THE COURT OF APPEAL

[163/21]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

G.MCD.

APPELLANT

JUDGMENT of the Court delivered on the 30th day of March 2023 by Birmingham P.

Introduction

1. Before the Court is an appeal against severity of sentence. The sentence under appeal is one that was imposed in the Circuit Criminal Court on 29th July 2021. On that occasion, a sentence of seven years and two months, with 20 months of the sentence suspended, was imposed, leaving an effective sentence of five years and six months. The appellant appealed against his conviction and sentence, and in an earlier judgment ([2022] IECA 261), this Court dismissed the appeal against conviction. The background to the case is set out there in some detail and that exercise will not be repeated. It is sufficient to say, at this stage, that what was involved were two periods of child sexual abuse, spanning in all a period of approximately eight years, the first period commencing when the complainant was three to three and a half years of age, continuing until she was five years old, and the second period, when the complainant was ten to 12 years of age. As explained in the earlier judgment of this Court, the appellant was the uncle by marriage of the complainant.

2. In relation to the sentence appeal, the appellant says that the Circuit Court judge fell into error in the manner in which she set about structuring her sentence, that the effect of that error was that there were headline or pre-mitigation sentences that were, to a significant extent, too high, and that consequent on that, the ultimate sentence that was imposed, when regard was had to the mitigating factors, was also too high. Moreover, it was said, though less emphasis was placed on this aspect during the course of the oral appeal hearing, that the judge failed to have sufficient regard to the absence of previous convictions, and to the fact that the appellant was a person of previously positive good

character, with a deserved reputation as a highly thought-of hard worker. The appellant says that the offending in the case did not involve the more egregious activity that is sometimes found in cases such as this, and it is pointed out that it is not unusual for cases that come before the courts to involve multiple complainants, but that that was not the case here.

Personal Circumstances of the Appellant

3. In terms of the appellant's background and personal circumstances, he was 61 years of age at the time of the sentence hearing, a married man with two grown up children. He had a long career in the public service. He was a skilled tradesman and had reached management level.

The Sentence Imposed

4. Insofar as how the judge set about structuring the sentence has been the subject of much criticism in the course of the appeal hearing. It seems to us appropriate to quote from and paraphrase the judge at somewhat greater length than would usually be the case. The sentencing judge began her remarks by stating that significant to the sentencing process was the fact that the counts relate to a time between 30 and 40 years ago. She pointed out that, at the time of offending, the complainant was aged between three and a half to five years in respect of counts one to three, and between ten and 12 years in respect of counts four and five. The appellant, an uncle by marriage of the complainant, was between 21 and 29 years of age. The judge pointed out that the Court was bound by the applicable law, as it stood at the time, specifically in relation to the maximum penalties that were available. In respect of the first three counts, the maximum sentence was one of two years imprisonment, and in respect of counts four and five, the maximum sentence at the time was one of ten years imprisonment. The judge commented that, while all offending against a child is serious, the most egregious offending in this case was the subject of count two, which occurred when the complainant was very young and in respect of which a two-year upper limit applied.

5. The sentencing judge then dealt with the victim evidence which had been put before her, observing that the complainant had expressed most eloquently the impact the abuse had on her. The judge referred specifically to the fact that the victim had said she had found the trial process distressing.

6. At that point, the judge addressed the nature and gravity of the offending. She addressed these issues, first, at the level of principle or generality, and then made some remarks in relation to the individual offences and the individual headline sentences that would be appropriate. She observed first that the conduct involved a most serious breach of trust on the part of the appellant, who was the complainant's uncle by marriage, and was a person whom the complainant loved. Second, there was the youth of the victim, between three and a half and five years of age in respect of the earlier series of offences, and between ten and 12 years in respect of the latter counts on the indictment. The

complainant was at a very vulnerable age and the effect of the abuse was to destroy her innocence. The judge observed that it was an attack on her bodily integrity at a time when she was defenceless. It was also an attack on the dignity of the complainant, and she did not understand what was happening to her at the time; in particular, that was so in respect of the first three counts on the indictment. The abuse spanned from lesser, grooming-type conduct to more invasive conduct. The judge noted that it did not involve penetration, but count two, she said, involved conduct of a highly egregious nature – an attempt to penetrate a young child, which left her sore in the genital area. There were other aspects of grooming conduct, such as the buying of an inappropriate present, a reference to the fact that there had been evidence about the buying of lingerie, and sexualised conduct in front of the complainant. The judge referred to the fact that there was psychological pressure used in respect of count five, and to the fact that the burden of the consequences of the appellant's conduct was laid at the door of the complainant, in that it was said to her that if she told anyone, there would be no more nannies, and that the appellant's children would be taken from him. The judge said this was a significant psychological burden to place on a child. The judge noted that there had been no expression of remorse, and indeed, on a number of occasions in the course of her sentencing remarks, she indicated that the mitigation that would have been provided by way of a guilty plea was absent.

