THE COURT OF APPEAL

Record Number: 214/18

Birmingham P.
Whelan J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SA

APPELLANT

JUDGMENT of the Court delivered on the 16th day of November 2020 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. On the 2nd April 2018, following a 42-day trial, the appellant was convicted in the Central Criminal Court on three counts of rape and twenty counts of sexual assault. The trial involved two complainants, who were sisters, CE and JE, who were ten and twelve years respectively, at the time of the alleged offences, which related to the period 3rd December 2010 to 11th March 2011. On the 29th June 2018, the appellant received a sentence of fourteen years' imprisonment with the final two years suspended on terms.

Background

2. CE and JE and their two younger siblings, are the children of RE. They lived with their mother at various addresses in England from birth. The evidence at trial was that RE lived in somewhat chaotic and reduced circumstances. She was known to social services in the UK in the context of parenting issues.

3. In 2010, the family were living in the Surrey area. CE, in her evidence, described their flat as "a mouse hole". At some stage in 2010, RE renewed acquaintance with the appellant who had been a long-time friend of her brother. The appellant would later intimate to Gardaí that he was a professional gambler and he gave the appearance of being a person of some financial substance, owning a valuable, substantial detached house in West Sussex. He was separated from his wife and the mother of his two children.

4. In 2010, when RE was experiencing difficulties with social services, the appellant invited her and her four children to come and live with him at his home. He provided a luxurious

and lavish lifestyle, fee-paying schools, horse riding, stabling horses for them and furnishing a large number of expensive presents. In effect, the lives of the children in terms of material comfort were transformed. In late 2010, social services had concerns in relation to SA's involvement with the children, particularly concerns about personal grooming of the older girls such as bathing, etc.

5. In November 2010, social services had requested that RE and SA agree to a contract of arrangements which would involve the giving of undertakings relating to non-involvement of SA in the personal physical grooming of CE and JE.

6. According to CE, SA collected her from school one day, told her that he and her mother did not intend to agree to the conditions and that they were going to Ireland on holidays. At very short notice, the appellant, RE and her four children travelled to Ireland on 19th November 2010. They stayed at a number of hotels in the greater Dublin area and all expenses were paid by the appellant. On around 3rd December 2010, SA, after viewing properties in the County Louth area, rented a substantial detached house on its own grounds with gated security and stabling for horses.

C.E.

7. The weather in December 2010 was unusually severe. This partly explained why RE was absent from the rented house for periods. On one occasion, SA, despite the very poor road conditions, travelled to Dublin in a taxi with CE for the purpose of retrieving a car left by RE at Dublin Airport. The evidence at trial was that the weather was so poor that SA and CE ultimately stayed at the Hilton Hotel in Dublin Airport that night, sharing a bedroom. CE told the jury at trial that during the night, SA raped and sexually assaulted her. Counts 1 – 5 related to these incidents.

8. CE described falling asleep watching a pay-per-view movie on television when she became aware that he was sexually assaulting her and that he then raped her. She subsequently fell back asleep. She told the jury that the accused later told her that her mother had communicated her whereabouts to her English grandmother and relatives, and that as a result of their concerns, a request was made by the UK police to Coolock Gardaí to check on the appellant. The evidence was that Gardaí were not aware of any concerns about sexual impropriety, and simply went to the hotel to check on their presence. After the Gardaí left, SA once more sexually assaulted her.

9. CE's evidence was that following the incidents in the Hilton Hotel, that SA thereafter raped her in their rented home, and that he sexually assaulted her on a number of occasions in that locations until the time when they were taken into care by Gardaí/Tusla on 13th March 2011.

10. CE's evidence was that she, her sister JE, and her other siblings all slept on the first floor of this substantial residence and that SA had his bedroom on the same floor which was beside the girls' bedrooms, while their mother occupied the second upper floor of the house. CE disclosed the abuse some 18 days after CE went into foster care and led to

Gardaí and Tulsa being notified. The nature of the sexual assault involved touching her vagina area and digital penetration.

JE.

11. This led to JE being interviewed by specialist child interviewers where she ultimately described incidents of sexually abuse and rape by the appellant at the rented accommodation.

12. The sexual offending in respect of both victims occurred over a period of time between the 3rd December 2010 and the 10th March 2011.

13. Sometime in the Spring of 2011 the appellant travelled to South America and took up residence in Chile. He was not apprehended until he entered the United States of America in the summer of 2014 for the purpose of attending a gambling convention in Florida. His extradition was sought from the United States. He did not contest it, and on 24th July 2014, he was arrested following his extradition.

14. There were two earlier trial dates in 2016 and 2017, but the trial did not proceed. The appellant was convicted in the Central Criminal Court on 2nd April 2018. He maintains his innocence following his conviction and sentence.

