THE COURT OF APPEAL

[250/19]

The President
Edwards J.
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

T.P.

APPELLANT

JUDGMENT of the Court delivered on the 28th day of January 2022 by Birmingham P.

Introduction

1. This is an appeal against severity of sentence. The sentence under appeal is an aggregate or effective sentence of ten years imprisonment (four years plus six years consecutive) imposed in the Circuit Criminal Court in Dublin on 6th November 2019. The sentence hearing took place in circumstances where the accused had been convicted of a number of offences following a contested trial which had concluded on 30th July 2019. He appealed against conviction and sentence and this Court, differently constituted in part, dismissed his appeal against conviction.

Background

2. The background to the matter is set out in considerable detail in the Court's judgment on the conviction aspect and it is not proposed to repeat that exercise now. At this stage, suffice to note that the accused and the injured party were first cousins. The offending behaviour spanned the period 1st April 1984 to 1st January 1990. The offences were committed at the home of the accused in Donegal, a dwelling which was also the home of the injured party's grandmother. The offending occurred during regular visits by the injured party to Donegal at weekends and also during school holidays. The Court was told that there was a 9-year age gap between the accused and injured party and that the offending began when the injured party was approximately six years of age. During the course of the visits, the accused shared a bed with the injured party. The sexual acts that were described, initially to the trial Court and then to the Court on the sentence hearing, encompassed a wide spectrum of sexual behaviour, including the most extreme forms of violation. The injured party had a strong emotional attachment to the accused. It appears the allegations became known within the broader P family when the injured party was in his early 20s. At one stage, there was a working relationship between the accused and injured party in the construction sector, but there were significant tensions within that relationship.

3. In terms of the appellant's background and personal circumstances, he was 51 years of age at the time of the sentence hearing, he had no previous convictions and had a successful career in the construction industry.

4. Before the sentencing Court was a victim impact statement. From that, it is clear that the injured party was significantly affected by his childhood experiences and that this led to a great number of difficulties in his life.

The Sentence

5. In assessing culpability, the Court indicated that it was proposing to have regard to a number of aggravating factors which included; the extreme nature of the sexual violations involved, the prolonged period of time over which the offending occurred, the regularity of the offending, the youth of the injured party throughout the period in question and that there was a grave breach of trust because of the close familial relationship and the particular bond between them. The Court said that before setting a headline sentence, it had to have regard to the fact that some of the offences, those between 1st April 1984 and 7th September 1986, were committed by the accused while he himself was still a child. In respect of those counts, the judge proposed making a significant distinction to the headline sentence which would be applicable to the other counts, reflecting the fact of childhood. She took the view that the offending was in the upper midrange and she set headline sentences of six years for the earlier offences and headline sentences of eight years for the latter. As indicated, she said she was taking into account that he was a child at the time of the early offences, and indeed, at the time of all offences, was a very young man.

6. In the course of her sentencing remarks, having reviewed the factual background and identified the aggravating factors, as indicated, the judge stated that she had to have regard to the fact that some of the offences, those committed between 1st April 1986 to 7th September 1986, were committed by the accused while still a child. She observed that the sentences to be imposed had to reflect the overall culpability of the accused and principles of totality and proportionality must apply. In respect of counts 6 to 15, the earlier tranche of offences, the judge said she was placing these in the upper midrange and setting headline sentences of six years, and in respect of counts 16 to 29, the latter tranche, she was placing the offences in the upper range and setting headline sentences of eight years. She repeated that in respect of the earlier offences, she was taking into account that the accused himself was a child, and in respect of all counts, was taking into account the fact that when the offences were committed, the accused was a very young man. She said she was taking into account his absence of previous convictions and the productive life that he had led since the commission of these offences. She said she was also taking into account his pro-social family life and his achievements in business and referred to favourable testimonials which had been submitted and to the fact that he had been applying his time in prison to positive pursuits. The judge then proceeded to impose the sentences which are now the subject of the appeal. When she concluded her sentencing remarks, Senior Counsel for the accused queried, "the Court is not suspending any aspect of that sentence? I'm just asking". The judge responded, "well, in the circumstances, in view of the fact that there does not appear to be any risk of reoffending, given the fact that in the period since the commission of these offences, there is nothing to

suggest any likelihood of repeat offending, I don't see any basis for suspending any portion of the sentence". Defence counsel then interjected, "I should not and I will not interfere with your order other than to say that maybe it is for those reasons that an acknowledgement of those factors might be a reason to suspend an aspect of it, if the Court were to look at it". The judge intervened, "they have already been acknowledged as mitigating factors in the evidence".

