



**THE COURT OF APPEAL
CRIMINAL**

Court of Appeal Record Number: 158/2019

Bill No.: WXDP0035/2018

Neutral Citation No: [2022] IECA 252

Edwards J.

Kennedy J.

Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC

PROSECUTIONS)

RESPONDENT/PROSECUTOR

-AND-

M.C.

APPELLANT/DEFENDANT

Draft/ ex tempore JUDGMENT of the Court delivered by Ms. Justice Ní Raifeartaigh on the 10 October 2022

1. The appellant was convicted by a jury of three counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by section 37 of the Sex Offenders Act, 2001. His appeal against conviction was previously refused in a judgment of this Court ([2022] IECA 96) and this judgment concerns his appeal in respect of sentence.

2. The indictment contained three counts of sexual assault: the first on a date unknown between the 1 July 2015 and the 30 September 2015; the second between the 1 October and the 31 December 2015; and the third between the 1 January 2016 and the 31 May 2016. The victim's 10th birthday fell in July 2016.
3. The appellant was born in 1951 and is now aged approximately 71. The victim was born in 2006 and is now aged approximately 16. The appellant is the victim's paternal grandfather. The events in question took place during the period 2015/2016, i.e. when they were both 6-7 years younger than they are now.
4. On occasion, the victim and one of her brothers used to stay overnight with the appellant and his wife (i.e. the victim's paternal grandparents) from time to time when her parents went to various social events. The victim alleged that the offending took place on some of those occasions.
5. The victim was aged 12 at the time of the trial. Her evidence-in-chief consisted of a DVD recording of her interview by the Gardaí, which had been conducted by a specialist Garda interviewer. She was sworn in at the trial and cross-examined after the DVD was played. The following is a summary of the answers she gave during the specialist interview, which was video-recorded.
6. The victim said that the appellant tickled her whenever she went to his house and that at night she would go to bed and in the morning he would say "do you want a back rub" and then he would give her a back rub, and then "he goes too far and he touches me in my places". She said "he always he does it when granny is not there". When asked to explain about the tickling, she says "he tickles me but then he goes too far and touches my places". She said that she sits on a chair and then "he starts tickling me and then sometimes he rubs my places and then when my granny comes into the room, then he goes back to tickling". When asked

to explain what she meant by “my places”, she indicated “my private parts”. When asked whether this was over or under her clothes, she said “sometimes over or sometimes under”. She said that it happened more than one time.

7. She described how it happened the first time. She said he was going to give her a back rub and then he went into her “places” and she said stop and then he kept going and then he went in to wake up her granny. She said it was in the morning when she was in bed: “he always does it in the mornings”. She said it first happened when she was nine years old. She said he did it and then she went back to sleep and then she woke up and he came in and he was watching her and then he came in and did it to her and then he went back out. She said she was wearing her pyjamas and that it was happening in a spare room in the double bed. Her brother was in the sitting room at the time.

8. She described another time when she was on “his” chair in the sitting room, and he started tickling her and then he “tried to go over” but granny came in and he just let go. She said that he tickled her under her arms and on her belly and on her legs.

9. She also described that her mum and dad went off to various places for a night or to a wedding or a christening. She said that was when it would happen.

10. She was asked to describe what happened when she was in the spare room. She said she was in the bed because there were two spare rooms but one of them was a playroom and the other was where she and her brother slept. She said that the appellant would tickle her and then he would start rubbing her “there”. She said she felt uncomfortable. She said the first person she told was her mother. She said it happened sometimes in the mornings and she also said that he did it “whenever I go over there”.

11. She said that the last time it happened was before her 10th birthday. She said she would be lying in the bed, and her grandfather would be standing right beside her and he'd be doing it and she said "stop or I'll wake granny". She was asked if she noticed anything about his body when he did that and she said no. She repeated that it felt really uncomfortable when he did that to her.

12. She also said that she remembered "last year a really really really long time ago", he grabbed her hand and he said "touch here" and she let go and then she turned back to the wall. She said that it was "his place" that he was asking her to touch and she didn't want to touch there. She did not have another name for his place but he used it to go to the toilet, and therefore she was clearly referring to his penis. She said that this was over his clothes rather than under and she did not know anything about his body when he did this. She said that happened just one time and it was before he started rubbing her. She thought it was "the morning or the evening time". She was asked if there was a particular reason she was in the house at the time and she said she thought it was because her mother was at a friend's wedding with her daddy.

