THE COURT OF APPEAL

Record No: 160/2016

Birmingham P.
Woulfe J.
Edwards J.

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

T. D.

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered by Mr Justice Edwards on the 4th of March 2021.

Introduction

1. On the 1st of February 2016, the appellant pleaded guilty to nine counts on the indictment, which consisted of two counts of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act, 1990 ("The Act of 1990"), and seven counts of sexual assault contrary to section 2 of the Act of 1990.

2. The appellant was sentenced on the 25th of April 2016 to eight years' imprisonment, with the final year thereof suspended upon conditions, on each of the s.4 rape counts; and three years' imprisonment on each of the sexual assault counts; with all sentences to run concurrently and to date from the 15th of April 2016.

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

Background facts

4. The appellant in this case is the first cousin of the victim. They were born in 1996 and 1990 respectively, making the appellant approximately six years older than the victim. The marriages of their respective parents had broken down, resulting in their spending time regularly in their grandparents' home in a rural village, where the victim's father was also residing. The victim visited and stayed with her grandparents once a fortnight, while the appellant did likewise once every two months, and his visits were concurrent with visits by the victim.

5. The offending behaviour occurred during a four-year period and each of the charges on the indictment was charged as having occurred on a date unknown between the 20th of April 2004 and the 20th of April 2008. Accordingly, it commenced when the victim and appellant were 8 years old and 14 years old, respectively; and continued until they were 12 years old and 16 years old, respectively. The sentencing court heard evidence that

gardaí were satisfied that the offending conduct began with experimentation based on pornography the appellant had seen and it progressed in seriousness over the course of the next four years. The investigating garda accepted under cross-examination that the victim's father used to make the appellant watch pornography on the television from the age of 12. When he would try to leave the room when pornography was on the television his uncle would become abusive and would say to him "*are you gay*?". It was viewing this material that led to the appellant's early experimentation with the victim.

6. The evidence before the sentencing court was that the victim was not sexually assaulted by the appellant on every occasion that they were together, but there were nevertheless a good many such incidents. It began with the appellant feeling the victim's breasts in his bedroom, and this then progressed to touching her outside her vagina, both over and under her clothes. The appellant accepted that there were a number of incidents where he inserted his penis into the mouth of the victim. There was also an incident where the appellant inserted his finger inside her vagina.

7. Several incidents were remembered with specific detail by the victim and are as follows. The victim described one occasion, when she was around 9 or 10, on which she was in the appellant's room. She said the appellant was playing his guitar or on the computer, and he asked her to touch his penis. She did so, following which the appellant masturbated himself and ejaculated into a tissue, which he then threw in the bin. This incident was said to have lasted about five minutes.

8. The victim described another occasion, while she was 10 or 11, when the appellant asked her to suck his penis. He pulled his trousers and underwear down to his knees, and the victim took his penis into her mouth for a few seconds. He then masturbated in front of her and ejaculated into a tissue which he threw into the bin.

9. She recalled yet another occasion, when the appellant asked her to suck and lick his penis and testicles, and then asked to see her vagina. He had pulled her bra up to feel her breasts, and upon seeing the victim's vagina, the appellant commented on her hair and asked whether she was going to shave.

10. On another occasion the appellant showed the victim his erect penis, but nothing further occurred at that time.

11. On yet another occasion the appellant, while in his own bedroom, felt the victim's breasts, and inserted his finger into her vagina. She said that it hurt, but that he then removed it and proceeded to masturbate.

12. At one point the appellant asked the victim to taste the semen on the tissue, and on another occasion, from his penis. On one occasion, when the appellant was 15 or 16 by his own account, and the victim was 9 or 10, he tried to insert his penis into the vagina of the victim but was unsuccessful in doing so. He then proceeded to masturbate.

13. The victim recalls that on yet another occasion the appellant felt the victim's breasts as she lay on a bed. He pulled her clothes down, but she would not let him insert his finger into her vagina. He then pulled the leg off of her Barbie doll and attempted to insert that object into her vagina. He then masturbated himself.

Impact on the victim

14. The victim in this case prepared a victim impact report for the court below, in which she stated that she had previously enjoyed an innocent childhood and had nice memories of going for walks with her cousins and grandmother, and had loved visiting her grandparent's house, but that this all changed for her at the age of 8. The victim stated that her innocence was taken away by a person she liked and trusted. Because of what happened she felt as if she never fitted in and was not a normal child, as she knew of no-one else who had experienced anything similar. She said she had felt dirty, that it was her fault and that she had invited this.

15. The victim said that what had occurred consumed her mind and that her education was negatively impacted by the underlying dread of visiting her grandparents' house. She began self-harming at the age of 13 and often felt suicidal. She still, seven years later, hesitated to go out shopping or to spend a night with friends lest she encounter the appellant. She says she is unable to commit to serious relationships with men because of anxieties over sexual motives they might have. She described being hopeful that the conclusion of the case might bring her some peace.

