



## THE COURT OF APPEAL

Birmingham J.  
Sheehan J.  
Mahon J.

258/13

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

**Respondent**

**V**

**B.D.**

**Appellant**

**JUDGMENT of the Court (ex tempore) delivered on the 25th day of July, 2016**

**by Mr. Justice Birmingham**

1. This is an appeal against severity of sentence. The sentence appealed is one of ten years imprisonment with the final three years suspended that was imposed in the Circuit Court in Offaly on the 22nd November, 2012. The sentences were imposed in respect of offences of defilement of a child under fifteen years contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act 2006.

### **Background**

2. The offences in question involved acts of buggery committed by the appellant against his son. The offending took place between 2009 and 2011. At that stage the injured party was between nine years and eleven years. The appellant had sole custody of his son who lived with him. It should be noted that his son has long term special needs. The abuse in this instance involved buggery, having his son penetrate him, mutual masturbation and introducing his son to pornography. The abuse occurred two or three times a week over a two year period.

3. The matter came to light in July 2011, when the young boy disclosed what was happening to his aunt who went to the authorities. Some nine days thereafter the appellant went to Tullamore garda station where he made voluntary admissions.

### **Background and personal circumstances**

4. In terms of the background and personal circumstances of the appellant he was born on the 7th February, 1971, and was the youngest of six children. At the time of sentencing he had been unemployed for a number of years, but had earlier worked for a period in a meat factory. He had been in a relationship with the mother of the injured party and they had two children together, a boy and a girl and they came to an arrangement that the boy, the injured party in this case, should be in the sole custody of the appellant, while his former partner would look after their daughter. Previously he had been in at least two other relationships and there were three children from those earlier relationships.

5. This was a case where a considerable number of reports were put before the court. These included a number of reports from Ms. Eileen Finnegan, Clinical Director with One in Four which dealt with the involvement of Mr. D with the Phoenix Programme provided by that organisation. There was a report from Dr. Fiona Weldon, Clinical Director of the Rutland Centre and a psychiatric report from Dr. Brenda Wright. Finally, there was a probation report.

### **Grounds of appeal**

6. The grounds of appeal submitted have focused on the fact that not enough regard was had by the sentencing judge to the expert evidence that there was as to the extent of mental/intellectual disability of the appellant. It is said too that not enough attention was given to his *bona fide* efforts to secure treatment and/or help and his resolve to continue in that regard. This is a reference to his participation in the Phoenix Programme with One in Four. Again, it is said that the sentence is too severe for someone who was in effect a first time offender.

7. There is no doubt that the appellant had a mental/intellectual disability. That was clear from the various reports but perhaps equally significance it was also the evidence of the investigating garda who interacted with him, who said that he was not surprised to hear that Mr. D had an intellectual disability and had himself realised that. There were references in the report to the fact that Mr. D had a full scale IQ of 63 and the fact that the IQ falls within the extremely low range of intellectual function and within the mild range of intellectual disability.

### **The judge's approach to sentence.**

8. The judge in the Circuit Court was clearly conscious that he was dealing with a difficult and sensitive case and there were two sentence hearings at which evidence was heard and the judge took some time for consideration.

9. In the course of his sentencing remarks the judge referred to the fact that the offending took place over a protracted period, that the offences were committed by someone in a position of parental authority and therefore involved a fundamental breach of trust. He stated that it is his view that having regard to the nature and duration of the abuse and the aggravating factors that were present that it was a case that fell in a scale well above the median, but he then referred to the fact that there were a number of mitigating factors present. In that regard he instanced how the accused had met the investigation and the prosecution. He saw the main mitigating factor in relation to the offences as being the fact that Mr. D had been assessed as a person who functions within a low range on the intellectual scale. He also took into account the fact that there were no relevant previous convictions. Such previous convictions as there were, were very minor and entirely irrelevant in the context of the enormity of the offending in this case. The judge indicated that it was a case where he saw the plea of guilty as very important or, "ultra important" because if the injured party was required to give evidence in front of a jury of strangers that would compound the situation enormously. The

judge then said that he felt that ordinarily the headline sentence would be fourteen years. But that having regard to the defendant's intellectual difficulties, and his previous good character, that he would mitigate that figure down to ten years and that he would then reflect the plea of guilty and the cooperation with the investigation by partly suspending the sentence and he then as we have seen, proceeded to suspend three years of the sentence.

10. In the court's view the judge was correct in identifying that the offending here was very grave indeed and would ordinarily attract a very significant sentence. However the judge was also correct in taking the view that there were significant mitigating factors present, in particular the fact that Mr. D functions within a low range on the intellectual scale. The real issue in the case is whether sufficient credit was given for the mitigating factors. It is accepted that there was credit, but the issue was, was that credit sufficient.

11. Counsel on behalf of the appellant has made the point that the fact that Mr. D functions at a low level is a relevant factor when considering how the admissions, the plea that was entered and the efforts at rehabilitation should be viewed.

12. In this case the judge moved from the sentence of fourteen years that he felt would ordinarily be appropriate, to one of ten years and then to one of ten years with three years suspended. In effect a net sentence of seven years. The net sentence finally arrived at is a 50% reduction from the starting point. In those circumstances the court is unable to identify any error in principle in the approach that was taken and the court must in these circumstances dismiss the appeal.