7. The judge then proceeded to deal with the five specific counts, and it is to be noted that these were specific counts and not sample counts. She did so in these terms.

8. In relation to count one, she considered that a headline sentence of eight months was the appropriate headline sentence, being at the upper end of the lower range. The offence involved touching over the clothing of a very young child.

9. Count two, again, one to which a two-year maximum sentence applied, involved the touching of the genitalia of a young child with the penis, with hands under the clothing, as well as an attempt to penetrate the child. The judge observed that this represented criminality of a very high degree. She felt that this offending conduct came within the upper end of the upper range, with a headline sentence of 22 months.

10. The judge saw count three as coming within the upper end of the lower range, involving the touching of the vagina outside the clothes. In relation to that offence, which carried a two-year maximum, she felt the headline sentence should be one of ten months.

11. Count four, the first offence to which a ten-year maximum applied, which consisted of the rubbing of the bottom over clothing of a ten-year-old child, the sentencing judge saw this as coming within the middle of the lower range and she specified a headline sentence of 18 months.

12. In relation to count five, also an offence carrying a ten-year maximum, the judge commented that it consisted of rubbing of the genitals under the clothing, with the appellant's hands under the bedcover and under the underwear. The appellant kneeled down and put his hands under the covers and was rubbing the complainant and moving

her clothes, and he was touching himself as well as touching the complainant. The judge referred to the fact that the complainant was frozen by this conduct and petrified, as it involved masturbation on the part of the appellant. The judge considered that it came well within the upper end of the midrange and that a headline sentence of six years would be the appropriate headline sentence.

13. In relation to the mitigating factors, the judge identified those present as being the appellant's lack of previous convictions, something she saw as particularly significant in view of the fact that these offences were historical in nature, and that the appellant had lived a pro-social life in all those intervening years. The judge took into account that the appellant was a person who had worked hard all of his life and progressed within his employment, and indeed, worked hard to progress in that way by attending and acquiring further education while working full time. She noted that the appellant had recently been promoted at work, but had now lost that job, and she took that into account and the impact that had on him, which was quite significant. She referred to the family circumstances of the appellant and to the fact that she had read several testimonials which were very positive, and which attested to his good character and the many positive attributes that he has. She referred to medical evidence to the effect that the appellant had been suffering from low mood and depression, with suicidal ideation. This evidence came from both a general practitioner and a psychotherapist.

14. Proceeding then to the nomination of actual sentences, as distinct from headline sentences, the judge referred to the fact that the appellant was now 61 years of age, that the conviction represented a significant fall from grace for a person who was clearly highly thought of and had been widely respected among his peers, family and friends. She then proceeded to structure the sentence and to apply discounts to the individual headline sentences. Count one saw a reduction from eight months to six months. Consecutive to that, to reflect the overall gravity of offending against a young child, she mitigated the 22-month headline sentence that had been identified in respect of counrt two to a sentence of 18 months. Count three saw ten months reduced to eight months, each sentence consecutive to the other. That represented a total of 32 months, or two years and eight months in respect of the first period of offending. Count four was reduced from 18 months to 16 months, and count five from six years to four years and six months. However, significantly, she stated that, to take account of the totality principle, she was going to make that concurrent to count four. So, counts four and five were concurrent to each other, but each were consecutive to count three. She said this gave rise to a total sentence of seven years and two months, but that in light of the various testimonials, the impact on the appellant of this conviction in terms of his fall from grace, his career prospects, and the fact that this was a historical offence, she was going to suspend the final one year and eight months, giving an effective sentence of five and a half years of imprisonment.

The Appeal

15. On behalf of the appellant, it is said that the aggregate of the mitigated sentences was excessive, and excessive to a significant degree. It is said that that is so, whether one has regard to the sentence as a whole, or whether the focus is on the sentence to be served after part-suspension. The argument is made that the judge fell into error in two particular respects. First, it is said that she did not provide a basis for concluding that consecutive sentences were appropriate, still less, that they were required. It is said that the judge fell into further error in not specifically addressing the question of the need to have regard to the principle of totality.

