



THE COURT OF APPEAL

Birmingham J.  
Irvine J.  
Edwards J.

Appeal Number 41/2014

The People at the Suit of the Director of Public Prosecutions

Respondent

- v -

LD

Appellant

**Judgment of the Court (ex tempore) delivered on the 17th day of December 2014, by Mr. Justice Edwards**

1. This is an appeal against the severity of certain sentences imposed on the appellant in this case by the Central Criminal Court following his conviction by a jury on the 12th December 2013 upon an indictment charging him with thirty counts of sexual offences.
2. Nineteen of those thirty counts consisted of thirteen rapes and six indecent assaults perpetrated between 1975 and 1991 upon a victim, WX, who was born on a date in 1968. The remaining eleven offences were all rapes that occurred between 1978 and 1988 and involved a second victim, YZ, who was born on a date in 1973.
3. The appellant is the father of both victims.
4. The trial judge imposed sentences of fifteen years on each of the rape counts, which involve both victims, with the last three years suspended in each case for a period of three years; and sentences of three years on each of the six counts of indecent assault, which relate solely to the victim YZ. All sentences were to run concurrently from the 12th of December 2013.
5. The appeal is against severity of sentencing. No complaint is made concerning where the trial judge placed the offending conduct on the range of potential penalties that might be imposed by the court. In the case of the rape offences specifically, which constituted the overwhelming majority of the relevant offences, the appellant does not complain about the trial judge taking a fifteen year sentence as his starting point. Rather, he complains that the trial judge failed to give adequate consideration to 1) the age of the appellant and 2) the state of health of the appellant as mitigating factors, and that he failed to give a sufficient discount from the headline sentence of fifteen years by way of mitigation.
6. In support of this contention significant reliance has been placed on certain *jurisprudence*, to which this Court has been referred, relating to how a sentencing court should treat an appellant in advanced age or in frail health, or a combination of both. In particular, the appellant relies on the judgment in the case of the *Director of Public Prosecutions v. JM* [2002] 1 I.R.363 with which this court is familiar and in respect of which it is unnecessary to set forth the details.
7. However, it is necessary for the purposes of this judgment to refer in a little detail to some of the circumstances of the present case. The offending in this case took place over a thirteen year span and the abuse of the victim, YZ, continued until she was nineteen years of age, from a fairly young age, and in the case of the victim, XY, she had been abused from age six up until she was aged sixteen. In the case of YZ it was somewhat shorter than that but there was a thirteen year span of offending. The length of time over which each victim was abused was an aggravating feature of the case. A further aggravating feature was the fact that there were two victims. Yet another aggravating feature was that the offending was perpetrated by a person who was not merely in a position of trust but was in a close familial relationship with his victims. He was their father. One of the victims makes the poignant and very appropriate comment in her victim impact statement that "*families are supposed to have a father who protects his sons and daughters, not sexually abuse them*".
8. There was relatively little that could be said by way of a plea in mitigation on behalf of the appellant. He was very ably represented and such matters as could be advanced in mitigation were advanced. He did not plead guilty in this case and while, of course, he could not be penalised in any way for that, the fact that he had pleaded not guilty had the consequence that he lost the substantial mitigation that a plea of guilty would have allowed for. A plea of guilty, particularly one entered at an early stage, usually entitles an accused to substantial mitigation for various reasons, including that it is an acknowledgement of wrongdoing and may be regarded as indicative of remorse; it spares the victims of the crime the trauma and the ordeal of having to go into the witness box to speak about the dreadful events that have occurred to them and of being subjected to cross examination; it provides certainty of outcome; and it spares scarce resources. However, in this particular case there was no plea of guilty and so there had to be a trial and the victims had to testify. There was a trial and while there is an apology now, and an acceptance now of the appellant's role in what occurred, it came very late in the day. I will be coming back to this apology later in this judgment.
9. Accordingly, the trial judge had to approach the matter on the basis that this was a very serious case and one in respect of which there were very significant aggravating factors. He measured the case on the scale of seriousness as one that attracted a potential penalty of fifteen years, certainly insofar as the rapes were concerned, before making any allowance for mitigating factors; and rightly and fairly in this court's view, no quarrel is made with that by the appellant in this appeal. The appellant's complaint relates to the discount applied in respect of mitigating factors.
10. It is necessary to examine what mitigating factors were taken into account. The trial judge in his sentencing remarks as recorded in the transcript alluded to the fact that the accused was now aged seventy, and specifically took account of it. He also noted the appellant's state of health.