The sentence

15. On the 26th June 2018 the appellant received a sentence of fourteen years' imprisonment with the final two years suspended on terms in respect of the three counts of rape and five years' imprisonment in respect of the sexual assault counts. All sentences are concurrent. The final two years of the sentence were suspended on the usual condition. The order of the Court also states:-

> "The portion of the sentence suspended of 2 years shall not be activated unless the Accused participates in the Better Lives Programme for Sexual Offenders while in Prison. If he participates in the programme he shall acknowledge a further bond in the sum of €100.00 in the presence of the Governor, Assistant Governor or Deputy Governor of the institution in which he is incarcerated."

16. The trial judge highlighted three aggravating factors. Firstly, the appellant's knowledge of the vulnerability of the children and their mother, secondly, aspects of issues put to CE in cross-examination and thirdly, the impact on the two victims.

17. The trial judge observed that the appellant used his considerable wealth to facilitate the family moving in with him. As a family friend, he had the opportunity to use his resources to help the children but instead he disregarded the advice of social workers and moved the family to Ireland, disrupting their lives and removing them from their extended family.

18. In terms of mitigation the trial judge refers to the previous good character of the appellant and the testimonials offered on his behalf by his family.

Grounds of appeal

19. In his Notice of Appeal dated the 9th July 2018 the appellant puts forward eleven grounds of appeal. However, in written submissions the appellant appears to rely on the following four grounds only:-

The learned sentencing Judge erred in law and in principle by:

a) Imposing sentences which were excessive and disproportionate in all the circumstances in respect of the counts of rape and in considering the appropriate sentence, absent mitigating factors, to be one of fourteen years imprisonment on counts 1, 6 and 24 (to be served concurrently) with two years suspended.

b) failing to have due regard to the mitigating factors and/or failing to correctly balance the mitigating factors against the severity of the offences.

c) attributing the background evidence to be an aggravating factor.

d) characterising a legitimate defence point as an aggravating factor.

20. Ms. Biggs SC for the appellant contends that the sentence imposed was excessive in all the circumstances and places the most emphasis on Ground (d).

Submissions of the parties

Excessive and disproportionate sentences

Submissions of the appellant

21. The appellant submits that the headline sentence of fourteen years is excessive and amounts to an error in principle. In this regard the appellant relies on *The People (DPP) v. FE* [2019] IESC 85 where Charleton J. examines the circumstances in which a rape will fall into the higher bands of sentences:-

> "At the upper end of this band, thus in or around 14 years, are those cases where, as paragraph 41 states, the "degree to which the perpetrator chooses to violate and humiliate the victim can bring the appropriate sentence into the upper end of the band of nine to fourteen years.""

22. It is submitted that the sentence of fourteen years with two suspended is excessive even in circumstances where there were two child complainants. The appellant was not a parent or step-parent to the complainants and there were no factors of ongoing violence or humiliation in respect of the offences.

23. The appellant submits that since he is protesting his innocence, he cannot engage with the Better Lives programmes as this requires an acceptance of guilt and therefore, he is effectively facing a fourteen-year sentence

24. By way of comparator the appellant refers to *The People (DPP) v. Moloney* (The Irish Times, 13th November 2019) in which the accused received a sentence of twelve years in respect of the rape of his foster daughter who was sixteen years old at the time.

25. There were elements of violence involved in *Moloney* which are not present in the instant case and it is submitted that the lack of violence as a background to the offences should be treated be taken into consideration in terms of sentencing as a mitigation aspect of this case.

Submissions of the respondent

26. It is submitted that the sentence of fourteen years with two years suspended was in line with the guidelines set out in *The People (DPP) v. FE* [2019] IESC 85 in circumstances where the sentence falls squarely within the 'More serious cases' category. The factual matrix involved the repeated sexual abuse of two young vulnerable siblings and demonstrated a profound breach of trust, premeditation, as well exploitative dominion and control, so as to persuade these children not to tell teachers or social workers about the abuse.

27. The respondent submits that the appellant's submissions in respect of the claimed absence of violence in the child sexual abuse perpetrated by the appellant are misplaced as acts of rape and sexual assault are acts of violence in and of themselves of both a physical and psychological nature.

28. The respondent submits that *The People (DPP) v. Moloney* (The Irish Times, 13th November 2019) can be wholly distinguished from the present case as it involved only one complainant; the complainant was much older and in her teenage years, and the offending behaviour occurred on one date only.

29. In written submissions the respondent refers to a number of cases considered to be relevant including *The People (DPP) v. ER* [2020] IECA 238; *The People (DPP) v. RK* [2016] IECA 208; *The People (DPP) v. DW* [2018] IECA 143; *The People (DPP) v. Griffin* [2011] IECCA 62; *The People (DPP) v. FG* [2014] IECA 42 and *The People (DPP) v. Hearne* [2019] IECA 137.

