THE COURT OF APPEAL

Record Number: 219/19

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M.W.

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 21st day of September 2020 by Ms. Justice Isobel Kennedy

1. This is an appeal against sentence. The appellant pleaded guilty to six counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 and on the 22nd October 2019 he received a sentence of five years' imprisonment with the final year suspended on terms.

Background

2. The period covered by the indictment ranges from the 1st of January 2006 until the 31st of December 2010 and refers to a series of sexual assaults perpetrated by the appellant against his younger female cousin who lived beside him. During the period referred to on the indictment the appellant were aged between seventeen to twenty-two years and the victim aged between six to eleven respectively. The assaults involved the appellant pulling down the complainant's trousers and underwear from behind and rubbing and pressing her vagina as he masturbated himself. The assaults took place at various locations around the appellant's family home including his bedroom, the sitting room of his house, the shed, in the nearby woods, and in his car.

3. The offences came to light in October 2016 when the complainant disclosed the abuse to her sister. The appellant was arrested in August 2017 and subsequently interviewed. He made no admissions at that time. The matter came on for trial before the Court on the 9th of July 2019 and a jury was empanelled. The next day the appellant was rearraigned and pleaded guilty to all six counts on the indictment.

Personal circumstances of the appellant

4. At the sentence hearing the Court heard that the appellant has no previous convictions. A psychological report was handed into the Court which detailed that the appellant

displayed limited insight into his offending behaviour. The appellant was assessed as having limited abilities in terms of his intellectual functioning and he was identified as being at a moderate risk of re-offending.

The sentence imposed

5. In terms of sentencing, the sentencing judge emphasised the impact of the offending on the complainant which was aggravated by the stress of the forthcoming trial, the social impact that it had on her and her family and extended family, the proximity of the relationship and the fact that they were living next door to each other, and by the maintenance of the appellant of his innocence until the trial had begun. In view of the aggravating factors the sentencing judge placed the offending at the low end of the mid-range and identified a headline sentence of six years.

6. In terms of mitigating factors, the sentencing judge referred to the guilty plea although due to the fact that the plea was entered at a late stage, the discount afforded was limited to 10%. The judge further referred to the psychological report and observed that it indicated a lack of insight and empathy for his victim. The sentencing judge reduced the sentence to five years on each count to run concurrently, with the final year suspended with the imposition of post-release supervision by probation and welfare for a period of two years.

Grounds of appeal

7. The appellant puts forward the following grounds of appeal:-

   (a) In all the circumstances, the sentence imposed was excessive. including in identifying six years as the appropriate headline or starting point and in reducing that sentence by only one year and in declining to suspend more than one year of same and the learned Trial Judge erred in law in imposing same;

   (b) That the learned sentencing judge erred in setting the headline sentence at too high a level in that he deemed same to be at the mid-range of offending rather than at the low range of offending as submitted by Defence counsel on behalf of the Appellant and thereby imposed a sentence on the Appellant that was excessive in all the circumstances;

   (c) That the learned sentencing judge failed to have regard to the fact that the Appellant may, on the evidence, have been under the age of 18 years during some or all of the period of offending complained of herein;

   (d) That the learned sentencing judge failed to have regard to the young age of the Appellant during the period of offending herein;

   (e) That the learned sentencing judge failed to take account of and/or have regard to the fact that the Appellant had no prior convictions on the date of sentencing;

(f) That the learned sentencing judge failed to have regard to the fact that the Appellant was himself the victim of sexual abuse during his own childhood and the impact which same had on him;

(g) The learned sentencing judge erred in failing to take into account adequately or at all many of the mitigating features of the case;

(h) That the learned sentencing judge erred in deeming that the trial had commenced in circumstances where, while a jury had been empanelled, the case had not been opened to them and the learned sentencing judge further erred in deeming the change of plea on the part of the Appellant, after the trial had commenced, as being an aggravating factor;

(i) That the learned sentencing judge erred in interpreting the expert professional psychological report placed before the court for the purposes of sentencing as being indicative of a lack of empathy on the part of the Appellant with the victim and more representative of the guilt and shame felt by the Appellant over how the index offending impacted upon him and his family when such interpretation could not fairly be adopted from the report as placed before the court;

(j) That the learned sentencing judge erred in passing an excessive sentence having regard to all the circumstances of the case and thereby failing to have adequate regard to the principles of proportionality and totality in imposing the said sentence;

8. In written submissions the appellant groups the grounds into three distinct headings and these headings are laid out below.

