THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 2016/304

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

BRIAN BUTLER

Appellant

JUDGMENT of the Court (ex tempore) delivered 26th January 2018 by

Mr. Justice Edwards.

Introduction
1. On the 29th of June 2016, the day the case was listed for trial, the appellant was arraigned and pleaded guilty to one count of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 ("the Act of 1990") and one count of rape contrary to s.4 of the Act of 1990. Subsequently, on 7th of November 2016, the date on which the case was actually due to open, he was again arraigned and pleaded guilty to a further seven counts sexual assault and a further two counts of s.4 rape assault on the 29th of June 2016.

2. The appellant was sentenced to concurrent sentences of six years imprisonment in respect of the s.4 rape counts, and the sexual assault counts were taken into consideration.

3. The appellant now appeals against the severity of his sentences.

The relevant facts
4. The appellant, Brian Butler, was born in September 1985. The complainant was his sister Leanne Butler, was born in June 1990, and who has waived her entitlement to anonymity. The offending conduct in question began in the year 2000 when the appellant was aged 15 and the complainant was aged 10.

5. A useful chronology of the key events in this case is set out in the appellant's submissions, and it bears reproduction.

September 5th 1985 The appellant's date of birth.

June 27th 1990 The complainant's date of birth.

2000 The abuse began.

2002 The abuse ended.

2003/2004 The complainant told a friend and a teacher about the abuse.

September 5th 2003 The appellant turned 18 years of age.

January 2004 The appellant and the complainant had a fight and the complainant threatened to tell their mother of the abuse.

January 24th 2004 The complainant told her mother of the abuse.

2004 The school contacted the parents of the appellant who in turn confronted him about the abuse which he admitted straight away. A garda investigation took place and garda were told that the family did not want a criminal prosecution. The appellant engaged with St Claire's unit and engaged "very well" with them in relation to his offending. He was "adamant he wished to take responsibility and that this wasn't her fault". The appellant subsequently engaged with the Northside Inter-Agency Project in relation to his offending and wrote a letter of apology.

June 27th 2008 The complainant turned 18 years of age.

2011 The complainant was the victim of an unrelated sexual offence perpetrated by another person. During the course of a subsequent garda investigation the complainant mentioned she had also been abused by the appellant.

September 3rd 2012 The complainant made a statement of complaint to the gardaí.

October 22nd 2013 The appellant presented for voluntary interview with the gardaí. He admitted repeated inappropriate sexual contact with his sister which was a 'big mistake'. In one interview he said that it was "100% my fault".

August 16th 2014 The appellant presented for voluntary interview with the gardaí. He admitted repeated sexual assault but denied penile penetration of the mouth admitting his penis was near her mouth on one occasion.

June 29th 2016 The case was listed for trial. The appellant pleaded guilty. No jury was empanelled. There had been discussions in advance of the trial between the parties.

November 7th 2017 The learned sentencing judge heard evidence in a sentence hearing. The appellant was remanded in custody (having previously been on bail) for sentence to be pronounced.

November 14th 2017 The learned sentencing judge imposed sentence.

6. In his evidence at the sentencing hearing, Sergeant Liam Donoghue described how the appellant had recounted a number of specific incidents of abuse. On the first occasion the appellant and the complainant were playing a video game in the appellant's bedroom. They engaged in normal sibling play before falling onto the appellant's bed. The appellant put his hand on her chest, lifted her nightdress and licked her chest. He then digitally penetrated her vagina. The complainant did not understand what had happened, and afterwards ran into her bedroom and pretended to be asleep when her sister, with whom she shared a room, arrived home. After this incidents of abuse became a regular occurrence for a number of months.

