



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.
40/16**

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J.F.

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 9th day of December 2016 by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence sought to be appealed is one of twelve years imprisonment with the final six years of that term suspended which was imposed in the Central Criminal Court on the 15th January, 2016. The sentence was imposed in respect of counts of attempted rape and on the same occasion lesser concurrent sentences of six years imprisonment were imposed in respect of counts of sexual assault.
2. The background to this matter is that the appellant and the complainant are uncle and niece. The appellant is the brother of the complainant's late father. The appellant is aged 75 years and his niece is aged 21 years. The offending was charged as occurring in two phases between 2005 and 2008 and between 2010 and 2012. The complainant was therefore between eleven and eighteen years at the time the offences were committed. The evidence in the Central Criminal Court is that the offences on the indictment – there were eight offences on the indictment – relating to four incidents reflected the entirety of the offending behaviour and were not to be regarded as sample counts.
3. The complainant has an intellectual disability and she attends a special needs facility. At the time of the sentence hearing she was in residential care with the HSE. She was a vulnerable young adult, both of her parents being dead. Her vulnerability was and is accepted as being an aggravating aspect of this case.
4. At one stage while in residential care, she disclosed to her social worker that she had been abused by her uncle. She was then interviewed by specialist garda interviewers. As part of the investigation in May 2014, the appellant was arrested and while detained he was interviewed on three occasions and in the course of these interviews while initialising minimising his activities somewhat, he essentially made admissions and confirmed what his niece had stated had occurred. All the indications from early on were that this was not a case that was going to be contested and this was then confirmed when a plea was entered when the matter was first listed in the Central Criminal Court.
5. At the sentence hearing a short but very significant impact report was prepared by the injured party and was read to the court by the investigating garda. It is couched in simple, indeed childish language, but there can be no doubt that this abuse impacted upon her very severely indeed. She concluded that statement as follows:-

"Sometimes I feel sad and like I want to hurt myself. I want to jump into the river some days. I keep things in my head now and I don't talk to people about what is going on in my head. I can't go home now in case he is there. Sometimes I can't get on the bus I am afraid he will be on it."
6. At the sentence hearing the plea in mitigation drew attention to the absence of previous convictions, to the admissions and to the fact that an early plea had been entered. It was pointed out to the court, though it is clear that this is a matter to which the court was very alive, that sentencing someone of 75 years of age is likely to have a greater impact on the balance of their life. The court's attention was drawn to the simplicity of language which was a feature of the garda interviews with Mr. F and it was said that from this the court could draw conclusions about the nature of the person that it was being required to sentence.
7. The court was obviously concerned about being asked to sentence someone in their mid 70's who it appears had started to offend in the mid 60's and of its own motion requested that a probation report be prepared. It is a notable feature of both the original and the adjourned sentence hearing that proceedings were conducted by the trial judge with considerable sympathy and understanding for Mr. F a fact acknowledged by his counsel today, but counsel is quick to add that while the proceedings may have been conducted sympathetically, that did not prevent a sentence being imposed that was manifestly excessive.
8. The probation report referred to the appellant's capacity to elaborate on thoughts, feelings and behaviour having been limited. The probation officer comments that he initially found it difficult to gauge whether it was an attempt to "avoid" and/or to minimise the severity of his actions or whether it was based on his sheer inability to do so. The probation officer said at that stage, the stage of writing the report, he inclined to the later view. The court has little doubt but that his conclusions in that regard are correct.
9. From the probation report it emerged that the appellant was the second eldest of seven, born into a farming family and that he worked full time on the farm between the ages of 13 years and 55 years. Mr. F told his probation officer that his early years were very difficult, referring to the fact that routinely he was physically, sexually and emotionally abused throughout his school life and that indeed it was a relief for him to leave age thirteen to work on the farm. The report notes that Mr. F has never had an intimate sexual relationship. There was a woman with whom he became friendly, but that was for companionship rather than for romance and she has died. The court is in no doubt that Mr. F is a particularly vulnerable individual who would seem to be emotionally and intellectually challenged.
10. At an early stage of the sentence hearing, the judge intervened to make clear that this was not a case where a non custodial disposal could be considered. With that view this Court is in complete agreement.
11. The approach adopted by the court of taking a high starting point in order to mark the seriousness of the offence and then to

suspend a significant portion having regard to the very significant factors present in favour of the appellant, such as the plea, the admissions, the absence of previous convictions and indeed his general vulnerability and inadequacy was an appropriate one.

12. However, the court feels that taking as a starting point a sentence of twelve years for these offences committed by this offender was unduly high and amounted to an error. This is so particularly given that the most serious offences on the indictment were offences of attempt rather than completed offences. Attempts are frequently dealt with somewhat less severely than full completed offence. In the case of rape the moral culpability is the same, but some comfort can be drawn from the fact that the victim has not been penetrated even though that was the offender's intent.

13. In the circumstances the court will vary the sentences by imposing now a sentence of nine years imprisonment, but it will maintain the approach of the Central Criminal Court by suspending half of that sentence. It will also follow the lead of the Central Criminal Court in imposing concurrent sentences on the sexual assaults of the same duration as the actual sentences to be served in respect of the attempted rape. In summary then the sentences will be nine years with four and a half years suspended on the attempted rape counts and concurrent four and a half year terms on the sexual assault accounts. The sentences will date from the same day as in the Central Criminal Court which was the 21st October, 2015. So far as the bond is concerned it will be a term of the bond that he keep the peace and be of good behaviour for a period of four and a half years post release, that there will be no contact with the injured party at any stage and that restriction will remain indefinitely and he will also be required to be under the supervision of the Probation Service following his release for a period of eighteen months and during that period to comply with their directions.