Submissions of the parties

Proportionality and totality- Grounds (a), (b) & (j)

9. The appellant submits that in circumstances where the maximum sentence available was fourteen years, the headline sentence of six years was too high to reflect the lower end of the midrange and a headline sentence of no more than five years would have been appropriate.

10. The appellant refers to the following sentencing remarks of the sentencing judge:-

> "The impact was aggravated in the recent time by obviously the stress of the forthcoming trial, the social impact that it had on her and her family and extended family, the proximity of the relationship and the fact that they were basically living next door to each other, and by the maintenance of the accused of his innocence until the trial had begun"

The appellant submits that these remarks indicate that the late plea of guilty was treated as an aggravating factor. The appellant refers to O'Malley on *Sentencing Law and Practice* (3rd Ed., Round Hall, 2016) at para 6-32:-

> "Defendants who plead guilty despite having initially opted for jury trial should not be penalised on that account, even if a jury panel had been summoned by the time the guilty plea was entered."

11. The appellant argues that the sentencing judge did not give sufficient value to the plea of guilty, giving a deduction of 10% or seven months in circumstances where the complainant was spared the stress and trauma of reliving the details of what the appellant did to her, not to speak of having to undergo cross-examination. The appellant refers to *The People (DPP) v. Downey* [2008] IECCA 150 where a plea was entered on the first day of the trial concerning the sexual abuse of two of the appellant's grand-nieces. On appeal it was found that there had been insufficient recognition of the guilty plea, however late it came.

12. The respondent submits that there are a number of aggravating factors present which justify the imposition of a headline sentence of six years. The first of these is the profound impact of the offending on the complainant as outlined in her victim impact statement. The respondent refers to *The People (DPP) v. Burke* [2015] IECA 186 where the Court considered importance of the impact of the offences on victims in determining the appropriate sentence. In Burke, the Court referred to the following remarks *in The People (DPP) v. Counihan* [2015] IECA 76 at para. 5:-

> "Another aggravating feature is the extent of the impact on the victim. Impact reports from victims are intended to remind the Court of the consequences of the crime and in many cases they may be long-lasting and profound, such as often is reported in cases of sexual abuse. Indeed, it may be that the damage to the victim far outlasts any sentence imposed on the perpetrator."

13. The respondent further refers to the vulnerability and age of the complainant and the abuse of trust. The respondent refers to *The People (DPP) v. DM* [2019] IECA 147 where the Court highlighted the age of the complainant, and at that age, her vulnerability and the likely impact on her sexual development were factors that weighed heavily in the sentencing decision.

14. The respondent submits that there was planning, premeditation and grooming in the actions of the appellant and notes that in *The People (DPP) v. DM* [2019] IECA 147 the Court acknowledged the aggravating factors of premeditated grooming and manipulative behaviour in cases of defilement.

15. The respondent rejects the assertion of the appellant that the guilty plea was treated as an aggravating factor but rather the sentencing judge was simply observing that it was a late plea and that the impact of the offences was aggravated by the stress of the forthcoming trial. In respect of *The People (DPP) v. Downey* [2008] IECCA 150, referred to by the appellant, it is submitted that the poor health of the applicant in that case, and the medical reports furnished to the Court in support of same were also factors taken into consideration in reducing the sentence originally imposed.

16. The respondent refers to *The People (DPP) v. FE* [2019] IESC 85 where the Court considered the totality principle in sentencing at para 35:-

> 'The totality principle means that the judge should objectively consider the overall impact of the offence on the victim or victims and also the rehabilitative effect of the overall result in light of the final total, and the justice of retribution and the need to mark the harm to the victim or victims. Thus, Street CJ's description of the principle in R v Holder [1983] 3 NSWLR 245 and in R v MMK (2006) 164 A Crim R 481 at 12 is apposite:
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> "The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences."'

Personal and mitigating features of the case- Ground (e), (f), (g), (h) & (i)

17. The appellant refers to several mitigating factors which, it is submitted, the sentencing judge did not take account of. The first of these is the previous good record of the appellant and the appellant refers to O'Malley on Sentencing Law and Practice (3rd Ed., Round Hall, 2016) at para 6-48:-

> "In those circumstances, the offenders conduct during the interval since the offences were committed is highly relevant. An offender, who has abstained from further offending over a lengthy period, is entitled to mitigation on that account. Abstention from further offending, especially if combined with positive good character, reflects well on the Defendant."