7. On a different occasion the complainant recalled watching or listening to the Bible Channel in the sitting room while the appellant touched and licked her chest and digitally penetrated her vagina. He then took her hand and put it on his penis, forcing the complainant to masturbate him and later ejaculated in her mouth, having forced her mouth onto his penis. In another instance, the appellant was babysitting the complainant while their parents were out socialising. The complainant was sitting on her bedroom floor wearing pyjamas and reading her sister's magazines. She locked the door to prevent the appellant entering. After much pleading by the appellant, who claimed he was looking for some CDs, she opened the door. Again, he kissed and licked her chest, digitally penetrated her vagina and also performed oral sex on her. He then forced her to perform oral sex on him. On a further occasion the complainant locked her bedroom door and refused to let the appellant enter. Following this she got into trouble for locking doors and her mother confiscated her key. Another time the appellant was babysitting the complainant. While she was taking a shower he indicated that he needed to go to the toilet and entered the bathroom. He pulled back the shower curtain and again performed oral sex on her, digitally penetrated her and forced her to perform oral sex on him.

8. There were said to be many more such incidents of abuse, however those just described were the incidents the complainant remembered best, and they formed the basis for the counts to which the appellant pleaded, and on foot of which he was sentenced. The abuse became less frequent over time and stopped completely after 2002. The complainant was not entirely sure why the offending stopped but thought it coincided with the appellant beginning a romantic relationship with a female around his own age.

9. In January 2004 the complainant had a fight with the appellant over a minor issue, resulting in her threatening to tell their mother about the abuse. He responded *"when we're alone we'll talk about it"* and she was asked not to say anything by the appellant's then-partner.

10. Around the age of 13 the complainant had begun to self-harm due to trauma caused by the abuse. In 2004 some classmates noticed the complainant's self-inflicted wounds and she disclosed the abuse to them. They made a schoolteacher aware, who informed the principal. The principal reported the incident to the authorities and contacted the appellant's parents, resulting in a social worker visiting the Butler household on the 26th of January 2004. The complainant informed her mother two days earlier, on the 24th of January. The appellant admitted to sexual misconduct straight away. When Gardaí spoke with the family their parents emphatically rejected any suggestion of a formal criminal investigation.

11. In 2011 the complainant suffered an unrelated act of sexual violence resulting in a separate Garda investigation ("the 2011 investigation"). During the investigation she referred to the abuse she had received at the hands of her brother but reiterated that she did not want to pursue a formal investigation at that time. The 2011 investigation terminated in 2012. On the 3rd of September 2012 the complainant, who was by now an adult, made a formal complaint to Gardaí in relation to the offending in question in this appeal.

12. In a statement, the complainant told Gardaí that she couldn't pinpoint precise dates or times for any individual incident of abuse. She said she was scared and confused during all the incidents and was afraid of getting into trouble. She also said there was "no real reason" why she waited so long to report the abuse, but she simply thought no one would care and didn't want to bring trouble into the family. She also indicated that she was unready to deal with it herself.

13. On the 22nd of October 2013 the appellant presented on a voluntary basis for interview. He presented again on the 16th of August 2014 for interview. In the first interview he accepted that he had engaged in sexual contact with his sister but admitted only to touching the complainant in the breast area and to forcing the complainant to touch his penis on five or six occasions. He denied sexual intercourse or oral sex and also denied masturbating in her presence. He also claimed they were fully clothed on all occasions except on one occasion when they were in the bathroom. He accepted wrongdoing, at one stage saying it was *"100% my fault"*, but felt that he was an immature teenager and while that was not an excuse, he felt they were both victims. Sergeant Donoghue told the court that the appellant was cooperative.

14. In the second interview he admitted to sexually assaulting the complainant five to eight times in the bathroom, his own room, the complainant's room and the living room. He said his penis was close to her mouth on only one occasion, this was when he was getting out of the bath. He confirmed that the complainant did masturbate him but denied ejaculating. He also denied any oral sex.

The victim impact

15. In a lengthy and poignant victim impact statement which she read to the court, Ms. Butler described the ongoing difficulties she has suffered as a result of the abuse. She described her panic, fear and confusion in the immediate moments and weeks after the first incident. Later she says she felt completely trapped, and felt unable to tell anyone because she hadn't done so at the time. She felt guilty for not wanting the abuse to continue because they were so close and he was so good to her at other times. The complainant was completely innocent at the time and it was only in later years that she learned words such as "incest", "abuse" and "assault". She spoke of having her innocence robbed:

> *"The child that I was disappeared and I became an adult. I learnt how a penis felt in my hands and in my mouth; what it felt like on the back of my throat and the horrible smell; what someone licking my privates felt like that and the pain and strength it took to hold in my pee for what always felt like forever. I learnt what it's like to not be in my body. I learnt that no matter how much I tried to make it stop that my body would betray me anyway. I learnt how to hate myself. I was filled with emotions that I had never known existed and could not comprehend and an emptiness that was so hollow, I was like a walking dead person and an endless amount of sleepless nights became a ritual in my schedule."*

16. At the age of 13 she began cutting herself which has become a regular occurrence in her life since then. She also stole pencil sharpeners as a coping mechanism.

