THE COURT OF APPEAL

Record Number: 177/20
Neutral Citation Number: [2021] IECA 222

Birmingham P.
Edwards J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

S.L.

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 30th day of July 2021 by Ms. Justice Kennedy.

1. This is an appeal against sentence. On the 28th July 2020 the appellant received an effective sentence of six years and nine months with the final nine months suspended on terms in respect of three counts, namely, a count of sexual assault contrary to section 2 of the Criminal Law (Rape)(Amendment) Act 1990, as amended, a count of distribution of child pornography contrary to section 5 of the Child Trafficking and Pornography Act 1998 and a count of production of child pornography contrary to section 5 of the Child Trafficking and Pornography Act 1998. A further count of possession was taken into consideration.

Background

2. On the 11th April 2016, members of an Garda Síochána executed a search warrant in relation to an individual residing in Co. Donegal. Among the items seized was a tablet which contained communications with another individual who was subsequently identified as the appellant. These communications included images and video recordings shared by the appellant which depicted the injured party in the bathroom. The appellant had filmed the injured party by means of a spy camera which he had hidden in the bathroom for this purpose. Skype text conversations relating to pornographic material followed, the nature of which was obscene and depraved.

3. On foot of this discovery a search warrant was issued in respect of the appellant's house and a further quantity of child pornography (which depicted persons other than the injured party) was discovered and forms the basis of the possession of child pornography offence.

4. Following the search, the injured party was interviewed by a specialist interviewer and the allegation regarding sexual assault came to light. The injured party described an occasion on which the appellant, who was in a relationship with the injured party's mother and resided with her, was home alone with the injured party. Under the pretext of treating the injured party's eczema, he touched the injured party inappropriately along the chest and bottom area. This occurred when the injured party was between the ages of 11 and 12 and forms the basis of the count concerning sexual assault.

5. Subsequent to that assault, the appellant obtained and placed a hidden camera in the shared bathroom of the house and filmed the injured party in the bathroom and while undressing to take a shower. The productions of those recordings and their subsequent distribution form the basis of the remaining two counts to which the appellant pleaded guilty.

Personal circumstances of the appellant

6. The appellant was born in 1970. He has no previous convictions. The Court heard evidence that shortly after Gardaí conducted the search of his house, the appellant began a therapy programme with One in Four and he participated in the after-care programme. At the time of sentencing the appellant was attending counselling with Eileen Finnegan, Forensic Psychotherapist, Systemic/Family therapist, who established a specialist forensic therapeutic intervention service. Ms. Finnegan prepared a psychological report for the court below. This report outlined that the appellant was assessed as being at low risk of re-offending, having been assessed at moderate risk previously in 2016.

The sentence imposed

7. In terms of the count of sexual assault, the sentencing judge referred to the following aggravating factors: that the appellant was aware of his predilection but did not remove himself from the situation, the age differentiation between the parties, the skin on skin touching, that he was a trusted adult *in locus parentis* at times and a confidant for the child and he assaulted the injured party at a vulnerable time when he was alone with the child in the family home. The sentencing judge placed the offending at the lower end of the mid-range and identified a headline sentence of four years.

8. In respect of the count of production, the judge noted that this represented a continuation of the sexual abuse of the injured party and a continuation of an abuse of his position of trust. In respect of both counts of production and distribution the sentencing judge identified the aggravating factors to be the relationship between the appellant and the victim, the planning and the premeditation that took place, the active involvement and the nature of the production. The Court also referred to Skype conversations between the appellant and a third party which accompanied the distribution of the pornographic material. These conversations highlighted the abhorrent nature of the offending, violating a young child, for

the perverse sexual gratification of the appellant. The offending was placed at the upper mid-level and headline sentences of nine years were identified.

9. In respect of mitigation on the appellant's part, the sentencing judge refers to the appellant's engagement with therapeutic services, the plea of guilty, his previous good character, the fact that he engaged in therapy for a period of four years in an effort to rehabilitate and that this has reduced the likelihood of re-offending to low risk and that he has gained insight and expressed remorse and shame, his loss of company of his family and friends and the social stigma attached to this offending, his loss of business, as he was self-employed and his work history, his cooperation with Tusla, that the numbers of videos and images were not in the higher amounts or numbers which might often be seen before this Court and that he will be placed on the sex offenders register.