18. The appellant also refers to the fact of his having suffered sexual abuse at the hands of his granduncle when he was a child. This was referenced in the psychological report and the probation report before the Court but the sentencing judge made no reference to this experience of abuse.

19. The Court was also addressed on the fact that the appellant had been unable to work since March 2018 owing to ill-health and had been assessed as eligible for disability benefit since then. The psychological report referred to the nature of his ill-health as including bronchitis, asthma, nasal problems, the necessity to insert grommets in one of his ears in adulthood and his high blood pressure. The report referred to the fact that the appellant had been hospitalised several times over the years and was taking several

prescribed medications. The sentencing judge made no reference to the appellant's ill-health when imposing sentence.

20. The appellant submits that the sentencing judge did not have sufficient regard to the appellant's remorse and insight into his offending. The report from Forensic Psychological Services did refer to the appellant's lack of victim empathy but it also referred to his awareness that the victim's attempt to take her life was likely due to the effect which his conduct had upon her. The report referred to the appellant's awareness that his behaviour had had a significantly negative impact on relations between the two families. The Court was also referred to a broadly favourable probation report which noted that the appellant felt "very ashamed and depressed with regards to his behaviour and the manner in which he harmed the victim" and which report noted his willingness to submit to a sex offenders treatment programme

21. The appellant submits that any deficiency in the appellant's capacity to have empathy was explained and contextualised by the reports which highlighted his low-intellectual functioning and his lack of any counselling to enable such insight However, it is submitted that the sentencing judge penalised the appellant for his lack of insight rather than considering his personal historical, intellectual and health circumstances. In light of the fact that the appellant had not had access to specialist treatment prior to being sentenced and having regard to the emphasis which the sentencing judge acknowledged had been placed on the importance of such treatment by the probation service, it is submitted that the sentencing judge ought to have suspended more than one year of the five-year sentence which he imposed.

22. The respondent notes that in *The People (DPP) v. Hearne* [2019] IECA 137, the Court stated that there are circumstances where the absence of previous convictions will not be treated as a mitigating factor, for example, where an accused has been engaged in sexual offending over a prolonged period but has not been brought to justice.

23. In relation to the ill-health of the appellant, the respondent argues that the health concerns of the appellant in the matter at hand do not reach the level that would warrant a reduction in sentence.

24. The respondent submits that the previous of the abuse of the appellant may provide a context for the appellant's behaviour but it in no way excuses it.

25. In terms of the appellant's remorse and insight into offending, the respondent notes that the sentencing judge referred to the letter of apology and he had the benefit of considering the probation report and psychological report at the sentencing hearing. The psychological report noted that the appellant had limited insight into his offending behaviour at that juncture but did demonstrate guilt and remorse.

The age and youth of the appellant at the time of the offending- Grounds (c) & (d)

26. The appellant argues that it is likely that the appellant was aged 17/18 years old at the time of offending and yet no consideration was given to his youth by the sentencing

judge. The appellant refers to *R v. Clarke* [2018] EWCA Crim 185 where the Lord Chief Justice observed:-

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."

27. The respondent submits that despite the age of the appellant at the time of offending there was still a significant age gap of eleven years between the appellant and the complainant.

Discussion

28. In admirably succinct form, Mr Dockery SC for the appellant, identified two primary issues on appeal. First, he takes issue with the headline sentence and second, says that insufficient discount was afforded for mitigating factors.

29. It is said that the judge considered the late plea as an aggravating factor. In this respect, the judge quite understandably considered the impact on the victim to have been exacerbated by the prospect of trial and the fact that the appellant maintained his innocence until after the jury was sworn. It is said on the part of the appellant that this was considered by the judge to be an aggravating factor, in this respect, reliance is placed on the judge's comments in identifying the headline sentence, and it is said that this was a factor which was the forefront of his mind. In fairness to Mr Dockery SC, he does not press this point to any great degree. It is trite to say that where an individual exercises his right to trial, this cannot be considered as an aggravating factor. However, we do not feel that the judge did this in the present case. His remarks concerning the appellant's stance at trial appear to be connected to the impact on the victim. Having set out the significant impact on her, he expresses the hope that the process will assist her in moving on with her life. He then proceeds to consider the mitigating factors, before moving to place the offences on the low end of the mid-range of offending. We find no error in this respect.