11. In that regard the Court had the benefit of a report from the appellant's general practitioner, a further report from his consultant endocrinologist specifically in relation to his diabetes and related conditions, and a report from a consultant surgeon who had recently treated the appellant for a minor foot condition. The general practitioner's report sets out all the appellant's various ailments in a reasonably comprehensive way. The endocrinologist's report also recites the various complaints that are set forth in the general practitioners report. It further describes the medical situation of the appellant as being one in which he has multiple co-morbidities, and points out that he is on a range of medications for a variety of conditions and requires those conditions to be well managed on a continuing basis.

12. While it is true to say that the sentencing judge does not allude in great detail to the appellant's specific medical issues in his remarks at sentencing as recorded in the transcript of 6th February 2014, his said remarks must be read in conjunction with the judgment that he issued later in which he went into greater detail. In particular, that judgment quotes at length from the general practitioner's report as follows:

*"Mr. D. has been in reasonably good health all his life. He has had a mild heart attack approximately thirty years ago and made a good recovery from this episode. He developed type 2 diabetes mellitus in April 2003 and has been on medication for this condition since. He attends regular reviews at this practice every six months and attends the diabetic out patients in [a local] Hospital under a consultant endocrinologist. His diabetes is well controlled and at present there is not cause for concern of this long time health.*

*Mr. D suffered a left sided [CVA] stroke in June 2006. He made an excellent recovery from the stroke and there has been no recurrence of any symptoms or signs of stroke since.*

*Mr. D. developed mild osteoarthritis in his right knee in 2008. Unfortunately, it is now labelled as moderately severe osteoarthritis. He has difficulty walking and needs the help of a single crutch. He is unable to walk for greater than 200-300 metres at any time. He has been attending the Orthopaedic Department of [a named hospital] where they have been injecting his right knee with medication. At some stage in the future he will require surgery for his right knee but it is not planned at present.*

*Mr. D. took an overdose of medication in January 2010. This was not a dangerous episode and he has made a good recovery since then. It was an accumulating of psychological stress factors that caused him to take this overdose. We have no concerns for his mental health at present."*

13. It is therefore clear that the sentencing judge was fully alive as to the medical picture concerning the appellant and that he did take it into account.

14. The judge sentencing judge, having noted in his sentencing remarks the period of time that had elapsed since the abuse ended, being twenty two years, and the age and state of health of the appellant, then went on to say that this case involved serious sexual abuse over a significant period of time. He later noted and took specific account of the fact that the defendant had no previous convictions. He also took account of the fact that there had been an apology and expression of remorse by the appellant following his conviction by the jury. He appears to have adopted a generous approach to the extent of the mitigation that that apology and his expression of remorse provided. This Court will make no comment other than to say that, in general, a post conviction apology should carry little weight in circumstances where the matter has gone to trial and the victims have had to go into the witness box and submit to cross examination.

15. In this court's view the trial judge took full account of all matters that were advanced in mitigation on this appellant's behalf. Having considered the mitigating circumstances including his age, his state of health, the apology, the fact that he had no previous convictions and the period of time that had elapsed since the abuse ended, we are satisfied that the trial judge was entitled to sentence the appellant in the manner that he did. The Court is further satisfied that adequate allowance was made for mitigating circumstances.

16. In conclusion, this Court considers that the sentencing judge did not err in principle in suspending the last three years of the headline sentence of fifteen years as a means of making of due and appropriate allowance for the mitigating circumstances in the case.

17. The appeal is therefore dismissed.