17. The complainant had been extremely close to the appellant up to the time the abuse began. He had been her favourite sibling, and appeared to have been a loving and protective older brother. After the abuse emerged her relationship with her family, particularly her mother, deteriorated sharply. She was left in the house alone with the appellant despite asking her mother not to leave them alone together. When alone in the house with the appellant she would stay in her room with a knife, terrified he would come and kill her. She felt that the appellant was and still is treated as the victim while she is viewed as the perpetrator. She described her home as a "warzone" where violence was constantly directed at her. She suffered anxiety, self-esteem issues and severe depression. There were many days where she couldn't get dressed or have a shower and would remain in bed all day and awake all night cutting herself. She said this was easier as she could avoid the appellant and her mother.

18. She said that at the age of 22 she *"broke"* unable to suffer any longer and attempted suicide. This prompted her to confront her past and to lodge a formal complaint with Gardaí.

19. The abuse continues to affect her. She described how she still lacks feelings of safety, confidence, freedom, trust, relaxation, pleasure and comfort and also has difficulty with sleep and focus. At the time of the sentencing she was due to marry during the year ahead, but felt unable to invite her mother. She refused to accept that the appellant did not know that what he was doing was wrong and noted that he had never apologised to her.

The appellant's personal circumstances
20. The appellant was 31 years of age, married and in employment at the time of sentence. He enjoys a good relationship with his parents and other siblings. He never discusses the abuse with his family.

21. The appellant has two previous convictions. They date from 2012 and relate to a breach of ss.2 and 4 of the Public Order Act 1994 on the 6th of December 2011. He was fined €100 for each offence and has not come to Garda attention since then. Sergeant Donoghue agreed with defence counsel when he described the appellant as *"a mild mannered, introspective person who hasn't displayed any difficulty".*

22. In 2004 the appellant's parents confronted him; he immediately accepted that he had committed wrongdoing (although apparently not to the full extent). The appellant attended at St Clare's Unit, Temple Street University Hospital ("St. Clare's"). St. Clare's is an assessment and therapy service for children and young people where sexual abuse is concerned, and it provides services to victims, offenders and families of victims and offenders. The appellant cooperated fully and engaged well with St. Clare's. In one report he was described as being *"adamant"* that he wanted to take responsibility and was open in his wrongdoing. He was later referred to the Northside Inter-Agency Project, a community based treatment programme aimed at treating adolescent sexual offenders. While engaging with these organisations, in 2005 he wrote an apology letter to his sister, acknowledging he had abused her but only admitting to it happening on "lots of occasions over six months". However, following consultation with his parents it was decided not to present this to her at that time and it remained on file until the sentencing hearing.

23. The appellant also suffered self-esteem issues and depression. After repeating his Leaving certificate he went to study in Letterkenny but dropped out in his first year. A probation report dated 2nd of November 2016 ("the probation report") stated that the appellant had attempted suicide by overdose on two occasions. It further stated that while the appellant denied any difficulties with alcohol or illicit drug use, he has used alcohol a coping mechanism. He has at times been prescribed anti-depressant medication but at the time the probation report was compiled was not on anti-depressants.

24. The probation report stated that while the appellant expressed remorse for his behaviour he found it difficult to speak about the effect the offending may have had on the complainant. The report stated that awareness of the implications of his offending is therefore an area which he needs to target. It also stated that the appellant *"presented with a certain level of denial and victimisation"* and *"has explanations that keep him from taking full responsibility for his offending behaviour … [suggesting] … he has a number of thinking errors which need to be challenged in order for him not to engage in further harmful behaviours."* The probation report went on to recommend psychological intervention and therapeutic supports.