Lack of due regard in respect of mitigating factors

Submissions of the appellant

30. The appellant identifies the following mitigating factors to which, it is submitted, the trial judge did not have due regard: no relevant previous convictions, no medical evidence of physical injury to the complainants, the appellant was not the father or stepfather of the complainants, the appellant's difficult family background, the appellant's real prospect of paid work on release, that he has used his time while awaiting trial to gain educational qualifications to a high standard, the appellant continued to support the children from his previous relationship and that he has the support of his family members.

Submissions of the respondent

31. The respondent submits that the trial judge took all relevant mitigation into account but there was limited mitigation present given the absence of an admission of guilt, any sign of remorse or any prospect of rehabilitation offered. In these circumstances it can be argued that the imposition of a partially suspended sentence may in fact be regarded as generous. The respondent refers to *The People (DPP) v. ML* [2015] IECA 144. This was an undue leniency appeal where the Court increased the sentence imposed of five years'

imprisonment in respect of multiple sexual assaults of six sisters between 1994 and 2005, to a sentence of nine years' imprisonment. The Court therein stated that there was in fact no merit in suspending any part of the sentence because the appellant refused to accept responsibility for his offending behaviour or participate in a treatment programme.

Background evidence as aggravating factor

32. This ground of appeal arises from the following comments of the trial judge during sentencing:-

> "Now, the aggravating factors in this particular conviction and process is first of all, SA's knowledge of the vulnerability of these children, CE and JE. SA knew this family well, he was friendly with the parents of these children's brother. And he certainly knew or should have known in early 2010 when he became directly involved with this family in Surrey, that this lady had particular difficulties and vulnerabilities. And as a result of those, as she was a single parent, the children had particular difficulties in that environment. SA and the Court from that perspective looks at it both ways, if he was trying to help the family to get them to move to […] and be a good family friend, and to use his considerable wealth to help them, his behaviour then in […] was particularly aggravating. A very sensible social worker, English social worker, SM, a man of moderation and not any extreme behaviour about him, carefully warned SA about his behaviour with CE, made a number of visits, and went to the trouble of explaining to RE and SA the expectation of the English social services as to what they expected from him.
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> They had prepared a contract of expectations where it was clearly open to SA to help these children if he had wanted to do, with his considerable extensive resources. But that that position which he found himself in as a family friend that he would respect that position in relation to the children, particularly CE. Despite the advice of SM and that very good advice to SA, he engaged in what the Court can only describe as a most reckless move to Ireland to escape the scrutiny of the social services. That move was funded in full by SA and it sadly has disrupted the lives of these children forever, leading to the actual physical separation of their family where eventually their siblings were also taken into care, but brought up in a separate family. And one can only describe what one would expect even from basic respect for children to have such disruption in their lives, where they'd been moved from [...] And within months then moved again to Ireland to a country that they had not lived in as children. "

Submissions of the appellant

33. The appellant submits that he was never charged with the neglect of the complainants nor of their siblings. As stated above, he was not their father or stepfather and he was not in a romantic relationship with their mother. Their mother had charge of her children at all times and in her absences, the appellant, with her authority, assisted in their care and education. It is submitted that this background, outlined as an aggravating factor by the sentencing judge, should not have been taken into account in sentencing the appellant.

34. It is submitted that while the background and circumstances require consideration, the sentencing judge's characterisation of the background as an aggravating factor was in error. The characterisation of the appellant as a person preying on the vulnerabilities of RE and her children is unmerited. While the actions of the appellant may be described as unwise, it is submitted that he believed that he was assisting and helping a long-time family friend. He was never charged or found guilty of any other offences. Nor was there any history of similar convictions.

Submissions of the respondent

35. The respondent submits that the appellant's knowledge and awareness of the vulnerability of the children as a result of their difficult family background, and his predatory exploitation of same constituted an aggravating factor in the case. The vulnerability of the children and their move from England to Ireland with the appellant was intrinsically linked to the factual matrix of the appellant's offending behaviour and the landscape within which the said offending took place.

36. It is submitted that in considering the presence of aggravating factors in cases involving sexual offences against children, it is well established that the targeting and / or taking advantage of vulnerable victims, constitutes an aggravating factor

Defence point as an aggravating factor

37. This ground is concerned with the trial judge's characterisation of the cross-examination of CE as an aggravating factor in sentencing.

Submissions of the appellant

38. The appellant submits that the prosecution evidence revealed a number of things which warranted challenging in cross-examination including the relationship between CE and her mother, CE's reluctance to return to England, the timing of the disclosure of the allegations and CE's influence on JE.

39. In terms of the relationship between CE and her mother, the appellant refers to the evidence of CE in her recorded direct examination and her cross-examination in which she refers to the difficulties she had had in relation to her mother for some time and which pre-dated the arrival of the appellant.