10. The trial judge reduced the sentences as follows: a sentence of three years for the sexual assault and sentences of six years and nine months in respect of the counts of production and distribution, with all sentences to run concurrently. In order to account for the prospect of rehabilitation the final nine months of the sentence were suspended on terms.

Grounds of appeal

11. The appellant puts forward the following grounds of appeal: It is contended that the trial judge:-

(1) Erred by identifying excessive headline sentences in respect of each count and in particular, erred in assessing the gravity of offending.

(2) Erred in assessing the level of mitigation to be afforded to the accused. In particular, the learned trial judge failed to take account of, adequately or at all, the personal circumstances of the accused and the principle of rehabilitation in determining the level of credit to be afforded in mitigation.

(3) Further, or in the alternative, erred in imposing a final sentence which was excessive in all the circumstances of the case. In that regard, the learned trial judge did not have any, or adequate, regard to the principle of totality in determining the sentences imposed.

Submissions of the appellant

12. The appellant takes issue with the trial judge's characterisation of the counts as constituting a "progression of offending". While there may be a factual nexus between the sexual assault and the counts of production and distribution, there was no further sexual contact between the appellant and the injured party after the sexual assault occurred.

13. The appellant submits that the sentences imposed in respect of the counts of production and distribution represent a departure from the sentencing norms given the factors present which include the low quantity of recordings and the nature of the recordings. The appellant notes that the trial judge referred to *inter alia*, *The People (DPP) v Cathal Donnelly* (The Irish Times, 21st March 2013) and *The People (DPP) v. McC* [2003] 3 IR 609 in sentencing but it is submitted that the nature of the offences in those cases are of a more serious nature and should be distinguished from the facts of the instant case.

14. The appellant further argues that whilst the Court was entitled to have regard to the Skype messages as an aggravating factor, that feature alone was not sufficient to bring the offences into the upper-mid range and as such the headline sentence of nine years was excessive.

15. The appellant submits that there was strong evidence before the Court that the appellant had taken significant action to understand his wrongdoing and a comprehensive report was put before the Court. In light of such, the appellant argues that the trial judge failed to take sufficient account of the principle of rehabilitation. The appellant's action in seeking treatment pre-charge was an unusual feature of the case and one which warranted

further prioritisation of the rehabilitation principle and credit in mitigation. The appellant refers to the following passage from *The People (DPP) v. O'Byrne* [2013] IECCA 93 which, while concerned with the offence of possession, is nevertheless instructive:-

> "Since the offence of possession of child pornography is often the reflection of the proclivities and appetites of the offender, then any professional assessment of the offender's attitude and state of mind is valuable. In particular, any assessment of the extent to which the offender genuinely recognises that his conduct is wrong and is willing to engage in appropriate therapy and treatment, and does so, may be important."

16. The appellant further refers to *The People (DPP) v. Fagan* [2020] IECA 290 where the Court restated that in order for a court to "go the extra mile" in reducing a sentence in the interest of rehabilitation, there must be evidence of a genuine desire to reform and a track record showing steps that have been taken in that regard.

17. Finally, it is submitted that in light of the foregoing submissions the ultimate sentence imposed was excessive for a first-time offender who had not spent time in custody

Submissions of the respondent

18. The respondent submits that the trial judge was entirely correct to find that secretly recording the injured party in the bathroom and disseminating those recordings to a third party and engaging in obscene Skype conversations about the injured party represented a progression of offending, having already sexually assaulted the injured party.

19. The actions of the appellant in recording the injured party involved abusing his position of trust and violated the privacy of the injured party.

20. The respondent submits that the Court was not in error in imposing the sentence, which was imposed on Count 2 and 4, and that the sentence did not constitute a departure from the

sentencing norms for distribution and production offences. While it is accepted that the number and quantity of the images was not at the higher end, and that the recordings made of the injured party did not include sexual acts there were factors which the Court determined were relevant in relation to the evidence. This included the fact that the offending took place subsequent to the appellant carrying out the act of sexual assault.

21. The respondent argues with the appellant's assertion that the sentencing judge relied on the Skype conversations to bring the matter into the upper-mid range. The conversations were clearly a factor considered by the judge, she also took account of other factors including the relationship between the parties, the premeditated element and the active involvement and nature of the production as being factors which increased the gravity of the offences.

22. The respondent submits that the sentencing judge carefully considered and gave due weight to the mitigating factors and she was especially cognisant of the principle of rehabilitation in the instant case, as is clear from her sentencing remarks.

