THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

173/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

W.L.

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 24th day of April 2017 by Mr. Justice Birmingham

1. Before the Court is an appeal against severity of sentence in a situation where the appellant was convicted on all counts of the indictment following a trial which took place between 4th and 17th February, 2015. At trial there were three complainants. The appellant appealed against conviction and sentence and on 13th October, 2016 this Court rejected an appeal against conviction in respect of 15 of the 18 counts on the indictment but allowed the appeal in respect of three counts relating to one of the three complainants, K.W.

2. The factual background to the trial and to the appeal is set out in some detail in the earlier judgment of this Court and that exercise will not be repeated at this stage. In terms of the background and personal circumstances of the appellant, he was born in February, 1970 and he was sixth in a family of 15. When at school he fell behind while in mainstream schooling and then moved to special education where he spent some four years. Before the sentencing court there was a psychological report from Dr. Brian Denville and that put his IQ at 87 or in the low average range. The situation is that after he left school he found sheltered employment and there he met his wife, a fellow trainee. As was referred to by this Court in the course of the conviction judgment appeal, she is profoundly deaf. From sheltered employment he moved to open employment through contacts that he had made while a trainee. Overall he has quite a good work record though in recent times he has struggled to find employment.

3. The marriage was not a happy one overall but it is the case that he was a good provider. As part of that he bought a small derelict council cottage with two acres attached and renovated it forming a comfortable home for his family. There were three children of the marriage including two boys. By reason of what has occurred he has not been in a position to continue to communicate with them and this is a source of considerable distress for him.

4. By the time of the sentencing hearing he had entered into a new relationship and his new partner was, and is, and remains, supportive of him. In terms of previous convictions the judge, properly in the view of this Court, took the view that he should be dealt with as a person without previous convictions. There was in fact one other conviction going back to January, 1989 when as a minor he had been convicted of assault but properly this was disregarded by the trial judge.

5. In terms of her approach to sentencing she said that these were very serious offences committed over several decades, and that the victims had been abused in a vile manner, each in turn being taken for abuse. Quite a number of points are made in support of the appeal. It is pointed that in the case of the complainant K.W. the maximum available by way of sentence was five years while higher maximum sentences applied in the case of C. W. and M.L., the maximum in those cases being 14 years. It is said that there is no recognition or reference to that by the sentencing judge. Perhaps more substantially attention is drawn to the fact that in the case of C.W. there was no evidence of digital penetration though the Court had referred to digital penetration of each victim. In that regard, though, it is the case that C.W. was, as counsel for the DPP points out, the youngest of the victims and emphasis is laid on that by counsel for the DPP while at the same time acknowledging that the reference to all three having been digitally penetrated was an error. Overall, it is said that if regard is had to the totality principle that the sentence of nine years that was imposed has to be regarded as excessive. Emphasis is laid on the fact that in the case of K.W. that Mr L. now stands convicted of one offence not multiple offences and that the offending window is significantly narrowed. It is said that there was an inappropriate failure to differentiate the seriousness of the offending as between the different complainants but rather that the case was approached on the basis that all of the offences were of equal gravity and that similar sentences were therefore appropriate. There is criticism of how the sentence was structured and in particular, it said that the question of rehabilitation was not addressed and that that ought to have been addressed, perhaps by part suspension. There is criticism too of the way in which the judge approached the task of structuring the sentence. It is said that there was no identification of headline or starting sentence and no indication of the extent to which mitigating factors were being taken into account or what allowance was being given in respect of such mitigating factors as were identified. In that connection, this Court has consistently indicated that it regards it as best practice that a headline or starting sentence should be identified and that there should be a specific indication of the factors that are being taken into account by way of mitigation and the extent to which credit is being given. Nonetheless, the Court has also said on a number of occasions that when that practice is not followed that of itself will not necessarily see an intervention. In this case, there was nothing unusual or exceptional or compelling in terms of the mitigating factors that were present and so the manner in which the judge structured the sentence would not have led this Court, of itself, to intervene.