40. The appellant also refers to the fact that in cross-examination it was put to CE that there was evidence of interaction between CE and social workers, medical professionals, teaching staff and foster parents on various occasions and yet no disclosure of allegations took place until the 31st March 2011.

41. There was also a cross-examination of CE on statements made regarding various family members and living with them.

42. The appellant submits that there was also sufficient prosecution evidence to warrant an exploration as to the changing feelings of JE, CE's sister, in respect of her mother. This change of feelings of JE towards her mother was apparent over the course of the interviews taken since JE had been placed in care and was living with CE and her new

foster family. The appellant submits that the evidence at trial of this change in feelings justified querying during cross-examination whether this change was as a result of external influence from CE. This possible influence from CE on the evidence of JE was noted by counsel for the appellant in the closing speech to the jury.

43. It is submitted that the cross-examination and the arguments made in closing, arose from evidence given by the complainants themselves as well by members of An Garda Síochána and relevant social workers. At no time did counsel for the appellant seek to ambush or confuse the complainant. The complainant had ample time to answer all questions asked of her and salient areas were revisited in order that a full response be given. There was a rational, logical purpose behind the cross-examination itself and the closing arguments which followed

44. The appellant asserts that it is his constitutional right to fully contest the charges against him and the right of the appellant to cross-examine should not be undermined by presenting a legitimate defence via cross-examination as an aggravating factor. The appellant refers to *DPP v. O'S* [2006] 3 IR 57 where the Court stated as follows:-

> "Before embarking on an analysis of this cross-examination it is important to record that this court has on a number of occasions emphasised the central and indispensable position in our system of justice held by what Henchy J. called the "truth eliciting" process of cross-examination. It is necessary only to mention Kiely v. Minister for Social Welfare [1977] I.R. 267, In re Haughey [1971] I.R. 217, Maguire v. Ardagh and O'Callaghan v. Mahon [2005] IESC 9, [2006] 2 I.R. 32."

45. The cross-examination of CE took place when she was 19 years old and it was conducted in a respectful, comprehensive but concise manner and in accordance with the Bar Council Code of Conduct.

46. The appellant submits that the requirement to challenge the testimony of a witness is the basis of fair procedures in this jurisdiction where the credibility of the testimony of the witness may be put in doubt by the defence. The appellant refers to *DPP v. Burke* [2014] 2 IR 651 where Baker J. states as follows:-

> "McGrath in his text Evidence (Dublin, 2005) at p. 91 suggests, correctly in my view, that if a party intends to impeach the credibility of a witness, fairness requires that the matter impugned should be put to that witness. This is a correct statement of the requirement of fairness in the conduct of the case. Browne v. Dunn (1894) 6 R. 67 is to some extent authority on the requirement of fairness in the conduct of a trial, and Lord Halsbury made it clear in that case that it is unfair to the witnesses that their credibility be impugned when they do not get an opportunity to respond."

Baker J. went on to outline the following guidelines:-

"(a) In closing submissions or argument a party may not impeach the credibility of a witness if that witness's evidence has not been tested in cross-examination.

(b) Ipso facto a person who does not cross-examine evidence is faced with the prospect that the evidence is heard by the trial judge or the jury and is untested.

(c) There is no requirement that evidence be cross-examined, but by not cross-examining evidence the evidence goes to the fact finder as untested and uncontradicted evidence.

(d) Untested and uncontradicted evidence carries greater weight than tested contradictory evidence.

(e) It is not the function of any rule of law to direct the court to accept evidence merely on account of the fact that it has not been tested. The court must hear all of the evidence before it and is entitled to weigh the evidence, including unchallenged evidence, against the evidence as a whole adduced at the trial.

(f) A trial judge or a jury is not compelled as a matter of law to accept evidence because it is not challenged. Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight but does not direct a particular result."

47. It is therefore submitted that where an alternative version is to be put before the jury, fair procedures require that this version be put before the relevant witness so that they may challenge it.

Submissions of the respondent

48. The respondent submits that the characterisation by the appellant of the cross-examination of the complainant as an aggravating factor is misplaced. Rather, the aggravating factor was the very specific putting of the proposition to CE that she had fabricated allegations and conspired with JE simply because she did not wish to return to her mother's care, in circumstances where it had been clearly established in evidence during the trial, that, on realising that her mother could not protect her or her siblings from the appellant, CE had in fact acted out of courage and maturity to ensure no further risk to her or her siblings. The respondent submits that the trial judge correctly identified this particularly personalised and egregious attack on a young complainant as an aggravating factor.