23. The sentencing judge carried out a careful balancing exercise in her sentencing and the sentence imposed was within the parameters available to her.

Discussion

24. Ms. Biggs SC for the appellant concedes that an appeal in respect the sexual assault offence is academic, but she refers to the facts of that assault by way of background. This appeal focuses on the sentence imposed on the counts of production and distribution of child pornography. It is important to note that two offences of possession of child pornography were taken into consideration. The possession of child pornography carries a maximum penalty of five years' imprisonment.

25. The maximum sentence on conviction on indictment for the production of child pornography and the distribution of child pornography is one of 14 years' imprisonment.

26. When the Gardaí assess images or videos involving child pornography, a standardised classification is utilised regarding the level of seriousness of the material. This may then assist a court in determining the nature of the material; that is in assessing the level of seriousness of the images or videos. Prof. O'Malley explains the classification at para. 8-29 of his text on Sexual Offences, second edition:-

> "As to the nature of the material, a classification method known as the COPINE system (developed at University College Cork) has proved highly influential. Under that system images are ranked on a ten-point scale ranging from indicative material (showing children in a normal setting or non-sexualised context but where the images are arranged or collected in such a way as to indicate a prurient interest on the part of the collector) to images depicting sadism or bestiality. This, in turn, was adapted by the English Sentencing Advisory Panel (SAP) but compressed to produce a five-level typology for sentencing purposes."

27. The five levels of gravity which were adopted in *R v. Oliver* [2003] 1 Cr. App. R. 28 are in ascending order of gravity.

28. Turning to the facts of this case, insofar as the production and distribution offences are concerned, we do not intend to elaborate on the nature of the material other than to say that there were four videos, each of which depicted the injured party in the bathroom undressing and/or showering and in respect of whom the appellant was *in loco parentis*. Factors which must be taken into account in assessing gravity include not only the nature of the images or movies, but also the manner in which the material was generated, and the quantity of the images or videos. In the present case there are a number of aggravating factors present which increase the gravity of the offending and in our view the following are of considerable significance.

29. Firstly, the level of planning and premeditation required in order to film the injured party is a very serious factor. The appellant purchased a spy camera which he then hid in a clock in the bathroom with a view to capturing the victim on camera. His conduct was conniving and deceitful, which of course is hardly surprising given his intention to record his victim in her most private moments.

30. Secondly, we believe the Skype messages are egregious. The nature of the conversations between this appellant and the other individual are depraved and properly described by the judge as 'obscene and grotesque in the extreme.' The communications make the most disturbing reading and serve to emphasis the deep depravity of child pornography.

31. Aside from those factors, the victim to this offence was a vulnerable young girl to whom the appellant was in *loco parentis.* The breach of trust on this basis alone was of a most serious order. In addition the appellant violated her privacy. The injured party was entitled to feel safe and secure in her own home and was, in particular entitled to feel that she was entirely secure in the privacy of her family bathroom. Understandably, the impact on the injured party is of a really severe order. The appellant's conduct has caused her to endure appalling pain and suffering. The victim was known to the appellant, he was someone she trusted and the knowledge of how the appellant violated her, must weigh very heavily on her.

32. Many of the aggravating factors identified above apply to the sexual assault of this young and vulnerable child. This offence took place prior to the pornography offences and involved the appellant massaging the victim on her bottom and breast area under the guise of treating her eczema. No argument was advanced at the appeal hearing regarding the sentence imposed on this count and it is conceded in written submissions that the judge was entitled to take into account that this offence occurred prior to the child pornography offending.

33. Insofar as the possession counts are concerned, which were taken into consideration and thus impact on the overall offending, there were two devices examined by the Gardaí on foot of the search of the appellant's home. Under one hundred images/movies were found on each device. Possession of child pornography is not a victimless crime, it involves the abhorrent abuse of vulnerable children regardless of the level of classification. The material was said by the judge to relate to children aged from 3 to 11 and involved sexually explicit acts. It seems there were also images/movies where genital and anal areas were visible.

34. In the context of the offences of production and distribution of child pornography, the question as we see it is whether, given that the material itself was not of such a number as sometimes seen in the context of cases of this nature and given that the material did not involve sexual activity of any kind, did the judge fall into error in nominating a pre-mitigation sentence of nine years which is above the mid-point on the range of sentencing available?