6. So far as this Court's approach is concerned, in a situation where Mr. L. now stands convicted of fewer offences than he did at the time of the sentencing hearing, the Court felt and made this clear to the parties that it would have to address the question of sentence even if, not excluding the possibility that the outcome of the exercise of addressing the sentence might very well be the sentence that was originally imposed unaltered. In those circumstances, counsel on behalf of the appellant was invited to address the Court on the basis of any up to date information that was available and to update the Court on the extent to which there was any progress to report. A number of documents from the Governor, from the Chaplain and from a psychologist within the Prison Service have been made available.

7. This Court takes as its starting position, as did the trial judge, that these were by any standards very serious offences. Particular aggravating factors were the duration of the offending period, the fact of multiple complainants, all very young, and the nature of the offending behaviour. The Court is very conscious of the significant impact that this offending behaviour has had on the victims. It is also the situation that absent from the case was a plea of guilty which removed from consideration what would, if present, have been

the most significant mitigating factor. It is, however, the situation that there were no relevant previous convictions, the one assault having properly been disregarded. There were other factors such as his limited intellectual capacity, his role at work and his role as a husband and provider which were to his credit. Overall, though, the Court agrees with the sentencing judge that this was a case where there had to be a significant sentence. Nor does the Court disagree that this was a case where an element of consecutive sentencing was appropriate and that it was appropriate to make the sentences in respect of each individual complainant consecutive to the sentences that were imposed in respect of other complainants. The Court, though, feels it necessary to vary the sentence imposed in the Circuit Court in two respects. In the case of K.W., Mr. L. succeeded in respect of three counts in the indictment. The Court has carefully considered the arguments by the Director of Public Prosecutions that the offending recorded is still very serious and was directed at a very young child. In particular, the point is made on behalf of the Director that the offences on the indictment were always sample counts and the offence he remains convicted of is a sample count. So, the fact of partial success on the conviction aspect in respect of K.W. has not converted the offending in respect of that complainant into a once-off or isolated incident. That is certainly true though it has narrowed the offending window. Given that the narrative provided of the sequence in which offending activity occurred the more serious incidents of abuse including the act of digital penetration remain in issue. In recognition of the fact that the period in respect of which the offences are recorded as being narrowed but that the offending remains very serious, the Court will reduce the sentence in respect of K.W. from three years to two years.

8. In respect of C.W., where the judge erred in referring to digital penetration the Court has had to consider whether an intervention is required. The Court acknowledges the force behind the submissions from counsel for the DPP that the offending recorded was particularly serious involving a very young child indeed. Nonetheless, the Court feels compelled to intervene where there has been a clear factual error though again will do so only to a limited extent. The Court will reduce the sentences in respect of each of the counts involving C.W. from three years to two years. As the trial judge did, the Court will make the sentences in respect of each complainant consecutive to the sentence in respective of the other complainants. The effect of that is, whereas the trial judge imposed sentences of three years in respect of each of three complainants making an aggregate of nine, this Court will impose sentences of three, two and two years, making an aggregate of seven years.

9. The Court has considered the argument in relation to rehabilitation and what was in effect an invitation to structure the sentence by part suspending. The Court, having considered the matter however, does not believe that this would be appropriate. While there are some encouraging signs now present such as his good conduct while in custody and perhaps the first very tentative hints of a recognition of wrongdoing as in his acceptance of engaging in "horse play" which is seen as offering some encouragement by the psychologist, even though it is a singularly inadequate and inappropriate description of what occurred. The Court does not believe that structuring the sentence by way of part suspension would be justified at this stage. The Court notes the reference that there has been to the Better Lives programme and hopes that it is the situation that Mr. L. will avail of it and that if he does that he will benefit from it.

10. The Court will address the question of post release supervision. In the Circuit Court that issue was left somewhat open-ended. The Court feels it more appropriate to make provision now for a two-year post-release supervision so that Mr. L., on his release from custody, will be under the supervision of the Probation Service for a period of two years and the order of this Court will so direct.