30. However, it does not appear that the judge considered the appellant's youth at the time of offending. While the indictment extended from January 2006 to December 2010, placing the appellant's age between seventeen and nineteen years old, in evidence the garda stated that the victim thought that she was six or seven years old when the abuse occurred and that the appellant was approximately seventeen to nineteen years old. The prosecuting garda went on to give evidence that the victim pinned the offences as around 2006 and in fact indicated in evidence that the victim's earliest memory concerned a period when she was seven years old and he was eighteen years old. Garda Nolan accepted in evidence that the offending could have taken place over a period of months or years.

31. In the course of the cross-examination of the prosecuting garda, the following exchange took place:

> "Counsel: I think the incidents occurred a considerable number of years ago, now, the period covered by the indictment ranges from 1st January 2006 until 31st December 2010, isn't that correct?
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> Garda: Yes, Judge, that's correct.
>
> Counsel: And I think all six counts refer to a date unknown, somewhere within that 4-year period, isn't that so?
>
> Garda: That's correct, Judge.
>
> Counsel: So, this is a case where there is some absence of clarity around when precisely these matters are said to have occurred, isn't that correct?
>
> Garda: Yes, that is correct.
>
> Counsel: But in any event, there is a psychological report before the Court where there is some reference to my client thinking that it occurred over a number of months, but it's not possible to say, really, is it, whether they occurred over months or whether they occurred over years?
>
> Garda: No, over a period of years or months, I suppose, yes.
>
> Counsel: Or months – it could have been either?
>
> Garda: Yes.
>
> Counsel: In other words, it's difficult to say exactly over what period of time these offences occurred."

32. In this Court's view, there is clearly a difference between offending which continues for a period of some five years where an individual reaches the age of twenty-two years and offending which continues over a period of months when an individual is seventeen to eighteen years old.

33. In our view, the appellant's age is an extenuating factor which operates to reduce his moral culpability. The gravity of an offence is measured by a consideration of the moral culpability of the offender for the offence and the harm done. In performing this measurement while it is obviously necessary to take into account the general circumstances of the crime, and to have regard to the range of available penalties, it is also necessary to take into account any particular circumstances, bearing on moral culpability, that are personal or particular to the offender. These can be either aggravating or mitigating factors.

34. There is no doubt that these are serious offences perpetrated on a very young child with the consequential severe impact on the victim. This young girl was severely affected by the appellant's offending conduct. She has and continues to suffer enormously as a result of the appellant's abuse of her. The appellant's conduct sundered the relationship between the two families, constituted a significant breach of trust, involved planning on his part and continued certainly for some months.

35. However, in the view of this Court, we find that the judge erred in principle in failing to consider the appellant's youth at the time of offending. Of particular concern is the distinct possibility that the offending occurred when the appellant was eighteen years old and continued for a period of months and not years as originally stated on the indictment. His youth operates as an extenuating factor bearing on his moral culpability and as a result impacts on the headline sentence. In those circumstances, we find the judge erred in principle in placing the headline or pre-mitigation sentence as one of six years and as a consequence, we will quash the sentence imposed.

36. In light of the above, we consider the appropriate headline sentence to be one of five years' imprisonment. We are not persuaded that the judge erred in the discount he afforded for mitigation. We observe in this respect that the plea was entered at a very late stage indeed. Therefore, we reduce the sentence of five years to one of four years and we will suspend the final year on the condition that the appellant be of good behaviour for a period of three years in the sum of €100.00. We see from the probation report that the appellant agreed to move from his home beside the victim and so we also impose two additional conditions; that he comply with all directions of the probation services and that he shall reside other than next door to the victim.

37. The bond to be entered into before the Governor or Assistant Governor of the prison and liberty to re-enter should any difficulty arise with the bond.

38. We see from the transcript that the judge also imposed two years post-release supervision. However, this appears to have been tied into the bond relating to the suspended period of the sentence. It is in fact a separate order. It is apparent from the Probation Report that the probation officer discussed the Safer Lives Programme with the appellant and that he agreed to attend that programme. In those circumstances, we can readily see why the judge sought to impose a post release supervision order pursuant to the Sex Offenders Act 2001.

39. We therefore impose two years post-release supervision during which period the appellant will be required to attend the appropriate therapeutic service as directed by the probation service.