THE COURT OF APPEAL

[99/18]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GERARD O'GRADY

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 13th day of February 2019 by Birmingham P.

1. This is an appeal against severity of sentence. The sentences under appeal were sentences of six years imprisonment with two years suspended and a sentence of four years imprisonment, concurrent, which were imposed in the Cork Circuit Criminal Court on 6th March 2018.

2. The case concerned offending behaviour between 1st January 1982 and 31st January 1985. There were two injured parties, MD and JD. One of the counts on the indictment related to JD while the remaining counts related to MD.

3. The offending occurred when the appellant was babysitting for the injured parties at their home. At the time, he was between the ages of sixteen and nineteen years and the injured parties were approximately six years and eight years younger than him, respectively. The offence involved indecently assaulting the injured parties by fondling them, simulating sexual intercourse, performing oral sex, and in the case of the injured party, JD, penile penetration of his anus.

4. At the sentencing hearing in the Circuit Court, there were letters and testimonials from the appellant's General Practitioner and from his employer. The Sentencing Court heard that he was 52 years of age at the time of the sentencing hearing, that he was married, that he has four adult children and that he was employed as a painter. There was reference to his significant hearing difficulties, suggested that so significant were those difficulties that it was likely to give rise difficulty for him in a prison setting and to trauma that he had experienced during his upbringing. His father had died when he was a very young child, aged approximately six years, and he had the experience of witnessing a friend drown at a time when they were skimming stones together at a river. There was reference, also, to his good and continuous history of employment and a note or letter from the appellant's wife was also handed into Court. During the course of the sentence hearing, the appellant entered the witness box in order to convey personally an apology to both injured parties. He explained to the Court that at the time the offending began, that he did not recognise or understand what he was doing and he linked his development of any sense of understanding to the birth of his first child, some five or six years after the abuse ceased. It is clear that the Sentencing Judge was impressed by what he had heard from the appellant from the witness box because in the course of his sentencing remarks, the Judge, who is a particularly experienced one, commented "he now has a good understanding of the damage he did and he apologises for that. That's probably genuine. It's certainly more genuine than the usual trite expression of remorse that one hears in this Court".

5. It is necessary to examine the offending conduct in a little bit more detail. JD was ten or eleven years old at the time when he was anally penetrated. The appellant was eight years older than the injured party at the time of the offence. After the incident, the appellant sent the injured party to bed and told him that if he told his parents what had happened, that they would either be taken away or that the appellant would hurt them.

6. So far as the other injured party, MD, is concerned, he was the eldest of the D family. It was the practice of his parents to go out on Saturday nights and the appellant was a regular babysitter. He was seven years older than MD. At the time of the offences, the appellant was between sixteen and nineteen years and the injured party was between ten years and thirteen years of age. While babysitting at the D family home, the appellant would allow the injured party to stay up late to watch television, while his younger siblings were upstairs in bed. Virtually every Saturday, indeed, the injured party says every Saturday that the appellant babysat, he abused MD. The abuse would occur in a number of ways. Firstly, the appellant would perform oral sex on the injured party, he would lie the injured party on the floor and then lie on top of him and simulate having sex until such time as the appellant would ejaculate. The injured party indicated that as he was getting older, he tried to say no to the appellant, but that the appellant went into the hall and threatened "to do" the injured party's sisters if the injured party did not play along with him. The injured party wanted to protect his sisters so he went along. On another occasion, the appellant took out his penis and threatened to urinate all over the house and to tell the injured party's parents that he injured party had done it. On occasions, the injured party was required to wear tights in response to demands to that effect from the appellant. Throughout the period of abuse, the appellant behaved in a bullying manner to the injured party, name-calling, telling him repeatedly that he was ugly and useless and that nobody would believe him.

7. The sentence hearing heard victim impact statements from both injured parties. It is clear that the abuse has had a very significant and long-term impact on both injured parties, and given the nature of the abuse, that is scarcely surprising.

8. In the course of the appeal hearing, counsel has described the sentences imposed as "a little heavy". She has emphasised the fact that the offending occurred when the appellant was very young, in his teens, that it occurred a very long time ago, but that the complaints emerged only in 2016, and notwithstanding that, there had been absolutely no contact between the appellant and the injured parties over the intervening period.

9. When imposing sentence, the Judge commented "on any reading of the facts, this is an offence at the higher level of what can be expected to come before the Court in relation to indecent or sexual assault. The events are in themselves individually gross. The penetration signifies a degree of depravity, the use of the tights, the use of threats on occasions, these are all significant aggravating factors".

10. This Court would agree with the Judge's assessment. This was serious offending indeed. The single offence involving the injured party, JD, is the most serious form of sexual assault and, nowadays, such incidents would be expected to be dealt with in the Central Criminal Court. So far as MD is concerned, the offending was consistent and sustained. The fact that there were two injured parties adds an additional dimension of seriousness as does the very young age of both victims and the breach of trust that was involved. As we have seen, there were aspects of the conduct calculated to degrade and humiliate. The Judge instanced, correctly, in our view, the issuing of threats on occasions as a very serious aspect of the matter indeed.

11. There were, of course, significant factors present to the credit of the appellant. The many years during which he did not reoffend or come to adverse Garda attention, his family and employment situation, the pleas that were entered, the degree of insight that he now displays and the expression of remorse. However, a reading of the Judge's sentencing remarks, brief as they admittedly are, leaves no room for doubt that the Judge was fully conscious of all of these and that they were reflected in the sentence imposed. While the Judge did not specifically advert to the option of consecutive sentences, it is the case that this would have been an option that was open to her. Her decision not to adopt that approach, and instead, to make all sentences concurrent was very much in ease of the appellant.

12. Overall, in the Court's view, it cannot be said that this was an inappropriate sentence for offending of such seriousness, even when all of the many factors in favour of the appellant had been taken into account. We have not been persuaded that the sentences imposed were excessively severe. On the contrary, we are of the view that the sentences imposed fell within the available range.

13. In those circumstances, this Court is obliged to dismiss the appeal.