16. Within the last 24 hours we have been furnished, on an agreed basis, with an updated victim impact statement. It makes poignant reading, with the victim speaking of still having sleepless nights, of still struggling to cope on a daily basis, and of suffering on-going depression and anxiety directly linked to her abuse at the hands of the appellant. Understandably much of her statement is focused on communicating her apprehension and worry about the prospect of the appellant being released. This was due to happen in any event in July of this year, but the victim's concern is that this might occur even earlier because of this appeal. We note her concerns and are sensitive to them. We do not interpret them as being motivated by a desire for vengeance, but rather as reflecting her very real concerns and fears about possibly encountering the appellant at some point after his return to the community in which they both live, and her worry about how she might deal with that. We will take what she says into account in the event of seeing fit to intervene but will also have to keep sight of the fact that we are constitutionally mandated to ensure that any sentence imposed on the appellant is proportionate, both with respect to the gravity of the offending conduct and with respect to the circumstances of the offender.

Circumstances of the appellant

17. The appellant was 26 years old at the time of sentencing. However, he had been a minor throughout almost the entirety of the four-year period of his offending, which ceased when he was 18. He had no previous convictions. The offences had come to light in late 2010 following a report to gardai by the victim, leading to the appellant's arrest on the 5th of November 2010. He was fully co-operative with the investigation and made

extensive admissions. After he was charged he was admitted to bail subject to conditions and it is accepted that he honoured the relevant conditions. It is also accepted that he has not further offended or come to adverse notice in any way since his arrest. The evidence was that he had indicated an intention to plead guilty at an early stage, but that as the court date for his arraignment drew near he developed what was characterised by his counsel as "*cold feet*", leading to the setting of a trial date. However, he did ultimately plead guilty approximately a month before his trial was due to begin. The appellant's counsel properly informed us that there had been an earlier trial date on which it had not been possible for the case to be heard, necessitating a rescheduling. The guilty pleas were entered approximately a month before the rescheduled trial date.

18. At the time of his sentencing he was self-employed as a bicycle repair man. He was by that stage sharing a flat with several housemates in an urban area. There was evidence that his parents had separated when he was around 5 years old. His mother is now in a new relationship, and the appellant has four younger half-siblings from that new relationship. He has a good relationship with his mother, but very little contact with his father. His father, who now lives elsewhere in the same county, has remarried and has had further children in his new marriage. The appellant is said to have suffered both physical and mental abuse at the hands of this uncle, the victim's father. The appellant informed the gardaí that he suffers from attention deficit hyperactivity disorder (ADHD), for which he was prescribed Ritalin.

19. The Court was provided with a report on the appellant from a consultant psychologist, who described, inter alia, erratic behaviour and poor mood control consistent with ADHD. The psychologist was informed by the appellant when taking a history from him that he was diagnosed as having ADHD by Brothers of Charity Services, but no report confirming this was provided to her.

20. The psychologist reported that he had poor coping strategies and was showing patterns of behaviour both destructive to his mental health and physical well-being. He had high anxiety and stress levels, low self-esteem and the history provided included suicidal ideation. He had significant reactive and clinical depression and was not sleeping properly. His insight as to the effect of his crimes on the victim was said to be poor. The psychologist expressed the view that the appellant had disconnected from himself as a perpetrator and was viewing the abuse externally, for which he would likely require counselling and medication. For his part, the appellant recognised the need for counselling and intended to avail of it if offered in prison.

21. The appellant was described as quite an insular person who prefers to spend time playing music alone. He has expressed remorse for his actions and upset about the hurt he had caused the victim and the family, but had not done so prior to his arrest. However, he did state that he had attempted to call the victim's father, but he was rejected and was later told not to call again. His actions have caused him a great deal of distress to the point where he has considered suicide. The appellant had informed his counsel that he intended to personally apologise in court, but was unable to do so due to a panic attack.

Remarks of the sentencing judge

22. The sentencing judge began by recounting the facts of the case without detailing the specifics of each remembered incident. He then summarised the victim impact report. He then acknowledged the guilty plea but said that he could not afford him any credit for an early plea, stating that while it was of some benefit to the victim not having to give evidence, she would have been anticipating having to do so for some time. He recognised the lack of previous convictions, which he characterised as "*not unsurprising*" (sic) as "*very few offenders of this type have convictions*".