49. The respondent refers to two recent decisions of the English Court of Appeal. The first of these is *R v. Hall* [2013] EWCA Crim 1450. This case involved an appeal against undue leniency in respect of the imposition of a custodial sentence of fifteen months' imprisonment for multiple counts of historic indecent assault on a number of young female girls, to which the accused ultimately pleaded guilty. During the course of the judgment the Court held that a public statement made by the accused to the media during the court process and prior to his plea, proclaiming his innocence, was a serious aggravating feature. The Court held that the accused went much further than denying the

charges and had effectively accused the complainants of acting 'mendaciously and, indeed, maliciously in concocting allegations against him'.

50. The respondent further refers to *R v. Clifford* [2014] EWCA Crim 2245 where the Court upheld a sentence of eight years' imprisonment in respect of multiple counts of historic sexual assault perpetrated against four girls notwithstanding the fact that the sentencing judge had fallen into error in his analysis by considering factors wrongly taken into account, including the alleged attitude and behaviour of the appellant during the trial and in front of media reporters. The respondent considers the following comments of the Court to be relevant to the case at hand:-

> "Whilst we readily understand that victims who were eventually vindicated would find such comments upsetting, we think that great care needs to be taken by sentencing courts not to elevate denials, albeit vehement, into something deserving of further punishment in the absence of some more explicit traducing of the victim."

51. The respondent submits that the appellant went further than what was necessary and required for the putting of his defence, and the proposition that she had maliciously fabricated allegations of persistent child sexual abuse constituted the '*explicit traducing'* of CE, in circumstances where the impact of same caused her exacerbated harm and trauma.

Discussion

52. Whilst the appellant relies on four grounds of appeal, we will first consider Ground (d) as Ms Biggs placed considerable emphasis on this aspect of the appeal.

53. For ease of reference Ground (d) concerns the alleged characterisation by the trial judge of a defence point as an aggravating factor.

54. Insofar as aspects of the cross-examination were concerned, it is necessary to set out the views as expressed by the judge:-

> "The other aggravating factor in relation to the course of the trial, the realisation of CE shortly after being taken into care that her mother could not protect her and her younger siblings was turned into a weapon against her with the allegation that the reason for making false allegations of sexual abuse and conspiring with her younger sister JE to do so, was because she did not wish to return to her mother's care. The reverse is true. A young girl of 12 years of age, mature beyond her years acting with maturity and courage in realising that further contact with their mother endangered her and her younger siblings because of the risk that SA would come back into their lives."

55. It is fair to say that it is this aspect of the sentence with which the appellant takes serious issue, contending that the cross-examination was necessary in order to properly defend the appellant and that such cross-examination was conducted in a fair and courteous manner. It is said that the judge erred in considering aspects of cross-examination as an

aggravating factor and thus imposed a sentence which was excessive in the circumstances.

56. In response, Mr McGinn SC for the respondent says that the judge did not in fact consider the manner of cross-examination as an aggravating factor but did consider the position adopted by the appellant in making very damaging and false suggestions to the witness as an aggravating factor. In a rather ingenious argument, the respondent says that in making his observations, the judge did not criticise the appellant's right to contest the charges against him, rather he considered as an aggravating factor a particular aspect of the suggestion put to the witness.

57. Firstly, it must be said that there is no suggestion that counsel for the appellant should be criticised for the manner in which she approached the defence of her client. Ms. Biggs relies upon the decision of the Court of Criminal Appeal in *The People (DPP) v. Gillane* (unreported, 21st December 1998) which confirms an individual's right to fully contest the charges levied against him or her and in so doing, and where the individual is convicted, the fact that the trial was contested does not:-

> "add one day to the appropriate sentence, but it does mean that he is not entitled to the discount which is now given virtually as a matter of course in cases where there is a plea of guilty and to a greater element of discount the earlier the plea of guilty comes"

58. She further relies on the decision of the Court of Criminal Appeal in *The People (DPP) v. Daly* [2011] IECCA 104 where McKechnie J. in reiterating the principles enunciated in Gillane said:-

> "It was said in Maloney (1989) 3 Frewen and repeated in The People (DPP) v Gillane (CCA, u/r, 21st December 1998) that an accused has a legal (and, may I add, a constitutional) right to fight the case to the and nail, as it was put and that his decision to do so must not add one day to his sentence."

59. In our trial process where the right to a fair trial is guaranteed by Article 38. 1 of the Constitution, cross-examination is valuable and indeed essential in order to test the credibility and reliability of a witness. The cross-examination has been described by Wigmore in *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 3rd ed, (Little Brown & Co, 1940) Vol 5 as "beyond doubt the greatest legal engine ever invented for the discovery of truth." However, it is of course the position that whilst an accused person has a right to cross-examine a witness, this is subject to the court's right to disallow any questions asked on the basis of relevancy. However, this is not the issue in the present case.

60. It must be said that much of the legal submission in respect of this ground relates to this particular issue but in our view the undoubted focus of the ground relates solely to whether the trial judge ought to have considered aspects of the cross-examination on the instructions of SA as constituting an aggravating factor.