Other evidence at trial

13. The victim's mother said that matters came to light on the 23 May 2016. She had collected the children from school and brought them home. At the time, her daughter was learning the Stay Safe program at school and on this day, she told her mother that something "bad" had been happening with her grandfather. The victim then told her that the appellant had been touching her in her private area. The appellant's mother made a statement to the Gardaí on the same date.

14. In due course, the appellant was arrested on the 10 December 2016 and was interviewed on three occasions during the course of his Garda detention. He denied the allegations completely and this evidence was put before the jury.

15. The appellant also gave evidence at the trial and denied having ever touched the victim inappropriately. He said he was never alone with the children. He said his wife would always get up first in the morning and make the breakfast.

Verdict and sentence

16. The jury found the appellant guilty on the 13 May 2019 of the three counts of sexual assault. On the 20 June 2019 he was sentenced to 6 years' imprisonment on each count to run concurrently; with the final 12 months of each sentence to be suspended on conditions. He was placed upon the Sex Offenders Register and is currently detained at Midlands Prison.

The appeal

17. The appellant submits that the trial judge erred in setting a headline sentence of 7 years and ultimately arriving at a sentence of 6 years with last 12 months suspended. He submits that this placed the headline squarely in the mid-range of such offences, given that the maximum sentence is 14 years. He submits that the offending behaviour should not have been deemed to fall within the mid-range; the offences involved one victim, a ten-month period, and involved the touching or rubbing of her private parts (both over and under clothing), as well as a request to touch his penis (over his clothing). It is accepted that this is serious offending, but nonetheless it is submitted that there were no further aggravating features; for example, there were no additional acts of violence or indicia of gravity; the assaults were not particularly prolonged; no weapons or other intimidating articles were used; the injured party was not plied with drugs or alcohol; there were no threats or false

imprisonment. The appellant therefore submits that the offending should have been placed in the first instance in a lower category.

18. It is accepted that there was dominion as a result of the age disparity, and the fact of the grandfather-granddaughter relationship; but it is submitted that other aggravating features which are sometimes present were not present in this case. There was repeated offending here, but, it is submitted, this did not amount to “habitual” offending as one sometimes sees in such cases.

19. The appellant also submits that the trial judge paid insufficient regard to the appellant’s age (68 years), and the impact upon someone of that age of serving a prison sentence for the first time in his life, together with the absence of any prior convictions (or complaints). He was of past good character and had a solid employment record. During the oral hearing of the appeal, counsel referred to the fact that the appellant is from a relatively close-knit rural community and submitted that the effects of his conviction would follow him far beyond his sentence of imprisonment.

20. The respondent submits that that there was no error in principle or of law in nominating 7 years as a headline sentence, and that the trial judge was correct in selecting it and took the appropriate factors into account. These included the grave culpability of the offender (particularly because of his being the victim’s grandfather); the seriousness of the offences (rubbing inside and outside her clothes, and asking her to touch his penis); the fact that there were a number of different offences; the egregious breach of trust involved, the age of the victim (9-10 at the time of the offences); the fact that she was supposed to be in a place of safety (in bed in her pyjamas) when they occurred; and the impact on the victim as described to the court.

21. The respondent points out that the sentencing judge allowed in effect a 24-month discount of the mitigating factors (by reducing the headline of 7 years to 6, and then suspending 1 year); the mitigating factors being the absence of previous convictions, and the appellant's employment history. This was, it was submitted, in effect between 25% and 33% discount for the mitigating factors.

22. The Court is of the view that the selection of a headline sentence of 7 years was in error, notwithstanding the fact that there were three offences over a period of time amounting to 10 months and that there were other aggravating factors such as relationship between the parties, the grave breach of trust involved in the offending, the age of the victim, and the impact upon the victim.

23. While all sexual assaults are serious, nonetheless a differentiation must be made for the nature of the conduct involved. The maximum sentence here was 14 years; the offence of sexual assault covers a multitude of acts varying in seriousness (whether by reason of the acts involved, which cover the entire spectrum up as far as the most serious form of sexual assault falling just short of "s. 4 rape" under the 1990 Act or "rape" under the 1981 Act), or by reason of other circumstances connected with the offence.

24. Here the victim was touched and rubbed on her private parts inside and outside her clothes, and on one occasion was asked to touch the appellant's penis. We are of the view that a headline sentence of 7 years was too severe, even having regard to the aggravating factors outlined above.

25. In view of this error, we will proceed to re-sentence the appellant. We will nominate a figure of 5 ½ years as the headline sentence; and reduce that figure to 4 years to take account of the mitigating factors recited above. Given the nature of the offending, we are of the view that it is also appropriate to order post-release supervision for a period of 2 years.

