, insofar as he decided to incarcerate the appellant by way of preventative detention. That was, he submitted, impermissible.

The respondent's submissions
14. Ms. Biggs S.C. on behalf of the Director, prior to making her submissions, indicated her client was not standing over the trial judge's statement to the effect that the appellant was "a dirty old man".

15. Counsel on behalf of the Director submitted that the trial judge had imposed a sentence which was just and appropriate having regard to the circumstances of the offences and the personal circumstances of the offender. She submitted that while there were more serious offences of this type, this did not mean that the offences, the subject matter of this application, could be viewed as being at the low end of the spectrum. It was the circumstances surrounding these offences that made them very serious and the Court will return to consider these factors later.

16. She also submitted that the protection of the public was an appropriate factor to be taken into account by the trial judge in exercising his sentencing function. She maintained that the trial judge had worked within the proper sentencing framework and that the law permitted the Court to factor into its considerations, in a case of this nature, the fact that the offender was at risk of re-offending, when imposing sentence. She relied upon the decision of *Murray J. in The People DPP v. Lyons,* (Unreported, Court of Criminal Appeal, 31st July 2014) and that of O'Donnell. J. in *DPP v. McMahon* [2011] 3 IR 774.

17. Counsel on behalf of the Director, submitted that the trial judge had taken all mitigating factors into account, including the appellant's guilty plea and the risk that he could be subjected to offensive behaviour or abuse while in custody. It was submitted that he had also dealt properly with the aggravating factors, insofar as the appellant was not a first time offender. Counsel submitted that he had given appropriate consideration to the age of the victims, the fact that the appellant had displayed no real remorse and his disposition to re-offend in respect of the most vulnerable members of society, namely young girls

The Court's decision
18. The first matter, which the Court would wish to refer to, is the unfortunate reference by the trial judge, on two occasions in the course of his sentence, to the appellant as 'a dirty old man'. That reference is, to say the least, unfortunate, particularly having regard to the medical evidence that he is a man of poor intellectual capacity with little insight into his behaviour. The Court is pleased to note the Director of Public Prosecutions has stated that she cannot stand over such a description of the appellant.

19. That said, the Court does not believe that these derogatory remarks can be taken as evidence of any intention, on the part of the trial judge, to depart from a proper consideration of the matters material to the imposition of sentence. It goes without saying that the onus is on the appellant to demonstrate that the sentences imposed by the trial judge were excessive, or that the trial judge erred in principle in the manner in which he constructed or imposed the sentences.

20. At the heart of the application is a submission that the sentence imposed was unduly harsh, having regard to the circumstances of the offences and those of the offender. The Court rejects that submission.

21. The trial judge took into account all of the circumstances material to the assessment of the gravity of each offence. In particular, he referred to the fact that the victim of the first assault was only fifteen years of age at the time and that she had had to be rescued by other women on the street. In relation to the second offence, the girl concerned was only ten years of age. The appellant, on the other hand, was in his sixties at the time.

22. The trial judge also considered the culpability of the appellant and his personal circumstances. He came to the view that the appellant had no major mental illness and that while he had a border line IQ with symptoms of frontal lobe dementia and intellectual impairment, his mental condition was not such that he was not able to take control of himself. He knew that he was doing wrong. He

had deliberately selected his first victim because she was on her own. He knew she was only fifteen and that she was frightened. Yet, he said he would have gone further if circumstances had allowed and that he would have got up on her to have sex, if there had been no one around and if it had been physically possible.

23. The trial judge was also satisfied that the appellant had not shown any genuine remorse and that he had consciously engaged in the activities. He was not a first time offender. He had been convicted in 2007 in respect of two counts of indecency and one count of sexual assault, for which he had received a suspended sentence. This had not deterred him from his predatory sexual activities.

24. The evidence contained in the medical reports produced on the appellant's behalf demonstrated that there was a real risk of sexual re-offending and that this risk was very high. He had been engaged in predatory sexual activity for more than twenty years and his victims were vulnerable, mainly children and very young women. The only possibility of reducing that risk lay in his compliance with a medication regime designed to reduce his testosterone levels and a scheme of post release supervision.

The Court is of the view that the trial judge properly considered the circumstances of the offences and the personal circumstances of the appellant. The Court is also satisfied that the trial judge took into account all of the appropriate mitigating factors. He mentions the guilty plea as being extremely important, as it eliminated the need for the girls in question to revisit the assault. The Court is satisfied that the trial judge did more than pay lip service to the plea of guilty, because he outlined what the victims had been saved in terms of distress. The Court is also satisfied that the trial judge took the age of the appellant into account. He mentions the fact that the appellant was sixty eight years of age and, at p. 23 of the transcript, when referring to Dr. Rowling's medical report, he acknowledged that the appellant was assaulted while in prison and that he would continue to be at risk in that regard.

While it might be said that the trial judge made an error in principle in terms of where he placed the offences on the scale in terms of their gravity when commencing his consideration of the sentences to be imposed or that he incorrectly treated certain statements made by the appellant at interview as aggravating factors, the Court is nonetheless satisfied that, in the light of the circumstances of the offences and those of the offender, and particularly having regard to the medical evidence, the Circuit Court judge was left with no option but to impose a significant custodial sentence in respect of each offence.

The Court is satisfied that the sentences ultimately imposed were not unduly severe such as to warrant setting them aside. The Court has come to that conclusion regardless of whether or not the appellant was on bail at the time that he committed the second offence, on 10th September, 2011.

Accordingly, the Court will refuse the application.