61. In his text on *Sentencing Law and Practice*, 3rd Ed., (Dublin, 2016), Professor O'Malley in considering an offender's conduct during trial at page 102 observes as follows:-

> "A person whose behaviour is so disruptive or unacceptable as to amount to contempt of court can be dealt with separately on that account. The same holds true where a defendant's sworn evidence has obviously been rejected by a jury or the judge is of the view that it amounted to perjury. Defendants are permitted to give evidence in their own defence, though they are never obliged to do so. But they should not be subject to unfair disincentives when deciding if they should testify. The possibility of enhanced punishment for suspected perjury would be one such disincentive. *In People (DPP) v Gillane* the Court of Criminal Appeal remarked that the appellant had fought the case "tooth and nail", as he was perfectly entitled to, and that this would not add one day to the appropriate sentence. Appeal courts elsewhere apply the same principle. In *R v Harper* the sentencing judge mentioned that the appellant had instructed his defence counsel to make allegations of perjury against prosecution witnesses and to allege that senior police officers had engaged in intimidation, threats and other improper behaviour. The Court of Appeal, fearing that these factors may have influenced sentence, reduced the prison term from five to three years. The court, per Lord Parker, C.J. said: :
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> > "The court feels that it is quite improper to use language which might convey that a man is being sentenced because he has pleaded not guilty, or because he has run his defence in a particular way. It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty.""

62. In the present case, when this Court examines the words of the sentencing judge, it is crystal clear that he approached the question of sentence in a scrupulously careful and diligent manner. It is readily understandable that the judge took exception to the suggestion that a twelve year old girl made false allegations against the appellant and conspired with her younger sister in order to do so whereas she, on been taken into care, realised that her mother was unable to protect her and her siblings and was aware that further contact with their mother would place her and her younger siblings at risk that SA would come back into their lives.

63. The impugned remarks follow on from the judge's view that the appellant had in effect disregarded the advice of the social services in the UK and instead moved to Ireland in order to avoid further scrutiny. This in effect led to the disruption of the victims' lives. In the view of this Court that type of conduct on the part of the appellant serves to underline his manipulative character.

64. On one reading of the impugned paragraph which forms the basis for this ground of appeal, it could be said that the reference to a particular aspect of the cross-examination was given by the sentencing judge in order to provide a further example of the appellant's manipulative conduct.

65. However, whilst it is readily understandable that the sentencing judge may have held this view, nonetheless in the view of this Court and in accordance with the jurisprudence and in particular *The People (DPP) v. Gillane* (unreported, 21st December 1998) and *The People (DPP) v. Daly* [2012] 1 IR 476 , the fact that an individual contests his trial should not add one day to the sentence. This of course also includes the manner in which an individual contests the trial, subject of course to that caveat that irrelevant or vexatious cross-examination should be prohibited by the trial judge.

66. With some reservation we conclude that the trial judge erred in considering this aspect of the trial as an aggravating factor, however, we are not persuaded that this was an error of substance justifying intervention by this Court and we now consider the balance of the grounds of appeal.

The background evidence

67. We now address Ground c) where it is contended that the trial judge erred in attributing the background evidence to be an aggravating factor. In this respect reliance is placed by the appellant on the judge's sentencing remarks where it is said that he considered the background of the family circumstances and the appellant's connection to those circumstances to be an aggravating factor. Particular reliance is placed on the following passage: –

> "Now, the aggravating factors in this particular conviction and process is first of all, Mr A's knowledge of the vulnerability of these children, C and JE."

68. The judge then proceeds to set out what could be termed as the unusual background to the case resulting in the children residing in rented accommodation in this jurisdiction. He observes that the move in order to escape the scrutiny of the social services in the UK resulted in the disruption to the lives of the victims. Having set out the background which certainly in our view underlines aspects of grooming and manipulation and isolation on the part of the appellant, the judge then comments: –

> "Mr A had to be very conscious of what he was doing."

69. In our view this ground can be disposed of in short order. The material to which the judge referred and in particular the manner and the reasons why the victims ended up in this jurisdiction were certainly matters which serve to aggravate the offending conduct.

70. Grounds a) and b) may be addressed together. It is said that the sentences imposed by the sentencing judge were excessive and disproportionate and that the judge failed to have due regard to the mitigating factors present.

The mitigating factors

71. Firstly, to address the judge's approach to the mitigating factors. He identified the mitigating factors as being the appellant's previous good character and also the testimonials produced on his behalf together with the support of his family. He remarked that the testimonials showed traits which were very worthy in his history. Issue is taken with the judge's approach to the identification of the mitigating factors and in written

submissions it is contended that the judge failed to take into consideration a number of relevant factors. However many of these were not pressed in oral submissions and this Court can readily see why. Firstly, it is said that the judge failed to take into account the absence of relevant previous convictions however it is quite clear that the judge took the view that the appellant was of previous good character. Secondly, it is said that the absence of medical evidence of harm or physical injury to the victims is a relevant mitigating factor. This Court finds no merit whatsoever in that particular submission.

