



**THE COURT OF APPEAL**

**[322/18]**

The President

Edwards J.

Whelan J.

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**BARRY WATTERS**

**APPELLANT**

**JUDGMENT (Ex tempore) of the Court delivered on the 25th day of June 2019 by Birmingham P.**

1. This is an appeal against severity of sentences. The sentences under appeal are sentences of five years imprisonment with the final 12 months of the sentence suspended that was imposed in respect of the offence of possession of child pornography and a sentence of two years imprisonment in respect of the offence of committing an indecent act in public, along with a lesser concurrent sentence that was imposed in respect of an earlier count of committing an indecent act in public. The sentence for possession of child pornography was made consecutive to the sentence in respect of the offences of committing an indecent act in public.

2. The background facts relating to the offence of committing an indecent act in public relate to events that occurred on 1st December and 2nd December 2014 in the Francis Street area of Dublin. On the first occasion, a youth worker, who was active in the area, observed a man, it was the now appellant, with his penis hanging out of an open zip and saw him walking up to a group of girls who had gathered to attend a music college. The man then encountered a number of primary schoolchildren. One, Emily, aged 11 years, found a man in front of her holding his penis in his left hand. She told her teacher and the school Principal. Another child, Kate, aged 9 years, also saw a man with his penis sticking out, and in her case, told her parents. The following day, she showed the "dirty man" to her father when she was attending at a breakfast club which is held in the area. On the following day, 2nd December 2014, the second day of these incidents, Kathleen, aged 10 years, and her friend, Alex, saw a man with his penis out. The man put his penis on Kathleen's arm, but she was unsure whether that was intended or accidental. The breakfast club social worker contacted the Gardaí with the result that in April 2016, the appellant was charged with these offences. He entered pleas of guilty when the matter was listed for trial. It was accepted, though, that the case should be dealt with as one where there was an early plea of guilty. This was in a situation where the constitutionality of the charges originally laid was in issue and where those charges were substituted with the offences contrary to common law in respect of which pleas were ultimately entered. It is also the case that the indictment had contained a count of sexual assault. So, it is in those circumstances that it is accepted on both sides of the Court that the case is to be dealt with as an early plea.

3. So far as the possession of child pornography aspect is concerned, that came to light when Gardaí, on 20th October 2016, came upon the appellant in Dublin city centre. They followed him into an Internet café on Middle Abbey Street in Dublin. With the assistance of the café manager, Gardaí were able to establish that the appellant was accessing social media dating sites and was moving between those sites and sites showing photographs of preteen boys and girls, with girls in bikinis. When he left the premises, Gardaí approached him and spoke to him and he produced a USB stick to them. In all, there were some 422 images on that stick, of which 23 were of concern. Seventeen showed images of boys and girls engaged in sexual activity with other children and with adults, and six showed children with their genitals exposed.

4. In terms of the appellant's background and personal circumstances, he was born in April 1976, so he is now 43 years of age. He had not been in any trouble until he reached 32 years of age. Up to that point, he had lived with his parents, but thereafter, he had accumulated six previous convictions, one was for criminal damage, which apparently related to damaging a Garda cell in which he found himself as part of the investigation of another matter. But in 2008, he had received a two-and-a-half-year sentence in respect of the offence of possession of child pornography. That sentence was suspended. However, it was activated in 2009. He then received a sentence of three years imprisonment in 2010 in respect of a similar offence, and a sentence of four years, with the final 12 months of the sentence suspended, in 2012. Again, that was a sentence in respect of the offence of possession of child pornography. That matter, too, was re-entered in December 2014 when he was in breach of a number of conditions of the suspension, including conditions which restricted him from entering Internet cafes. The Francis Street public indecency offences were committed some eight or nine days before the reactivation application was due to be dealt with by the courts.

5. At the sentence hearing, there was a psychologist's report before the Court. Among the findings of the psychologist were that the appellant suffered significant cognitive deficits. His thinking and reasoning ability was exceeded by 97% of adults of his age; his general cognitive ability was in the borderline range of intellectual functioning and the report queried whether he was on the Autism Spectrum Disorder.