23. The sentencing judge then turned to the circumstances of the appellant and accepted that he suffered from the attention deficit hyperactivity disorder. He also noted the appellant's self-admitted panic attacks, obsessive compulsive tendencies, and ritualistic behaviour. He acknowledged the difficulties faced by the appellant, both educational and familial, and that his understanding of sexual matters and capacity to deal with sexual matters may have been adversely affected by his exposure to pornographic material on television at a young age. The sentencing judge noted the appellant's depression, anxiety and low self-esteem. He accepted that comments made by the appellant to the psychologist, to the effect that he would rather be labelled as a person who had killed himself than be labelled as a sex offender, represented an acknowledgement by the appellant of his understanding of the seriousness of his wrongdoing.

24. The sentencing judge quoted the concerns of the psychologist and commented that the appellant did not seem to have the capacity for coping well in society in general. The sentencing judge did accept that by his plea, the appellant had accepted responsibility.

25. The sentencing judge then stated:

> *"In the circumstances, I believe that the appropriate sentence for these multiple offences between the ages of when the complainant was six years younger than him and even though he was very young when they started between 2004 and 2008 is a sentence of in or about nine years. I believe that the maximum reduction which he is entitled to is, for the mitigating factor of a plea, is in or about one year and accordingly I impose a sentence of eight years from the date upon which he went into custody …*
>
> *…*
>
> *what I'll do is I'll impose the sentence on counts 1 and 2 and then …*
>
> *…*
>
> *I'm going to suspend the last year of the sentence because the reference to [the psychologist] to the necessity for him to receive help. I can't predict what the suggestion what the suggestion is going to be in six or seven years' time because it that will be dependent upon the extent to which he submits to, say, probation services and other rehabilitative treatment in prison, but on the basis that I cannot*

predict the situation which may arise, I cannot say on the in this case that post release supervision is appropriate. There's no expert testimony on that."

26. The sentencing judge concluded his remarks by further imposing three year sentences on each of the sexual assault counts, and saying that all sentences were to run concurrently.

Grounds of Appeal

27. In truth, while the appeal against severity technically embraced all of the sentences, the focus of the appeal was against the eight year sentences, with the last year thereof suspended, imposed for the s.4 rape offences.

28. Two complaints were advanced. The first was to the effect that the headline sentence for the s.4 rape offences was set too high at nine years in the overall circumstances, but particularly having regard to the fact that the appellant was a minor throughout most of the period in which the offending was committed. The offending period ran just 11 days beyond the appellant's age of majority. The second complaint was that the appellant received a discount of just one year from the nine year headline sentence to reflect his plea of guilty. That amounted to a discount of 12.96% from the headline sentence, which it was suggested was altogether too low.

Discussion and Decision.

29. Counsel for the respondent has sought to argue that the headline sentence was indeed appropriate, relying on the following passage from the judgment of Charleton J in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 85:

> *'While precise numerical certainty is not possible in this exercise, the precedents in sentencing clearly establish that conviction for rape ordinarily merits a substantial sentence and, further, that consideration should commence in terms of mitigation at a headline sentence of 7 years. These cases of their nature will be ones where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence.'*

30. It was suggested, on the authority of cases such as *The People (Director of Public Prosecutions) v T.E.* [2015] IECA 218; *The People (Director of Public Prosecutions) v. B.V.* [2018] IECA 253 and *The People (Director of Public Prosecutions) v. WD* [2008] 1 I.R. 308, that the circumstances of the present case were aggravated by the level of harm done to the victim, by the fact that there was a sequence of offending of an escalating nature and by the fact that due to the age differential the appellant had been in a dominant position qua the victim who was particularly young and vulnerable. We accept that in principle these circumstances are capable of providing aggravation, but the extent to which the offence is in fact aggravated depends very much on context. There is no doubt but that the harm done to the victim was serious and significant. As the up to date victim impact statement provided to us in the last 24 hours makes clear, the harm caused is ongoing. However, as regards the aggravating effects of the escalating nature of the offending and the age differential, account must be taken in weighing these of the fact that that the appellant here was only 14 himself when the offending commenced and he had only just attained 18 when the offending ceased. We think that in the circumstances

of this case the degree of ultimate aggravation provided by the matters pointed to was modest, having regard to the countervailing circumstance of the youth and likely immaturity of the appellant the effect of which would have been to mitigate his culpability.

31. Be all of that as it may, this was a serious case. The starting point of seven years indicated as appropriate by Charleton J in *The People (Director of Public Prosecutions) v F.E.* for cases *"where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence"* relates to rape committed by a mature adult and not by minor. In fairness to the trial judge there is as yet no guidance in this jurisdiction on the weight that might be afforded to the circumstance of minority. We feel that the fact of minority represents a very significant circumstance, that will in many cases, and we think this is one of them, operate to in fact reduce culpability somewhat. That is not to gainsay that rape is always a various serious offence, and one which must be punished as such. However, the Constitution requires that such punishment must not only be proportionate to the gravity of the offending conduct but also to the circumstances of the offender.