The Appeal

7. In the course of this appeal, it has been contended that the sentence imposed was overly severe and was disproportionate. It is said that this was not an appropriate case for consecutive sentences. It is said that the headline sentences identified were overly severe and that this, certainly taken in conjunction with the decision to make sentences consecutive and the limited credit given for the factors present by way of mitigation, gave rise to an ultimate sentence that was excessive.

8. In arguing that the decision to impose consecutive sentences was not warranted, the appellant invokes the single transaction or a series of repeated offences rule. This was a case where there was only one complainant and the period of offending was a continuum. The periods prior to and subsequent to the accused's 18th birthday are not separate periods, constituting distinct periods of offending, and as such, did not warrant consecutive punishments.

9. It is said that if, contrary to what is submitted, the view is taken that this was a case where consecutive sentences were warranted or appropriate, that there was then an obligation to make appropriate adjustments, perhaps by suspending a period. In particular, the judge is criticised for not applying the totality principle and addressing specifically and directly the question of whether an adjustment was required to the aggregate sentence arrived at as a result of the imposition of consecutive sentences.

10. On behalf of the Director, it is said that the sentences imposed clearly fell within the range available to the sentencing judge. This was offending of very great seriousness and a situation where the judge was fully entitled to impose consecutive sentences. The Director says that if the judge had decided not to impose consecutive sentences, but had imposed concurrent sentences, some or all of which were fixed at ten years, the statutory maximum applicable to each individual count, could she have been faulted in that regard?

Discussion and Decision

11. We begin our consideration of this issue by stating the obvious. For the reasons identified by the trial judge, this was offending of exceptional seriousness. While, for historic reasons, the offences are charged as offences of indecent assault, the evidence before the jury was of conduct which, nowadays, would be charged under different statutes with higher maximum penalties, up to life imprisonment. In the case of *DPP v. FE* [2019] IESC 85, the Supreme Court offered guidance in relation to sentencing for rape-type offences. While we appreciate that the offences here were charged as indecent assault, it seems to us that the exercise that the Supreme Court engaged in, in categorising offences into different bands of seriousness, offers some assistance. It seems to us that if offences of this nature had been committed by an adult over such a prolonged period and against such a young child, the offending would have to be seen as falling into the most serious

category, those that would attract a sentence of 15 years or more. We have no doubt that the duration of the offending meant that it was a case where it was entirely appropriate to consider resort to consecutive sentencing. If there was to be resort, then differentiating cases committed before and after the appellant attaining his majority is a logical starting point. However, it is not the situation that all of these offences were committed by an adult. Some were committed while the accused was still a child, and, as the trial judge pointed out, all were committed while he was a child or a young man. It is clear that the trial judge was very aware of this and was very conscious of the need to address this issue. She did so by identifying both a lower headline sentence and a lower ultimate sentence for the offences committed before the accused attained his majority. It seems to us that this was an entirely appropriate approach. We cannot see any basis for faulting the trial judge's view that the earlier offences in time were upper midrange, and those from the latter part of the offending period were in the upper range. We do not believe she can be faulted for setting the headlines she did of six years and eight years, respectively. We have already indicated that we are of the view that she was entitled to conclude that this was an appropriate case for consecutive sentences. In our view, having identified the headline sentences that she did, the ultimate sentences that she decided upon are unimpeachable.

12. It was necessary for the trial judge to step back and consider, whether having regard to the totality principle, any adjustment was required to the sentenced that she had arrived at, an effective aggregate sentence of ten years imprisonment. It has to be acknowledged that she did not do so expressly and this is a cause of some concern. However, as we have pointed out, in the course of her sentencing remarks, she did state that the sentence that she was imposing was one to which the principles of totality and proportionality must apply. From this observation by the trial judge, it might be concluded that she did in fact address the totality issue, but insofar as she did not expressly do so, following identification of the sentence, we have asked ourselves whether addressing the concept of totality would require an amelioration of the sentence that had been arrived at. Did the sentence of ten years in aggregate require to be adjusted downwards by reason of the totality principle? We have concluded that the answer to that question is in the negative. We have concluded that the offending in this case was of such a grave nature that no amelioration was required, or indeed, would have been warranted.

13. Therefore, we dismiss the appeal.