25. His risk of reoffending was also assessed by way of an actuarial classification instrument called Risk Matrix 2000 ("RM 2000"). This measures static risk factors (such as age, offence type and offending history) associated with sexual and violent offending. Under this model the appellant was placed in the medium risk category for sexual and nonsexual violent re-conviction.

The sentence imposed
26. The sentencing judge made the following remarks in passing sentence:

> *"Now, I then turn to the material before me in relation to the accused. A letter has been furnished to me in the course of which an apology is tendered, and that is dated the 11th of July 2005. At the risk of repetition, I see that in that letter he, the accused says that the abuse occurred on, "Lots of occasions for six months." And sadly, that means in July 2005, he had not faced up to the matter and it is only recently, that is to say when the plea of guilty was entered into that he did so. As I understand the matter, certain proposals to plead guilty were made at a given stage. These were not accepted by the Director of Public Prosecutions, and ultimately the accused proceeded to plead guilty to all of the offences. And it was only at that juncture, which plainly was very late in the day, the - it was in or about the trial date, I'm prepared to accept the proposition that notification was given at least sometime before the trial date. But the proposals made to the Director were refused in or about April, and the trial date was in about June. In any event, the accused deserves credit for the pleas of guilty which he has entered.*
>
> *The accused, when under treatment from the agencies to which I have referred accepted his responsibility to a great or lesser degree. I'll come to the treatment in a moment. I say that in connection with the plea of guilty which has been entered. Now, the I have the benefit, as I said of a number of reports. There is the probation report, there is the report from the Northside Project, if I might describe it as such. That is a favourable report, but dated the 10th of May 2016. [Counsel for the accused] has sought to rely upon it as indicative of the fact that the risk which was then identified as with all instances of paedophilia was one which plainly was not consummated and that accordingly, over a ten year period at least one can be clear that there was no further question of sexual abuse on any party, thus excluding or negativing, so to speak, the risk of such offending in the future.*
>
> *I should pause there and say, no part -- a judge may not impose sentence on the basis that a person poses a risk in the future. It is however, lawful in considering the personality of the person and the extent to which he is contrite to have regard to his state of mind in that regard. And of course, it is nowadays relevant to post release supervision orders. Now, the accused was assessed and having been passed on from St Clare's unit, that apparently had a number of young children, younger than the accused who in 2004 was 19 or thereabouts and he didn't find it satisfactory. But that*

appears to have been accepted as being reasonable. In any event, he was reviewed over a period of time and he had a considerable number of meetings with social workers and others with expertise at the Northside Interagency Project, and he ultimately was released from the supervision in question.

Now, the focus of the individual work there is apparently understanding why he had sexually abused. The completion of a letter of apology. The provision of support and advice in addressing his mental health and general well being. Now, he is undoubtedly a person who has presented as depressed and suicidal. It appears from the probation report that he is a person who, on in or about the time of this abuse, was alienated from society, was even though he was a young person suffering from depression also. And in part, he himself attributes his behaviour to that state of mind. Now, he is also a person who reached leaving cert level in terms of studies, went to the Letterkenny Institute of Technology and did find himself suicidal in the course of that period. Now, he has received or did receive from the project, help also in relation to the mental situation.

Now, he -- in relation to the future risks involving the accused, it is stressed that he is someone who requires further assistance. He has and some improvement in his mental health, had apparently occurred at that time from the probation report, it seems to be continuing. Now, I have to confess to you there is nothing of enormous detail in that report that I could find which would seem to indicate the position for the future. There is however, a Probation Service report where there's a reference to the risk matrix 2000 which is frequently used, and I've seen it on a number occasions. That is for the purpose of attempting to ascertain the level of intervention during periods of supervision and the risk of re offending. It places persons in four categories from low to very high risk. The accused is in the medium risk category for sexual and non sexual violent conviction in the long term.

