THE COURT OF APPEAL

[96/18]

The President
Edwards J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JIM BYRNE

APPELLANT

JUDGMENT of the Court delivered on the 25th day of November 2019 by Birmingham P.

1. The appellant has appealed against the severity of sentences imposed upon him. The sentences under appeal were imposed in the Central Criminal Court on 23rd March 2018 in relation to a range of sexual offences that dated back as early as 1981 and continued until 2015 in some form. The aggregate sentence imposed on that occasion was one of 20 years imprisonment structured on the basis of a sentence of eight years imprisonment and three sentences of four years imprisonment, each consecutive to the others.

2. By way of background, it should be explained that on 1st August 2017, the appellant was convicted by a jury on two counts of rape and 27 counts of sexual assault. These charges were set out in Bill No. 58/2016 which dealt with offending that occurred between 1st July 2004 and 28th February 2015, at three different locations. The appellant was the paternal grandparent of the complainant, D. The prosecution's case was that the appellant committed sexual assaults against that complainant from when he was four years of age. This involved the appellant putting the complainant's hand on his penis, the appellant putting his penis into the complainant's mouth, and the appellant putting his hand on the complainant's penis. It is alleged that after the complainant turned eleven years old, that the appellant committed further sexual assaults against the complainant, in that he touched the buttocks of the complainant with his penis, and on two occasions, committed rape contrary to s. 4, in that the sexual assault involved the penetration of the anus of the complainant.

3. In respect of Bill No. 61/2017, on which Bill pleas of guilty were entered, the appellant was charged with 20 counts of indecent assault, two counts of rape, and one count of attempted rape. On this Bill, there were three complainants, these being the daughters of the appellant. The prosecution's case was that the appellant had committed indecent

assaults against each of them during their childhood. In the case of one complainant, there was an attempted rape, and in the case of a second complainant, two actual rapes. In the case of the complainant, S, the offending occurred between 1981 and 1986 when the complainant was between the ages of nine and fourteen years. In the case of the complainant, A, the offending occurred between 1981 and 1987, when the complainant was between the ages of eight and fourteen years. So far as the complainant, C, was concerned, the offending occurred between December 1981 and December 1987 when the complainant was aged between eight and thirteen years.

Victim Impact Statement

4. The sentencing hearing on 12th March 2018 heard that the offending had a very significant impact on the lives of each complainant. In the case of the male complainant, the offending emerged when he went to the career guidance teacher in his school in the company of a friend. It appears friends of his had succeeded in persuading him not to take his own life the day before and decided to involve the school authorities. There was a history of suicidal ideation and he was admitted to a psychiatric hospital in May/June 2015. So far as the female complainants are concerned, in C's case, a victim impact statement was read and referred to the fact that in her teenage years, she suffered from depression and anxiety and tried to kill herself on a number of occasions.

5. So far as the three female complainants are concerned, the eldest and youngest addressed the Court during the course of a sentence hearing on 12th March 2018. The eldest spoke of having lived a life in fear for thirty years. She described her fear turning to guilt upon discovering that the appellant had not only abused her, but had also abused her sisters and her nephew. The appellant's youngest daughter referred to the fact that her childhood was stolen and that the offending had left her without any sense of confidence or self-worth. There was reference to the fact that she suffered depression and anxiety throughout her teenage years and attempted to kill herself on a number of occasions.

Plea in Mitigation

6. So far as the appellant's own background and personal circumstances were concerned, he was 68 years of age at the time of sentencing, he had no previous convictions and had not otherwise come to the attention of Gardaí. He had a good work record, working in various different capacities, including driving a taxi. At other stages, he had worked as a bus conductor and in a garage. The plea in mitigation at trial focused on the fact that there were no threats of any kind made to the victims, and that other than the violence inherent in the offending, there was no additional or gratuitous violence over and above that involved.

7. At this stage, the grounds of appeal are based on the contention that the sentence imposed was excessive in not having sufficient regard to the personal circumstances of the appellant, to the nature and character of the offence, the fact that guilty pleas were entered in respect of the offences on one Bill, and having regard to the totality of the circumstances. There is also criticism of levelled at the trial judge for exercising his discretion to impose consecutive sentences. It is said that there were no adequate

reasons given for the decision to impose consecutive sentences and that the principle of proportionality was not adhered to.