32. The approach of the Sentencing Council for England and Wales is informative in this area. The Sentencing Council has published a Definitive Guideline on the Sentencing of Children and Young People which, consistent with the ethos of our own Children Act 2001, requires a completely different approach to the sentencing of minors, based on welfare; and it recommends, where appropriate, a sentence broadly within the region of one half to two thirds of the appropriate adult sentence for minors in the age bracket 15-17.

33. While we are not to be taken as adopting uncritically guidance provided by the Sentencing Council in the neighbouring jurisdiction, because it applies to a separate and distinct legal system which has different sentencing rules, structures and laws, we do take note of it and regard it as being at least a helpful indicator as to the potential significance of the fact of minority in any assessment of an offender's culpability.

34. In an article published very recently in the Criminal Law Review and entitled "*The sentencing of young adults: a distinct group requiring a distinct approach*" (2021 Criminal Law Review (3) 203-217) David Emanuel QC *et al* review the recent jurisprudence in England and Wales which recognizes that where offending straddles the boundary line between minority and majority it is vital that a sentencing court has regard to the maturity and developmental reality of the offender in question. The authors cite, *inter alia*, a case of *R. v Balogun* [2018] EWCA 2933, a case involving a young adult who had committed a series of very serious sexual offences with several aggravating features in the months just after his eighteenth birthday. The sentencing judge at first instance had imposed a sentence of detention of twenty-one years, a period longer than the defendant had been alive. The Court of Appeal concluded that insufficient regard has been given to the appellant's age and lack of maturity and was prepared to significantly reduce the sentence. In doing so, Holroyde LJ had observed:

"[the appellant] had not been invested overnight with all the understanding and self-control of a fully mature adult"

35. We think that in this case the trial judge was in error in nominating a headline sentence such as could have been applied to such offending if it had been committed by a person who was an adult at the time. We consider that insufficient account was taken of the fact that the offender was himself a minor for all but eleven days of the offending period.

36. We also believe that insufficient credit was given for the plea in this case. The sentencing judge was right to conclude that it was not a plea offered at the very earliest opportunity, but we consider that the actual discount afforded was simply too low. We have said on several occasions that the range of discounts typically afforded for pleas of guilty in our courts ranges from about 15% to about 331/3 %. The appellant here was only afforded a discount of just under 13%.

37. The victim in this case was ultimately spared the trauma of having to testify by virtue of the appellant's pleas. The sentencing judge makes a valid point about her not having been spared the worry of possibly having to testify until quite late in the day. That she should have been caused that worry is certainly regrettable and the appellant could therefore never have been entitled to maximum credit for his plea on that account. It would have been justifiable to deprive him of the extra mitigation, or premium, that an early plea in sexual cases attracts. However, his delay in pleading until a month before the trial was not so reprehensible as to disentitle him to at least reasonable credit for the fact of having pleaded, albeit not as early as he might have done.

38. The cost and court time that would have been associated with a trial was still spared. Further, the entering of guilty pleas indicated a facing up by the appellant to his wrongdoing and a taking of responsibility for his actions. It was an important public acknowledgement of his wrongdoing, and of the fact that his victim was to be believed in her complaint. Further, this was not a case where the appellant's co-operation and pleas were manifestly self-serving, or where the evidence against the appellant had otherwise been overwhelming. While the appellant temporarily developed cold feet after initially saying that he would plead guilty, in weighing the significance of this circumstance account needs to be taken of the fact that the appellant, albeit by then a young adult, was himself psychologically vulnerable; further, of the fact that he is an insular individual who had little, in terms of a family or support network, available to him that he could look to for sound advice or counselling or emotional support in respect of the issue of pleading guilty in circumstances where he was wavering in his earlier resolve (we accept that he had legal advice but that is not the same thing); and the fact that he is a person who had and still has mental health issues. He was arguably not therefore deserving of being harshly judged for having temporarily developed cold feet about pleading.

39. The important features in regard to the "cold feet issue" seem to us to be that he was very co-operative with the investigation, did at an early stage evince an intention to plead guilty, and ultimately did so about a month before his scheduled trial.

40. We are in receipt of a report from the Governor of Arbour Hill Prison, which speaks favourably of the appellant, and which indicates that based on the existing sentence he is due for release on the 14th of July 2021. By this stage he has spent 58.5 months, or just under five years, in prison (the equivalent, allowing for standard remission, of a sentence of six years and one month), having been committed on the 15th of April 2016. In the circumstances, rather than quashing the existing sentence and formally substituting a new sentence, we feel that the justice of this case can be met by simply varying the existing sentence to suspend the unserved balance thereof with effect from 12 noon on Monday next, i.e., the 8th of March 2021. The suspension is to be subject to the same conditions as attached to the suspended portion of the sentence imposed by the court below, and any necessary bond can be entered into before the Governor of Arbour Hill Prison.