72. It is said that while the appellant was in a position of trust that he was neither the father or stepfather of his victims and so the offending did not amount to the most serious breach of trust. This Court again finds no merit in that particular submission. Firstly, we are not at all persuaded that the contention that the appellant was not a father or stepfather is a mitigating factor in the first instance. It is well known that the abuse of trust or the abuse of a particular position of influence (such as in the present case) is in fact an aggravating factor. The extent of the abuse of trust is a consideration as to the level to which that factor aggravates the offence. Secondly, the appellant was in effect acting as a parent to these young children and as such was undoubtedly in a position of trust. The children lived in a home which was rented by him and much of their day-to-day life was financed by the appellant. Thirdly, not only was the appellant in a position of trust but he was in a position of influence in respect of the victims.

73. It is further said that the appellant came from a difficult family background and had real prospects of work on release but this material was contained within his brethren's letter to the judge and to which the judge specifically referred.

74. Insofar as it is said that the appellant uses time while awaiting trial to gain further education qualifications and that he continued to financially support children from a previous relationship, we do not believe that either matter is of any great moment in the context of mitigation and indeed the latter contention seems to us to be without merit.

75. Finally it is said that the appellant has support from family members who reside in another jurisdiction and travelling to visit the appellant would be an ongoing onerous undertaking. Again this was a matter which was referred to in the letter from the appellant's brother to which the judge had reference.

76. In summary, it seems to this Court that the sentencing judge properly identified the mitigating factors and adequately reflected the mitigation, such as it was, by suspending two years of the sentence.

Excessive and disproportionate?

77. It is submitted that a pre-mitigation sentence of fourteen years is excessive and that in itself constitutes an error in principle.

78. In imposing sentence, a court must assess the seriousness of an offence with reference to the available penalty and the moral culpability and harm done. In this assessment, the

court will consider the aggravating factors as the judge did in the present case. The judge properly cited the duty of the court when he said: –

> "The duty of the Court is to impose a **proportionate sentence**, taking into account the seriousness of the crimes, deterrence and rehabilitation. The Court has to consider aggravating and mitigating factors to compose then a sentence which is proportionate, and which reflects the seriousness of the crimes for which Mr. A has been convicted." (Emphasis added)

79. In the view of this Court, the appellant's offending conduct was very grave indeed. It involved the sexual abuse of two young and vulnerable siblings over a period. Significantly, the appellant was fully aware of, and took advantage of the vulnerability of each girl. His conduct was premeditated and controlling. His abuse involved a significant breach of trust by a person who was in effect, entrusted with the care and safety of these children. Moreover, his actions were those of a manipulative individual who groomed the children for his own sexual ends. The impact on the victims is understandably of a severe order. In one instance the abuse took place in a hotel to which the appellant took CE and the rest of the abuse took place in their home. It is in fact the position that there were numerous factors which aggravated the appellant's offending conduct.

80. The appellant relies on several cases in support of his contention that the pre-mitigation sentence is too high. However, it is the position as stated by Birmingham P. in *The People (DPP) v. RK* [2016] IECA 208. that:-

> "Cases vary significantly, and even in those cases of offending behaviour which at first sight appear very similar in character, on closer examination, significant differences will often emerge. For that reason, a degree of caution is required when comparing sentences in one case with sentences in another."

81. In our view on any assessment of the aggravating factors, this is a most serious case with many aggravating factors present. It is certainly a case which merited a headline sentence in the region nominated by the trial judge and we find no error in this respect.

82. Moreover, while we are of the view that the judge erred in considering aspects of the conduct of the trial as an aggravating factor, we are confirmed in our opinion that such an error is not one of substance in light of the extent of the aggravating factors.

83. The ultimate sentence imposed having taken into consideration the mitigating factors was one which was proportionate to the offending and the personal circumstances of the appellant.

The terms of suspension of a portion of the sentence

84. Section 99 of the Criminal Justice Act 2006, as amended, places the common law on a statutory footing which allows for the imposition of a part-suspended sentence where such is appropriate, *inter alia*, in light of the mitigating factors or where there is a real possibility of rehabilitation. The section vests a broad discretion in a court to impose

appropriate conditions in addition to the mandatory condition that an offender keep the peace and be of good behaviour during the operational period.

85. The conditions may require an individual to take some positive action or indeed to refrain from certain activities.

86. The relevant portion of s.99 provides as follows: -

"(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during —

(a) the period of suspension of the sentence concerned, or
(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,

and that condition shall be specified in the order concerned.

