



THE COURT OF APPEAL

Birmingham J.
Sheehan J
Mahon J.

Appeal No. 166/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

J. D.

Appellant

Judgment of the Court delivered on the 23rd day of October 2015 by Mr. Justice Mahon

1. On 22nd March 2013, the appellant pleaded guilty to nineteen offences of sexual assault, possession of child pornography and allowing a child to be used for the production of pornography.
2. On 1st July 2013 the appellant received a sentence of eleven years (with the final two years suspended on conditions) in respect of the first count of sexual assault, and the other counts were taken into consideration. The appellant was also ordered to be placed on the Registrar of Sex Offenders for an indefinite period. This is an appeal against severity of sentence.
3. The victim of the sexual assaults and the object of the child pornography was the appellant's daughter then aged thirteen/fourteen. The offences were committed over a period of approximately twelve months between April 2010 and April 2011. The victim is now eighteen years old.

Background facts

4. On 3rd April 2011, the appellant's wife, and the mother of the victim, discovered a number of pornographic photographs of her daughter on a digital camera in the hallway of the family home. Gardai were alerted and the appellant was arrested later on the same day. In the course of a search of the family home, a number of computer storage devices were found containing images of a pornographic nature depicting the appellant's young daughter. It was also discovered that the attic of the house had been converted into what was referred to as a "dress up room" containing a number of sexualised costumes. In the course of the search of the computer storage devices 1,150 still images and 74 movie images focussing on the genital area of the young victim were found, and a number of these also depicted the appellant. The appellant immediately accepted that he had constructed sexualised scenes with his daughter but sought to maintain that the victim was a willing participant, stating that he did not see anything wrong with what had occurred. The appellant identified himself in various movie images simulating intercourse with his daughter. He denied any intention or desire to have intercourse, stating that what had occurred was simply "a bit of fun".
5. In the Victim Impact Report presented to the Circuit Criminal Court, the appellant's daughter spoke of her inability to forget the abuse that had occurred and particularly so as it had occurred in her own home. She had a difficulty with dealing with it in her own mind when alone.
6. The details of the sexual abuse and the recording of pornography with the young victim as its main focus were provided to the sentencing court.
7. The appellant pleaded guilty, and thus saved the young victim from the necessity to give evidence. His plea of guilty however was made at a relatively late stage in the proceedings, and only after a trial date had been sought on two occasions. The learned sentencing judge described the plea of guilty in the following terms "...I obviously have to take into account the belated plea. Obviously, it probably could not be termed an early plea but even a plea at a late stage in this type of case is valuable and he has to be given credit for that".

The submissions

8. In the course of his submissions to the court, counsel for the appellant contended that the offences to which the appellant pleaded guilty were not at the upper end of the gravity scale, and were rather at the medium level of that scale. The Respondent, on the other hand, maintained that the offending in this case was at the "top end of gravity". The Respondent contended that the surrounding circumstances in this case were of particular importance and made the case especially serious, and in particular, the filming of the sexual assaults and the extra degradation caused to the victim thereby. It was submitted that the offending was aggravated by efforts on the part of the appellant to alienate his daughter from her mother. The victim stated that her father wanted her to hate her mother. There was, as was submitted by the Respondent, a degree of calculated approach to the offending and that the pre-mediation element was "highly significant", and was undertaken in a planned and organised fashion.
9. Counsel on behalf of the appellant also emphasised the absence of previous convictions and the fact that the appellant pleaded guilty. His personal circumstances including a disability resulting from type 1 diabetes, and the current risk that his home will be re-possessed were also relevant mitigation factors.
10. Submissions made by both the appellant and the respondent were particularly helpful in this case. Considerable research was undertaken to identify comparative cases to assist the court in identifying the range of sentences for broadly similar offences. This case however is quite unusual in that it involves both sexual assault AND video recording of that activity. The learned sentencing judge described the case in the following terms:-

"Obviously the abuse was not the most serious that these courts unfortunately have to deal with but there were numerous times and obviously, the aggravating factor that he photographed all this and made movies of it. It is difficult to understand why Mr. D did not think this was seriously wrong when interviewed. The mind boggles that a man of his maturity and age had any doubts that what he was doing was incredibly wrong, but it seems that he betrayed a certain lack of insight.. It is an appalling case to put it mildly".

11. A number of decisions of the Court of Criminal Appeal and this court were opened in the course of submissions. None could be said to fully reflect the somewhat unusual feature of this case, namely a father accused of both sexually assaulting his young daughter and recording such assaults presumably for future viewing. This court was referred to a recent newspaper report of a term of five years (with one year suspended) being imposed on a father who was filmed abusing his daughter. Another case referred to on behalf of the appellant was *DPP v. P.D.* [February 2014] where a stepfather was jailed for eighteen months for abusing his stepdaughter when she was thirteen years old.

12. It was suggested on behalf of the appellant that taking all of these decisions in the past into account, and with due regard to the different factors in each case, a sentence of eleven years imprisonment, with the final two years suspended, appeared excessive.

The decision

13. It is impossible to describe this case as anything but extremely serious. The maximum sentence for this offence is fourteen years. A sentence of eleven years, albeit with the last two years suspended, indicates that the learned sentencing judge placed the offending in this case at the higher end of the spectrum, although he expressed the view that it "*was not the most serious that these courts unfortunately have to deal with..*". He quite correctly observed that an aggravating factor was the photographing and recording of the sexual abuse perpetrated by him on his young daughter.

14. In this case there was a clear and gross breach of trust as between a father and his young daughter. The abuse took place over a prolonged period of time. It was repetitive, pre-mediated and systematic. It was rendered significantly more serious in that it was photographed and recorded, presumably for future use.

15. This court has identified one error of principle, to this limited extent. The sentence of eleven years (albeit with the final two years thereof suspended) is indicative of an offence at the very highest level in terms of gravity. It is however the case, and this appears to have been accepted by the learned sentencing judge, that the offending was not quite at that level. This court agrees with this assessment, but in doing so it is nevertheless of the view that the offending was of a very serious level and on a level requiring a significant custodial sentence.

16. The court is therefore satisfied that it is appropriate to set aside the sentence, and it will proceed to impose a new sentence in substitution for that sentence in due course, subject to any further submissions the parties may wish to make.