35. It is correct to say that the most serious cases of production and distribution of child pornography are likely to involve industrial-scale operations for commercial gain. In this case, the number of images involved is very low and the images are not in the most serious category. However, while not for commercial gain, the images were exchanged between the appellant and another party. This type of 'swapping' of images even without financial gain is significant. In the present case such swapping was limited to one other individual. As stated in *R v. Oliver* [2003] 1 Cr. App. R. 28 and as quoted in *The People (DPP) v. G.McC* [2003] 3 I.R. 609 at 619:-

> "Any element of commercial gain will place an offence at a high level of seriousness. In our judgment, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more

harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles and by reference to the shame and degradation to the original victims."

36. As we have stated, what sets the case apart and means that it has to be regarded as a very serious case is the fact that the images were created by the use of the spy camera which involved a deliberate and premeditated invasion of the privacy of a child to whom the appellant was *in loco parentis* and the nature of the communications on Skype. We have examined those communications and do not intend to refer to their content at all given the level of depravity expressed therein. Suffice to say, the content is truly shocking.

37. We are entirely satisfied that the judge was correct to take the view that these factors, together with the other aggravating factors meant that these offences should be regarded as mid-range offences. The real issue is whether the judge was correct in identifying a headline sentence above the mid-point on the range.

38. We are of the view that when we consider the nature of the activity; recording the child while in the bathroom or taking a shower and the number of the images, such would not merit a pre-mitigation sentence of nine years, that being in the upper mid-range. However, the aggravating factors bring the assessment of gravity of the offence to the mid-range of sentence, but not to the degree identified by the sentencing judge. Undoubtedly she was heavily and understandably influenced by the nature of the Skype messaging.

39. The second question is whether sufficient reduction was given by way of mitigation, in particular, whether sufficient account was taken of his prolonged involvement with One in Four. As stated by O'Donnell J. in *The People (DPP) v. O'Byrne* [2013] IECCA 93 in the context of a possession offence, which is apposite in the context of these offences:-

"Since the offence of possession of child pornography is often the reflection of the proclivities and appetites of the offender, then any professional assessment of the

offender's attitude and state of mind is valuable. In particular, any assessment of the extent to which the offender genuinely recognises that his conduct is wrong, and is willing to engage in appropriate therapy and treatment, and does so, may be important."

40. Having identified a headline sentence of nine years, the judge reduced this to six years and nine months which represents a 25% reduction. She then addressed the question of rehabilitation by suspending nine months of the sentence. It is true that the appellant engaged with One in Four in order to address his offending and did so for some four years by the sentence date. Such efforts to gain insight into his offending must be recognised as a step in the direction of rehabilitation. However, we do not see an error in a reduction of 25% for the mitigating factors and the suspension of the nine months as being an error in principle.

41. Having taken the view that the judge erred in nominating a pre-mitigation sentence at the upper mid- level, we will quash the sentence and proceed to re-sentence as of today's date.

Re-Sentence

42. It must be recalled that in sentencing the appellant, the offences of possession of child pornography are to be taken into consideration. This Court must impose an proportionate sentence and in this regard must take account of those offences and their nature in the imposition of an overall proportionate sentence. We are also cognisant of the sexual assault offence with which we will not intervene.

43. In the circumstances, we consider the appropriate pre-mitigation sentence on Counts 2 and 4 to be one of seven years' imprisonment. Taking account of the mitigating factors, we reduce that sentence to one of five years and six months. We note that the appellant has undergone four years of therapy since the commission of the offence. Such efforts towards rehabilitation must be carefully considered by this Court and must in our view continue and

consequently, we will suspend the final year of the sentence for a period of four years on the mandatory condition and on the condition that he engage with the probation services and remain under their supervision and comply with all directions, and in particular that he undergo all relevant courses and therapeutic programs to further his rehabilitation. A bond in the sum of €100.00 which may be entered into before the Governor or the Assistant Governor of the prison. Liberty to apply if any difficulties arise. The sentence of three years' imprisonment remains on Count 1. Counts 3 and 5 are taken into consideration.

44. In order to prevent the commission of any further sexual offences and to protect the public from the harm caused by the appellant's activities, we also impose post-release supervision for a period of six years from the date of his release from custody under the supervision of the probation services. As part of the post-release supervision order, we impose a condition that the appellant receive psychological counselling or other appropriate treatment provided by the probation services or as recommended by the service.

45. The appellant remains subject to the sex offenders register.