Now, these statistics are based on an analysis so to speak of the individual himself. External factors such as treatment, and I think it's fair to say lifetime life, the type of life someone leads may also accept recidivism. It is however also stressed that this is of an assessment tool of a somewhat rudimentary manner. In any event, the it is also conceived that the accused low mood and feelings of low self-esteem can have an adverse effect on his on the risk of recidivism. The accused now is in a civil partnership relationship, there was reference to the fact that he had a child. But in the nature of the relationship, I had understood perhaps that that would have not been possible for his partner. But I proceed on the assumption that what I am told in that regard is correct.

Now, the question therefore is the social worker found that he had some explanations that keep him from taking full responsibility for his behaviour. And the social worker is of the opinion that he requires psychological intervention, that is Ms Sharon Cahill. She also recommends that he needs to engage in therapeutic supports in order to challenge his thinking regarding his offending behaviour. And that he should subject himself to a pre-release plan and should ultimately be under the supervision of the Probation Service with a view to ensuring that he does not offend. And I think it's fair to say, reintegrate into society.

There are a number of letters, there's one from his mother, there's one from his partner. She stresses the extent of his remorse. His mother does similarly. She said that he she refers to the fact that she, his mother refers to the fact that she believes he will always be a valuable member of society and never re offend. He is working now in sales. She said he has grown into a wonderful gentleman from this and there is similarly a letter from his father. In that letter, his father makes it clear that he is equally aware of the suffering caused by his actions. And that he is the parent, as it were, of both, which obviously is a very difficult thing.

The unfortunate relationship with the accused mother is, I fear, borne out by her letter. She does not seem to express any particular understanding of concern. Now, I mention those factors as an aside because the accused cannot and should not be punished as a matter of law for what has occurred so far as the parents or other members of the family are concerned. Its relevance primarily arises insofar as the father is concerned, in as much as his letter makes clear his concerns for his daughter as well. And accordingly, in my opinion, greater weight is to be attributed to what he has said.

Mr Gillane has, dare I say it, very properly stressed the fact that due to the lapse of time and due to the age of the accused, and due to the fact that a short time after these matters came to light, he subjected himself to therapeutic treatment, to say nothing of the plea of guilty. This is a very exceptional case. He says it goes beyond, so to speak, a mere plea of guilty. He points out that there were certain admissions, although not fulsome or not sorry, not comprehensive in the not full or comprehensive in the in his interviews with the gardaí. So what I must do is, I must attempt to sentence this man and to bring a starting point or reach a starting point for sentence, then apply mitigating factors.

To me the mitigating factor is the plea. One assesses the individual in question, that is to say a person with a degree of remorse. A person who has undergone therapy, both in the past and apparently one can infer, will have therapy available to him. His remorse may be indicative of the fact I'd like to think it is, that he will undertake that therapy. The fact that he is now, in other words, a good citizen in employment. The fact that he was very young at the time. Those are factors which go to sentencing is a subjective issue. One sentences this accused for these offences.

So, on the basis of those factors I think the appropriate sentence is in or about eight years. One then has regard to the mitigating factor, one can describe the factors to which I've already referred as mitigating, or one simply takes them into account as I do, which I think is the proper course, in terms of principle, when one assesses the individual, that is the crime and by reference to the criminal in question. Sentencing is not an exercise in vengeance, there are quite a number of conflicting factors which have to be balanced. But it seems to me that the greatest reduction which can be granted in the light of the seriousness of the offences by virtue of the plea is in or about two years. That is a high level of that is the highest possible level one may grant in respect of a plea in circumstances of this kind. And I say candidly that I'm influenced in part by the fact that there is a prospect of continued rehabilitation.

What I will do, however, is apart from my elaboration of the fact of those that factor earlier in my remarks, I will direct post release supervision for a period of four years. And I will direct that the supervision extend to terms that the order explicitly include the reference to the following, first of all that the accused will apply the directions of the probation and welfare service. Now, that is enough generally. But I think I'll further add that without prejudice to the generality of that order, he should participate in offence focus work, attend all appointments offered to him by the supervising probation officer, adhere to all requirements under the Sex Offenders Act and notify the probation officer of any change of address. I further direct that he should participate in a victim awareness programme. So that then is my sentence."