6. A number of points are raised on the appeal. The Judge is criticised for imposing the maximum sentence in respect of the public indecency offence. It is said that in doing so, she fell into error. The Judge is also criticised in the written submissions for describing the fact that he did not speak to the children that he encountered as an ominous factor. Again, it is also said that the imposition of

the maximum sentence for child pornography was inappropriate, albeit that in the case of the child pornography offence, the final 12 months of the maximum sentence was suspended.

7. The appellant takes what might be described as a somewhat restrained approach to the appeal. The seriousness of the offending is acknowledged. There is a recognition of the extent of the loss of mitigation that has occurred by reason of the fact of directly relevant previous convictions. Indeed, there is an acceptance that that is an aggravating factor and there is a realistic recognition that the sentence that was going to be imposed on the child pornography offence was always going to be very different from what would have been expected to be imposed on a first offender of otherwise previous good character who was found in possession of a similar quantity and nature of child pornography. But, it is said, that the imposition of the actual maximum sentence on the public indecency and a maximum sentence on the child pornography, mitigated only by the suspension of 12 months, was an impermissible approach. It is said that notwithstanding the very significant prior record, that Mr. Watters had not reached the stage where the entry of a plea of guilty would not inure to his benefit.

8. This Court sees some substance in the points made by the appellant. It does so to the extent that it feels necessary to intervene. So far as the public indecency aspect is concerned, this was very serious offending. Indeed, notwithstanding the fact that a lower maximum sentence was available, it might be seen as the more serious aspect of the overall offending before the Court. Nonetheless, in the Court's view, the imposition of the maximum sentence was not appropriate. Counsel for the DPP says that a similar result could well have been achieved by the trial Judge assessing the sentences somewhat differently. The Court does see force in that argument, but notwithstanding that, is of the view that the imposition of the maximum was not the appropriate course of action. The Court will adopt the same approach as the trial Judge of opting for concurrent sentences in the case of the two public indecency matters.

9. So far as the first offence in time is concerned, the Court will impose a sentence of 12 months imprisonment, as had happened in the Circuit Court. In the case of the second offence in time, and the Court agrees with the assessment of the Circuit Court Judge that the fact that this was a repeat offence committed in the same area adds to the gravity, the Court will impose a sentence of 20 months imprisonment.

10. So far as the child pornography offending is concerned, the striking factor, and it must be said highly unusual factor, is the presence of directly relevant previous convictions. It is the case that the quantity and nature of the material located was not such that a maximum starting point would ordinarily be considered, and even in the particular circumstances of this appellant, the Court's view is that the maximum starting point was not the place to begin. In the Court's view, a more appropriate starting point would be one of four years imprisonment, and in respect of that sentence, the Court will suspend 18 months. The child pornography sentence will, as it was in the Circuit Court, be consecutive to the public indecency offence.

11. The effect of all of that is that the sentence, therefore, will be an aggregate sentence of five years and eight months, and of that, the final 18 months will be suspended. It will be suspended on the same terms and conditions as applied in the Circuit Court. In the Circuit Court, some eleven conditions had been stipulated.

12. The Court has hesitated about providing for a structured sentence and for a sentence that involves a part-suspended element. The Court is conscious that on two occasions, efforts to encourage and incentivise Mr. Watters by way of part-suspended sentences have failed and that on two occasions, part-suspended sentences were activated. Nonetheless, the conditions identified by the Circuit Court Judge were quite elaborate, they were identified against the background of the psychologist's report and the detailed probation reports that were available, and in the Court's view, offered some grounds for hope that they will provide a degree of structure and supervision for the appellant's lifestyle and thus discourage further offending. If that does not prove to be the case, if Mr. Watters reoffends, then it is very likely what will happen in the future is what has happened in the past.

13. In summary, then, the Court will quash the sentences imposed in the Circuit Court and substitute the sentences indicated.