16. A reading of the judge's sentencing remarks would suggest that these criticisms are misplaced. In imposing sentence, the judge commented, in respect of count one, "I'm mitigating the eight-month headline sentence to six months. Consecutive to that, to reflect the overall gravity of offending against a young child, I am mitigating the 22 months in respect of count 2 to 18 months." The remarks in relation to consecutive sentences are brief, and on one view, might be seen as having been made with specific reference to count two, but in truth, it seems to us that this was a case where that there was a role for consecutive sentences, must have been apparent to all. That the remarks in relation to consecutive sentences would be brief is, in the circumstances of the case, entirely understandable. The judge made explicit mention of the need to take account the totality principle, commenting, in relation to count five, "to take account of the totality principle I'm going to make that concurrent to count 4." In relation to the question of consecutive sentences, of note are the observations of the Supreme Court in the case of DPP v. MJ (No. 2) [2023] IESC 4, where O'Malley J commented:

> "The principle that consecutive sentences should be utilised 'sparingly' does not mean that they must be rare or exceptional. In a case of historical sequential offending, the court may legitimately feel that concurrent sentences within the maximum parameters of the available sentences will not adequately reflect both the gravity of the accused's behaviour and his culpability."

17. In the present case, where the most serious offence, that dealt with at count two, was subject to the lower maximum penalty of two years, an alternative approach that is sometimes taken, of imposing a sentence at the upper end of what would be regarded as appropriate for the most serious offence and then making other sentences concurrent to that, was not, in reality, available. We are in no doubt that the judge was correct to take the view that this was a case where consecutive sentences had a part to play. It is equally clear that the judge was very conscious of the principle of totality and sought to address it. She did so by making concurrent two sentences, even though she had started on the basis of making the sentences consecutive, each to the other.

18. However, the fact that the question of consecutive sentences was not precluded and that the question of totality was addressed, does not necessarily dispose of the appeal. There remains for consideration the question of whether the approach taken to consecutive sentences, which was to make each one of the sentences consecutive to the others, subject to making two particular sentences concurrent, to have regard to the principle of totality, was appropriate in the particular circumstances of the case. It is a feature of this case that the offending occurred at two very distinct time periods; thus, there are two very distinct blocks of offences. It seems to us that in those circumstances, an appropriate approach would be to consider passing sentence within each block, i.e., making the sentences referable to each offending period concurrent to each other, but making the sentences arising from the second period of offending consecutive to those arising from the first.

19. It seems to us that the argument for approaching the case on the basis of blocks of offending, in this case, is strengthened by the fact that in the case of count one there has to be some doubt whether, if that was being considered in isolation, the custody threshold would have been regarded as having been crossed. In these circumstances, it doesn't seem appropriate that it should be the subject of a standalone sentence to which other sentences would be made consecutive. This is a significant factor leading us to form the view that this is a case where it would have been appropriate to sentence on the basis of two blocks of offending. We hasten to add the fact that we regard sentencing on the basis of two blocks as appropriate in this case doesn't at all preclude judges in other cases from imposing sentences on individual counts subject, of course, to regard always being had to the principle of proportionality.

20. Adopting that approach would see counts one, two and three made concurrent to each other, and then making counts four and five, when the complainant was older, aged between ten and 12, consecutive to the sentences imposed in respect of the earlier offending. The trial judge imposed a sentence of 32 months in aggregate for the three offences arising from the earlier period of offending; six months, 18 months and eight months, these as mitigated. The sentence of 18 months, which was imposed on count two, which was clearly the most serious of all the offences on the indictment (though count five, it must be said, was also an offence of very considerable seriousness indeed) had been mitigated by the judge from an initial headline sentence identification of a 22-month sentence. It does not seem to us, if the sentences in respect of the earlier period of offending were made concurrent, that there would be any basis for reducing the headline or pre-mitigation sentence in respect of count two from 22 months to 18 months.

21. It seems to us that, on the contrary, there would be every reason for imposing a sentence greater than 18 months on count two given that this now was not a sentence that was being imposed in respect of a single serious offence, but now, would be the effective sentence in respect of a series of offences.

Decision

22. Accordingly, we will deal with the matter by quashing the sentences in the Circuit Court, and in substitution, providing for a sentence of six months on count one, a sentence of 22 months on count two, and a sentence of eight months on count three. However, those sentences will be directed to run concurrently. In relation to counts four and five, we will impose the same sentences as were imposed in the Circuit Court, count four being one of 16 months, and count five being one of four years and six months. As in the Circuit Court, these sentences, on counts four and five, will be concurrent, but they will be consecutive to the sentences imposed on count two. Thus, the aggregate sentence, before part-suspension, will be one of 76 months, or six years and four months. As in the Circuit Court, we will suspend the final 20 months of the sentence, leaving a sentence of four years and eight months to be served. The part-suspension will be on condition that the appellant keep the peace and be of good behaviour towards all the people of Ireland during his period in custody and for a period of 20 months post-release. As in the Circuit Court, we will provide for a period of 21 months post-release supervision by the Probation Service. In re-sentencing, we have had regard to the up-to-date information that has been put before the Court.