THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

124/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J.C. (No. 2)

Appellant

Judgment of the Court delivered on the 18th day of March 2016 by

Mr. Justice Sheehan

1. This judgment is concerned solely with the appeal against sentence.

2. On the 7th February, 2013, following a six day jury trial at Limerick Circuit Criminal Court the appellant was convicted on ten counts of indecent assault and three counts of sexual assault. On the 3rd May, 2013 he was sentenced to ten years imprisonment with the final two years of that sentence suspended on the usual terms.

3. In support of this application counsel for the appellant relies on the following grounds of appeal:-

> 1. The learned trial judge failed to have any or any adequate regard to the personal circumstances of the appellant.
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> 2. The learned trial judge failed to give any or any adequate weight to the mitigating factors advanced on behalf of the appellant. These included (i) the previous good character of the appellant, (ii) the age and family circumstances of the appellant, (iii) the loss of all contact by the appellant with the children of his marriage as a result of these allegations and (iv) the fact that the appellant had not come to garda attention since these allegations were made.
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> 3. The learned sentencing judge erred in law and in principle in calculating the appropriate sentence, in that he suspended a portion of the sentence of ten years as a mechanism to impose a sentence of eight years.
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> 4. The learned trial judge erred in law in failing to correctly assess the offences in this case as being towards the lower level of seriousness in relation to these types of offences and/or wrongly assessed the level of seriousness of the offences as being too high on the scale of such offences.
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> 5. The learned trial judge failed to consider post release supervision in imposing sentence.

4. The sexual offending in each case involved the appellant getting the injured party to touch his penis and, in most cases, getting the injured party to masturbate him. The offences are described in greater detail in our judgment delivered on the 14th November, 2015, which judgment dealt with the appellant's appeal against conviction.

Submissions

5. Counsel on behalf of the appellant in the course of written submissions contends that the learned sentencing judge erred in law and in principle in failing to assess these offences as being towards the lower level of seriousness for such offences and/or in assessing the offences as being towards the top end of the scale. As a result, the trial judge erred in deciding to impose a sentence of ten years imprisonment with the last two thereof suspended.

6. In support of this submission that the offending in this case could not be considered to be the worst of its kind or at the highest level of seriousness, counsel submitted by way of illustration that none of the offences involved the use of any violence or threats of violence nor do they include any penetration or attempted penetration of the victims in any manner whatsoever. Counsel relied on *The People (DPP) v. McC* [2003] 3 I.R. at 609 and *The People (DPP) v. Loving* [2006] 3 I.R. 355.

7. Counsel submitted that the sentencing judge erred in principle in failing to have sufficient regard to the mitigating factors and in particular (i) the previous good character of the appellant, (ii) the age and family circumstances of the appellant, (iii) the loss of all contact by the appellant with the children of his marriage as a result of these allegations and (iv) the fact that the appellant did not come to garda attention since these allegations had been made. In submitting that the lack of previous convictions were a matter to which particular regard should be had counsel on behalf of the appellant referred the court to the judgment of the Court of Criminal Appeal (Hardiman J.) delivered on the 5th July, 2004, in *The People (DPP) v Kelly* [2005] 2 I.R. 321, which made reference to the following passage from *Sentencing Law and Practice* (1st Ed., Dublin, 2000) by Prof. Thomas O'Malley (at p. 187) when considering the significance to be attached to previous convictions or a lack thereof:-

> "It is widely accepted even by ardent retributivists who would otherwise insist that punishment should be strictly proportionate to the crime, that previous good character justifies mitigation . . . there was a general policy that penal servitude, when it existed as a distinct form of custody, should not ordinarily be imposed for a first offence unless it was particularly serious. Today, the same policy would apply to imprisonment and, when a custodial sentence is imposed the absence of previous convictions provides a valid ground for making it as short as is at all consistent with the gravity of the offence. . . . All available evidence about the experience of imprisonment its stigmatising quality and its impact on the

> future prospects of offender's points to the wisdom of community based sanctions for first time offenders whenever possible. The absence of previous convictions may also indicate that the offence was out of character and unlikely to be repeated. Is has also been said that for a person of previous good character, the first time in prison 'is likely to be a severe punishment than the same period would be for a hardened criminal or even when suffered for the second time. Under a totality of hardship approach a first time offender should therefore receive a lighter prison sentence than would be appropriate for a more seasoned criminal. . . ."

8. Counsel on behalf of the appellant further submitted that the learned sentencing judge had erred in principle by failing to adequately address the public interest in rehabilitating the appellant.