(3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers —

(a) appropriate having regard to the nature of the offence, and
(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence, and any condition imposed in accordance with this subsection shall be specified in that order.

(4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any 1 or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:

(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;
(b) that the person undergo such —

(i) treatment for drug, alcohol or other substance addiction,
(ii) course of education, training or therapy,
(iii) psychological counselling or other treatment, as may be approved by the court;

(c) that the person be subject to the supervision of the probation and welfare service.

(5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.

(6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order."

87. Thus it can be seen that ss.(3) and (4) provides for the imposition of additional conditions. These additional conditions may serve to restrict behaviour or may have rehabilitative intent. Section 99 (13) provides: –

> "Where a member of the Garda Síochana or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened the condition referred to in subsection (2) or condition imposed under subsection (3), he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1)."

88. Under ss. 99(13) and (17) of the 2006 Act, a suspended sentence may be activated where there has been a breach of a condition including a breach of a condition imposed under subsection (3) of the Act. The Act was amended in this respect by s.2(f) of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017. Therefore, not only may an application be made for activation regarding an alleged breach of the mandatory condition, but also where there is an alleged breach of an additional condition imposed under s.99(3).

Discussion

89. In the present case, the judge indicated that the suspended portion of the sentence should not come into effect unless the appellant participated in the Better Lives Programme for Sexual Offenders whilst in prison. It is clear to this Court that the judge sought to change the appellant's conduct through attendance of the programme. However, as stated by O'Malley in *Sentencing Law and Practice*, 3rd Ed., (Dublin, 2016) at para 22-03 :-

> "The essence of the suspended sentence is that it threatens future punishment for past misconduct."

90. Where a part-suspended sentence is imposed the mandatory condition operates during the period of imprisonment and during the operational period whereas the additional conditions imposed under subsections (3) and (4) apply to the operational period only and an offender who breaches any of the specified conditions during that period is subject to reactivation of the sentence.

91. The judge gave effect to the mitigation present by suspending the final two years of the sentence. However, on foot of the order of the Court should the appellant fail to take part in the Better Lives Programme, the final two years will not be suspended.

92. The programme, in the understanding of this Court, is one to which a person volunteers to participate and in that regard it is clear that to do so there must be some acknowledgement of sexual wrongdoing, which is entirely absent in this case.

93. Therefore, whilst the undoubted aim of the sentencing judge in providing the option for the appellant to undergo the programme was to seek to reduce the likelihood of Mr A committing any other offence, without his cooperation, it is not possible to insist on his attendance on the programme.

94. There was some discussion regarding the nature of the bond required in the circumstances and ultimately whilst the appellant entered into the bond to be of good behaviour in the ordinary way, counsel for the respondent was concerned that he enter a bond regarding the attendance on the programme and suggested that he in fact enter into a bond before the prison governor in due course. The judge then clarified that the suspension would only be activated if he signed that bond. The judge then specified as follows: –

> "Judge: …. Mr A. in the event of you wishing to undergo the programme, it is a precondition of the activation of the suspended sentence and do you acknowledge that in the event you agreeing ultimately, you've not been asked now, but in the event you agreeing ultimately to do that, that you enter a bond before the governor of the prison in which you are large, that you have completed that programme and you acknowledge that that has been done?"

Conclusion

95. It seems to this Court that as the appellant does not wish to avail of the programme, in terms of the order of the Court, the final two years of the sentence will not, in reality be suspended. It is indeed unfortunate that he is unwilling to do so, however that does not remove the concern (albeit because of the appellant's refusal to engage), that the objective of the sentencing judge in suspending the final two years of the sentence to take account of mitigation cannot be fulfilled.

96. Moreover, s.99 of the Act does not permit of a precondition being fulfilled prior to the operation period of the suspended sentence coming into force. In the circumstances we find an error in the structure of the sentence and consequently, we will intervene but, to a limited extent, and that is to amend the order by removing the requirement that the appellant engage with the Better Lives Programme.

97. In lieu of that condition we will suspend the final two years of the sentence on the mandatory condition, that is the appellant enter into a bond before the Governor or Assistant Governor of the prison in the sum of €100.00 to keep the peace and be of good

behaviour for the period of his imprisonment and for 2 years following his release from the sentences imposed.

98. We will also impose the following additional conditions: –

1. That the appellant remains under the supervision of the probation services for a period of two years and that he complies with the directions from the probation services to include the attendance on any programme as directed by the probation services;

2. That the appellant keep away from and have no contact with the complainants in perpetuity.

99. We have also considered the need for post-release supervision and we direct that the appellant undergo post-release supervision for a period of four years from the date of his release on the following conditions:-

a) that he remain under probation supervision and comply with all directions from that service.

b) that he provide his address to the probation services;

c) that he notify any change of address to the probation services 7 days before any change takes place.