



**THE COURT OF APPEAL**

**Birmingham J.  
Edwards J.  
Hedigan J.**

**259/16**

**Between**

**The People at the suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Francis Barry**

**Appellant**

**JUDGMENT of the Court delivered on the 23rd day of May 2017 by**

**Mr. Justice Hedigan**

1. This is an appeal against conviction and sentence. On 9th June 2016, the appellant entered a guilty plea in the Central Criminal Court to two counts each of rape, section 4 rape and sexual assault, being six counts in total. This plea was made after legal argument and one day after the jury had been selected. He was sentenced on 29th July 2016 to five years imprisonment on each count to run concurrently with the final three and a half years suspended.
2. The suspension was on condition that he enters a bond of €100 to keep the peace and be of good behaviour for the period of his imprisonment and suspension. Further, that he seek to engage in a sex offenders treatment programme while in prison and on his release attend all appointments offered to him by the supervising officer of the Probation Service and follow directions given by the Probation Officer in relation to treatment plans. He should also notify the Probation Officer of any intention to change address and to access a structured day programme to reduce his risk of offending.
3. The offences took place between 2004 and 2007 and included sexual assault and rape. The appellant was aged between 12 and 14 and half years at the time of the offences. The victim was aged between six and eight and a half years. The appellant and the victim are related and the offences took place in a shared relative's house. The family became aware of the offences in 2007 but they were not reported until 2013 when they were initially reported to the HSE and then to the Gardaí.
4. When interviewed by the Gardaí, the appellant admitted the sexual offences except the rape offences. He was not deemed suitable for consideration for admission to the Juvenile Diversion Programme as he did not accept full responsibility. The appellant maintained that the programme was never clearly explained to him. Garda Egan however gave evidence that it was and the non-acceptance form signed by the appellant in relation to the Diversion Programme was presented to the Court.
5. The probation and psychological reports on the appellant indicate that he suffers with a major depressive disorder and is taking anti-depressants. It states that he suffered shame, guilt and horror. It described feelings of isolation and suicidal ideation. He apparently has made at least ten attempts on his own life. He was described by counsel as extraordinarily remorseful. He deeply regrets what happened and fully accepts that he was responsible for the hurt and pain caused to the victim. He has been described as having poor cognitive ability and inferior perceptual reasoning.
6. This is a most unusual and unfortunate case. It is a great pity that the appellant did not engage positively with the Juvenile Diversion Programme provided under the Children Act, 2001. It was there to deal with situations just such as occurred here. This Court can only echo the concern of the learned sentencing judge when he urged that in situations such as this, families should report to both the Child and Family Agency and to the Gardaí so that these matters can be dealt with at the appropriate time. It is clear from the reports of the Probation Service and Forensic Psychological Services that the appellant may well have not fully understood either how or even whether to engage in the Diversion Programme. He has certain limited cognitive ability. Due to the nature of the offences he was somewhat isolated in his family. He does not appear to have had the benefit of good advice as to how to deal with the situation. Had he engaged in the programme, the events of 2004 – 2007 may have been more appropriately dealt with to the benefit of all concerned.
7. We cannot however turn the clock back on the criminal procedure that concluded in the Central Criminal Court with a guilty plea by the appellant. We can however consider the sentence which was imposed. In doing so, we must consider things as they now stand. The appellant is 24 years old. He has served to date 11 months of the effective 18 to which he was sentenced. He seems to be doing well in prison. Had he engaged with the diversion programme, much of the consequences of his actions in assaulting his cousin would have now been ameliorated. The whole family in fact would have benefited from engagement with the appropriate services through the good offices of the Diversion Programme.
8. The Court cannot however overlook the seriousness of the offences committed against an innocent child. She is now 18 years old and has suffered very considerable difficulty as a result of the offences committed against her. The whole family has been gravely affected.
9. We are informed that the appellant has a release date of 13th September 2017. In the unusual circumstances of this case, whilst we can identify no error on the part of the learned sentencing judge, we propose to bring forward that release date. We consider that it would be inappropriate to order release immediately due to the absence of any plan of release. We note that the Director of Public Prosecutions does not advance any objection to this course of action. We are glad to hear that he is now welcome back in the family home and that he has good employment prospects. We will advance his release date to 16th June 2017 to enable an appropriate release plan to be prepared. We are of the view that he and his legal advisors should make immediate contact with the Probation Service to enable a plan of release. It should be emphasised that a substantial part of his sentence is being suspended and it is imperative that he comply with all the existing conditions fixed by the Court.

