THE COURT OF APPEAL

Record No. 93/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

F.C.

APPELLANT

JUDGMENT of the Court delivered on the 5th day of February 2018 by Mr. Justice Mahon

1. The appellant unsuccessfully appealed his conviction to this court in respect of six counts of sexual assault, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s. 37 of the Sex Offenders Act 2001. He was convicted by a jury at the Central Criminal Court on the 15th January 2016 following a five day trial and was sentenced on the 11th March 2016 to, in total, five years imprisonment with the final fifteen months suspended on certain conditions. He has now appealed that sentence. The complainant was W.H., the appellant's grand niece, who was fourteen years old at the time of the offences, while the appellant was then fifty years old.

2. The offences took place over a period of four months, between May and September 2012. On the relevant occasions, the appellant visited the complainant's grandfather's house while other family members were visiting a Sunday market in Lifford in Co. Donegal. The sexual assaults ranged from kissing the complainant on her lips, to touching her genitals, to rubbing himself against the complainant in a sexual manner and the digital penetration of her vagina.

Grounds of appeal
3. In the written submissions provided to this court, the appellant restricted his grounds of appeal to the following:-

> (i) Failing to have due regard to the mitigating circumstances advanced on behalf of the appellant, and
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> (ii) failing to have due and adequate regard to the age of the appellant.

4. The mitigating factors identified in the written submissions include the appellant's lack of previous convictions, his young age, the manner in which he conducted his defence and the consequences of been convicted of the particular offence on both the appellant and his family

5. The learned sentencing judge is criticised by the appellant for the brevity of his sentencing judgment and it is contended that such is indicative of the failure to have due regard to those mitigating factors.

6. Although, as was pointed out Ms. McLoughlin B.L., counsel for the respondent, the only ground of appeal notified in the case concerned mitigation, and more particularly, the contention that insufficient allowance was made by the learned sentencing judge to the mitigating factors, including the appellant's age, much of the case made at the oral hearing of this appeal related to the manner in which the sentence was calculated and structured. A particular criticism of the sentence now being made is that it was arrived at essentially as a result of a consecutive sentence approach to the various counts.

7. The approach taken by the learned sentencing judge may have been somewhat unusual. Undoubtedly, however, the approach was careful and considered, including in the manner in which he dealt with the mitigating factors. The learned sentencing judge stated:-

> *"Now, when dealing with a case where there are numerous offences, there are a number of ways that it can be approached. I think what I propose to do in this case is to impose a sentence on count No. 2 which seems to me to be the most serious individual offence. But, in imposing that sentence, I'm taking into account the fact that it was surrounded with and clustered - that there was a cluster of offending over the five month period. One is obliged in assessing sentence to look at the point on the spectrum where these offences exist. With the exception of count 2, it seems to me that if one divides the scale up into three, that being the lower level, the mid level and the upper level, five of these offences with the exception of count 2, viewed on an individual basis, would be - would fall firmly within the lower third of the spectrum. However, an offence involving digital penetration of the vagina of a young girl cannot fall within that category. And a single instance of that brings - brings the offence into the area of the lower end of the midscale. And as I say, I - in imposing a sentence on that count, I'm additionally - I must take into account the fact that I have decided to incorporate the other offences in that punishment and take them into account.*
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> *So it seems to me that having given the weight that applies to an offence at the lower end of the midscale and adding into it the fact that I'm taking other lesser offences into account, it seems to me that totality or proportionality would require a sentence of five years imprisonment on that count. However, having regard to the fact that there are mitigating features, albeit somewhat limited. But I do have to have regard to the prospect of rehabilitation, and I do have, I think, to give encouragement in that respect and give some discount in respect of the mitigating factors that I've identified. What I propose to do is to suspend the last 15 months of that sentence for a period of two years…"*

8. The learned sentencing judge summarised the mitigating factors in the following manner:-

> *"So, by way of mitigation, even in the absence of a plea of guilty, there are factors I can take into account. The fact that as I said, it's first offending that he's going into custody for the first time in his 50s. And that he has the attendant*

shame and publicity in terms of being labelled in this way by the jury verdict. And I also intend to give some credit for the fact that the case, although defended, was done - the defence was conducted in a proper manner."

9. Ultimately, it is the actual sentence arrived at which must be the main focus for this court, in this case five years with the final fifteen months suspended, in effect a custodial term of three years and nine months. The question to be asked is, does it represent an excessive sentence for six counts of sexual offending by a man of mature years perpetrated on a child in relation to whom he was in a position of trust, and which included one count of digitally penetrating the complainant's vagina. This degree of offending over a relatively prolonged period can only be described as very serious. Considerable trauma and distress has been caused to the complainant and is likely to negatively impact on her for many years to come, if not for her lifetime.

10. The court is satisfied that the sentence imposed on the appellant was within the discretion available to the learned sentencing judge and therefore not an error of principle. His approach to sentencing and the decision to, in effect, impose a global sentence for a series of sexual offending on the same victim, and with due consideration for the principles of totality and proportionality, is without fault.

11. The Court will therefore dismiss the appeal.