



THE COURT OF APPEAL

[149/19]

**The President
Edwards J.
McCarthy J.**

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JOSEPH CAREY

APPELLANT

Judgment (*ex tempore*) of the Court delivered on the 5th day of March 2020 by Mr. Justice McCarthy

1. This is an appeal against the sentence of two years and six months imprisonment, the last four months of which were suspended, imposed at Dublin Circuit Criminal Court on the 19th June, 2019 in respect of an offence of sexual assault contrary to section 2 of the Criminal Law (Rape) Amendment Act, 1990.
2. The accused was convicted after a trial on 13th May, 2019. The offence had occurred on an unspecified date in August 2001 at the accused/appellant's home at Ronan's Green, Clondalkin. The complainant was thirteen years old at the time. The appellant was forty-four. The appellant lived there with his wife and at least on the occasion in question his three-year-old grandson was also resident or at least present in the house. The complainant stayed overnight for the first time as a babysitter to the appellant's grandchild. She was sharing a bed with the latter and at some point in the morning the appellant entered the room, leant over her, tried to kiss her and put his hand down her pyjama bottoms, it appears inside them, touching her vagina and maintaining his hand there for at least what must have been a short period. When she got up, it appears a relatively short time thereafter, he apologised to her and asked her for a hug in the kitchen of the house. This was of a type which she associated with that which might be given by a partner. He also said sorry to her in the kitchen. When she returned home later that morning she told her mother what had occurred and the latter organised a meeting between the complainant, the appellant and his wife. At that meeting when he was asked why he had behaved as he did he said that he loved her, by which he meant the complainant.
3. The complainant continued to live in her home in Clondalkin, and the families of the complainant and the accused and his family were very close. She moved away from her family home when she was about twenty-eight years old.

4. The matter was apparently reported to the gardaí at the time and it was thought that the gardaí had in turn reported the matter to the HSE. Enquiries by the gardaí involving the present prosecution failed however, to unearth any material pertaining to such events. It is not suggested however that the appellant was ever investigated for offences of a sexually untoward nature apart from the present one, and the case proceeded on the basis that the crime was a once-off event.
5. A Victim Impact Report was read to the court and this makes affecting reading. We do not intend to set it out in *extenso*, but amongst the salient facts she points out in the report that she suffers from depression and anxiety as a result of the incident, and that she has found it necessary to attend counselling and has been under the care of a psychiatrist and a clinical nurse. She feels that she has been a financial burden on her family because of the need to obtain the assistance of such experts. She considers that she has also been a burden on others since she simply cannot forget what occurred. She points out that until the incident, she had trusted the appellant, that he was like an uncle and that his home, was to her, a safe place. She refers also to the fact, and this is not uncommon in cases of this kind, that she is afraid that an incident similar to that to which she was subjected could happen to a babysitter and states that one of the main reasons she reported the matter to the gardaí triggering the prosecution was that she was fearful that a child in the appellant's care would be subjected to a similar offence. There is no suggestion of course that might be the case.
6. The assault has been a major strain on her relationship with her partner. The guilty verdict, to use her own term, "meant the world to me" and she said also that "it took years of waiting to finally get the courage to report again". She hopes that the verdict will start her on a "new path to healing and finding closure".
7. The appellant denied the offence when interviewed by the gardaí. It was established at the sentencing hearing that he had answered questions put to him but this is of no consequence since the core of what he said was untrue.
8. Obviously the aggravating factors in the present case were the age of the child, the nature of the assault – which was in an area of bodily intimacy, and involved touching inside the child's clothing; the breaches of trust, namely the fact that a close relationship analogous to a family existed between the complainant's family and both the appellant and his, the fact that the appellant was a neighbour in whom trust was generally reposed and that the complainant was staying overnight in the appellant's home in his capacity as a babysitter. The ill-effects on the victim are significant; we have referred to them in part already, but suffice it to say that it seems clear that the incident has had a devastating long term effect on her.
9. Counsel for the appellant point to a number of mitigating factors, namely the nature of the incident is one which was brief, single and non-penetrative, the fact that it was not the case where grooming had taken place, that there was no element of premeditation, that there was significant delay in bringing this case to court by which was meant by the passage of years from the time of the incident to the commencement of the present

prosecution, the fact that the appellant was otherwise of good character, that the appellant had belatedly, when confronted by a finding of his guilt, apologised, and the fact that he had had a long-term addiction to alcohol and not insignificant health difficulties.

10. Apart from what appears to be long-standing alcoholism his other health difficulties are reported in the report of his General Practitioner, Dr. Cronin. Considerable emphasis is placed on the fact that he suffers from Crohn's Disease, that he has had surgery as a consequence thereof and for a number of other reasons in the colon, as well suffering from depression. Again, we do not set out the report *in extenso*.
11. It was also submitted that the opprobrium and loss of friendship of many years with the complainant's family as a consequence of this type of offence should be taken into account although any question of opprobrium arises in all cases of the present kind.
12. On consideration of the very comprehensive judgment it seems to us that the Circuit Judge had regard to all relevant aggravating and mitigating factors as we have sought to elaborate them. We think that she was right to place the matter in the mid-range in respect of offences of this kind. We think she was right in saying that taking the modest mitigation into account the appropriate sentence was one of two years and six months, the last four months of which were suspended.
13. We therefore find no error of principle and we are satisfied that the sentence imposed fell within the available range available to the trial judge.
14. We accordingly dismiss this appeal.