Grounds of Appeal
27. The principal complaint made on behalf of the appellant is that the sentencing judge's sentence of eight years was too harsh in the circumstances of this case, and in particular because the appellant was a minor at the time that the offences were committed. Counsel for the appellant contends that while such a headline sentence would not necessarily be inappropriate for the same offences committed in otherwise similar circumstances by a person who had attained his majority, it was not appropriate in circumstances where the appellant was a minor throughout the period of the offending, and was as young as fourteen when it first began.

28. In support of the submission that the appellant's culpability was reduced by his youth we have been referred to *R v Ghafoor* [2003] 1 Cr App R. (S) 84, in which the English Court of Appeal (Criminal Division) stated:

> *"The approach to be adopted where a defendant crosses a relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as 'a powerful factor'. That is for the obvious reason that, as Mr Emmerson points out, the philosophy of restricting sentencing powers in relation to young persons reflects both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that, in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults.*

29. It was further pointed out that this court previously considered *R v Ghafoor* in *People (DPP) v J.H.*, and stated:

> *"It is noteworthy that s. 52 of the Children Act 2001 provides that, firstly, a child under twelve years is incapable of committing an offence, and, secondly, that there is a rebuttable presumption that a child between twelve and fourteen years did not have the capacity to know that the act or omission concerned was wrong. These legislative provisions help to place the culpability of a fifteen year old in context."*

30. A second complaint is made that the sentencing judge only specifically referenced the plea of guilty as providing mitigation, in as much as he said "the mitigating factor is the plea", and it is suggested that other mitigating factors were not taken into account at all, or if so were not adequately taken into account.

Discussion and Decision
31. We are not satisfied that there was any error on the part of the sentencing judge in his selection of eight years as the headline sentence in the circumstances of this case. He was obliged to assess its gravity both by reference to the culpability of the offender and with reference to the harm done. The offending behaviour here was particularly egregious, and there were significant aggravating factors. In addition, there was very significant harm done to the victim. If the court had been sentencing for the same offences committed in otherwise similar circumstances by a person who had attained his majority, a headline sentence of eight years would not have been appropriate and a more appropriate starting point would be ten to twelve years. We are satisfied that a headline sentence of eight years in the case of this appellant, who was a minor at the time, was more appropriate and was within the sentencing judge's legitimate margin of appreciation.

32. However, that having been said we are somewhat concerned that there may have been inadequate reflection, in the circumstances of this case, of the mitigating factors. The effective discount was one of 25%, and certainly that was sufficient to reflect the plea in this case. Much is made by the respondent of the fact that the plea was not entered at the earliest opportunity, and of the fact that while some

33. degree of admissions were forthcoming from the appellant from a relatively early stage, he did not however admit to the most serious matters, i.e., the oral rapes, until quite late in the process. It was suggested that in those circumstances the plea would have attracted less weight in mitigation than it otherwise might.

34. The Court does not disagree that earlier pleas would have entitled the appellant to even greater discount than he was afforded, but it cannot be gainsaid that the pleas were nonetheless valuable in this case even at the stage at which they came. There was, at the end of the day, a full taking of responsibility; ostensible remorse; significant co-operation with the investigation; there had been significant delay which was not the appellant's fault; the appellant had never offended in the same way previously and (notwithstanding his conviction for two minor public order offences) required to be treated as a person with no relevant previous convictions; the appellant had taken significant steps towards his rehabilitation; the appellant was now married and in gainful employment, he has not come to adverse notice since the offences were first disclosed in 2004, and though he has been assessed as being of moderate risk of re-offending and as a man who needs to engage in therapeutic supports as part of his continued rehabilitation, he had evinced a willingness to do so.

35. We consider that in the circumstances there was insufficient discount for mitigation, and in particular there was inadequate reflection of his progress towards rehabilitation to date, and nothing in the sentence as structured by the court below to incentivise his continued rehabilitation. That was an error of principle in the circumstances of the case.

36. We will therefore quash the sentence in the court below and substitute for it a sentence of six years imprisonment with the final two years suspended for two years on condition that the appellant does not reoffend, and further on condition that he engages with therapeutic services while in prison, and submits to the supervision of the Probation Service, and co-operates with them in every way, during the suspended period of his sentence.