9. While acknowledging that the court could have imposed consecutive sentences, counsel for the appellant submitted that the sentencing judge had chosen not to approach sentencing in this case in that way.

10. Counsel for the respondent submitted the sentencing judge was correct in placing the offending behaviour at a high point on the scale of available penalties. She drew the court's attention to the fact that these young children were forced to engage in skin to skin contact with the appellant and to masturbate him. She identified the abuse of trust by a family member, the young age of the complainants and the harmful affects on the victims as being aggravating factors which justified the sentencing judge in imposing the ten year sentence. Counsel also referred to the length over which the offending had occurred and further submitted that the sentencing judge could, had he so wished have imposed consecutive sentences.

11. Counsel pointed out that one of the complainants was between three and four years of age on the first occasion that she was abused and five years of age when she was abused for the second time. The other complainants were aged between six and ten years of age when they were first abused. Counsel further pointed out that the daughter of the appellant had developed symptoms of agoraphobia and that another victim had been admitted to hospital with anorexia which she attributed to the abuse.

12. The maximum sentence for the indecent assault offences is ten years imprisonment and the maximum sentence for the sexual assault offences is fourteen years imprisonment.

13. The sentencing judge in this case chose to impose a global sentence for all the offending and identified a ten years sentence as the starting point. He duly imposed that sentence in respect of each offence of which the appellant had been convicted and suspended the final two years of each sentence.

14. While the individual acts of criminal offending in this case considered in isolation would not normally attract a penalty as the high end of the scale of available penalties the multiplicity of offences and the harm caused by the appellant require to be marked by a sentence at the high end of the scale.

15. The sentence imposed in this case was a substantial one especially for a 50 years old man who had a good work history and was effectively a person without previous convictions. Had he pleaded guilty to these offences, he would have been entitled to further significant mitigation. In cases such as this a plea of guilty is especially significant. It is well known that an early plea of guilty frequently assists in the amelioration of a victim's suffering. The appellant as he was entitled to maintained his innocence. While this of course is not an aggravating factor it does mean that he was deprived of the benefits that a plea of guilty usually brings. In the course of his sentencing remarks the sentencing judge noted that the six victims of the appellant included his son and his daughter and four young girls to whom he was related by marriage. The judge stated:-

> "Now for the most part the abuse consisted of the accused getting the injured parties to touch his penis and in most instances to masturbate him. There is no need for me to go into any more detail. The details were explained this morning in the case note prepared by and read out by Mr. Collins for the prosecution. Maximum penalty for these offences is ten year imprisonment if the offences predated 1990 as is the case in all except three of the counts. In three of the counts namely 9, 10 and 11 the maximum penalty is one of fourteen years.
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> The accused was born on the 20th August, 1962. He is now 50 years of age. He has one minor conviction under the Road Traffic Act. In the context of these offences it is completely irrelevant and the prosecution agrees that he is to be considered as a man of otherwise good character. He is in another relationship now. He is separated from his wife he is in another relationship by which relationship he has a ten year old daughter. He is not employed at the moment. In mitigation it can be said that he is a person of otherwise good character. That is an important consideration to take into account as these are cases of some antiquity. The offences were committed . . . years ago and he has not offended in the interval. It is submitted on his behalf that he has already been punished insofar as he has lost all contact with his family. And it is submitted on his behalf that the details of the abuse were at the lower end of the scale of gravity that is what is submitted on his behalf.
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> In aggravation it has to be said to be said that there are a number of aggravating factors in the case. Now I do not accept necessarily that this was at the lowest end of gravity. It was gross behaviour and particularly inflicted on very young children and gross behaviour of most unsavoury nature. Further aggravation of course is that the children were very young at the time aged between six and twelve and in one case one of the victims as young as four. It was said that the girl was three to four years at the time. They were very young children and should not have been subjected to this abuse. The accused was a parent of two of the victims and he was related by, as I say, through marriage to four of them. He had a duty to protect them. He was in a position of trust in that regard and these offences were a very serious breach of that trust. That is an aggravating factor as well. The victim impact statements have been read out and they make for very distressing reading. And we have all heard what the victim said. The distress and trauma that they describe and that we heard when the victim impact statements were read out this morning."

16. We have considered the submissions of counsel for the appellant as well as the submissions for counsel of the respondent in light of the above sentencing remarks and we hold that the sentencing judge was entitled to approach sentence in the manner that he did. We also hold that an overall sentence of ten years imprisonment with the final two years thereof being suspended is a proportionate sentence, bearing in mind the appellant's personal circumstances as well as the aggravating factors that have been outlined in the respondent's submissions and the sentencing judge's remarks.

17. Accordingly, we dismiss the appeal against sentence.