The Judge's Approach to Sentencing

8. In the course of his sentencing remarks, the trial judge observed that he had to have regard to the fact that Mr. Byrne was 68 years of age, and while that did not make him particularly old, that it was something that had to be taken into account. The purpose of sentencing was not vengeance; Mr. Byrne could not be sentenced in the same manner as a younger man might have been. He placed emphasis on the totality principle, observing that it can pose difficulty in cases involving serial sex abuse because the only way to uphold that principle is to impose lower sentences than might otherwise be expected in relation to particular offences, but to allow them run consecutively. Bearing that in mind, the judge began by addressing the offences committed against the appellant's grandson. The Court said that, ordinarily, an appropriate sentence in respect of the s. 4 rape counts would be one of fourteen years. Similarly, it was said that an appropriate sentence in respect of the miscellaneous sexual assaults would be twelve years. However, the judge felt that it would not be just or in accordance with the totality principle to simply impose sentences of that length and add them together. Instead, while seeking to differentiate between the two categories of offending, the judge imposed concurrent sentences of eight years in respect of each.

9. In relation to the offences that had been committed against the appellant's daughters, the judge felt that an appropriate sentence in respect of the indecent assault charges would ordinarily be nine years in circumstances where the maximum that could be imposed was ten years. However, there had been a plea of guilty in relation to these offences and that warranted a reduction of the sentence to one of six years and with a further reduction to four years required in light of the totality principle.

10. In respect of the rape offences committed against the appellant's daughters, concurrent sentences of eight years imprisonment were imposed, but these were also to run concurrently with the eight years imposed in respect of the rape charges committed against the grandson. This, the trial judge explained, was so as to mark the offences without further extending the custodial period. In considering the complaints about failure to have regard to proportionality and totality, it is noteworthy that the judge made the various rape sentences concurrent with each other so as to avoid an unduly lengthy sentence. Had the judge simply imposed the sentence that he regarded as appropriate in respect of each complainant, even when discounted, this would have resulted in a greater sentence than that which was actually imposed.

Discussion

11. The Court begins its consideration of the issues on this appeal by observing that this was offending of the utmost gravity, committed over a very prolonged period against four vulnerable young complainants. We are in no doubt that in the circumstances of the case, it was well within the judge's discretion to decide to impose consecutive sentences so that the sentences relating to offences committed against a particular complainant would be served consecutive to each other.

12. Having regard to the circumstances of the offending, and particularly, the duration of the offending, ordinarily, the Court would not regard a headline or pre-mitigation sentence of 20 years as being at all excessive. Indeed, absent very significant mitigation in a particular case, such offending might well result in a sentence of 20 years to be served. In the present case, however, the Court has one concern. The judge referred to the age of the appellant, 68 years at the time of sentencing. As we have seen, he observed that that did not make the appellant particularly old, but that it was something that had to be taken into account. If it was a case where the judge was contemplating a short sentence, something unthinkable in the circumstances of the case, or even a significant sentence, though not of the order that was imposed, that observation would be entirely appropriate. However, in the Court's view, where the nature of the offending was such that a very lengthy sentence had to be considered, the Court feels that the age of the appellant at the time of the sentence hearing ought to have been afforded specific weight. One has to have regard to general life experiences, and particularly to life expectancies, and even if one takes some account of the fact that, generally, prisoners receive remission on their sentences, it is nonetheless the case that imposing a sentence of 20 years imprisonment on a 68-year old is likely to see the person sentenced serving all or the greater part of whatever life he has remaining in custody. It seems to us that this was an issue which it would have been appropriate to address specifically, and had it been, that it would likely have resulted in some limited amelioration of the sentence.

13. Being of the view that it is an issue that we feel ought to have been specifically addressed, we will quash the sentence imposed in the Central Criminal Court, and in order to address the issue, substitute for the sentence imposed in the Central Criminal Court, the same sentence as was imposed there, but with the difference that we will suspend the final two and a half years of the aggregate sentence unconditionally.