



THE COURT OF APPEAL

Record Number: 76CJA/21
Neutral Citation No: [2021] IECA 344

McCarthy J.
Kennedy J.
Ní Raifeartaigh J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

ROBERT TRAYNOR

RESPONDENT

JUDGMENT of the Court delivered (electronically) on the 21st day of December 2021 by Kennedy J.

1. This is an application by the Director of Public Prosecutions pursuant to s. 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the respondent on the 12th March 2021. The respondent pleaded guilty to two counts on the indictment on a full facts basis, namely possession of child pornography contrary to s. 6 of the Child Trafficking and Pornography Act 1998 (hereinafter “the 1998 Act”), as substituted by s. 14 of the Criminal Law (Sexual Offences) Act 2017, and production of child

pornography contrary to s. 5 of the 1998 Act. The Court imposed a two and a half year sentence on each count, on a concurrent basis, which was suspended in its entirety on certain terms.

Background

2. On the 2nd February 2018, on foot of a search warrant issued pursuant to s. 7 of the 1998 Act, Gardaí searched the address of the respondent. He was cautioned and interviewed immediately by the attending Gardaí. A number of passwords for various electronic devices were handed over to the Gardaí. The respondent admitted that there were images of an “erotic” nature on the devices, but denied that they could be classified as child pornography. He was said to have believed that they were adults posing as children. He told the Gardaí that he used a particular browser which disguised user location when searching for images. The respondent cooperated with the Gardaí, and signed a consent form which gave access to various accounts. Two Dell laptops, two hard drives, and two cameras were seized from the property.

3. In cases such as these, it is common for Gardaí to prepare a report in which the content of the pornography is placed into three categories denoting the level of gravity in descending order: Category 1 contains content which is child explicit; Category 2 refers to child exposure; and, Category 3 contains cartoon-animated anime. This classification appears to derive from the definition of child pornography under s. 2 of the 1998 Act, as amended by s. 9 of the Criminal Law (Sexual Offences) Act 2017 which defines child pornography by visual representation *inter alia* as:

(a) any visual representation —

- i. that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in real or simulated sexually explicit activity,

- ii. that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or
- iii. that shows, for a sexual purpose, the genital or anal region of a child or of a person depicted as being a child,”

4. In this case, Category 2 was described as child exposure, involving a child under the age of seventeen where the genital and/or anal region of the child is exposed. Category 3 was described as cartoon or animated anime, videos, or computer-generated images (CGI) of children involved in sexual activity, where the focus of the image or video is the genital or anal region. As pointed out by Edwards J. in *The People (DPP) v. AM* [2021] IECA 322, the use of such a report is:

“as a means of categorising severity of images for police purposes, including giving evidence at sentencing, [and] is unobjectionable providing it is understood that police categorisations of severity using a scale, the scientific validity of which has not been established by supporting expert evidence, cannot bind a court’s view of the material.”

Obviously, a Court must come to its own conclusion as to gravity on the basis of the evidence. In the present case, no objection was taken to the evidence being adduced in this manner.

5. The evidence placed the images found on both laptops and an external hard drive into Category 2 and Category 3. 213 images and 65 video files were found on the hard drive, which included 213 Category 2 images. These depicted girls aged between eight and twelve, who were either naked or partially naked, and whose genital area was exposed to the camera. It was reported that the majority of these images include a logo symbol for “LS Models”, which is a phrase associated with child pornography material. Also found on this hard drive were 65 Category 2 video files of girls aged between six and twelve.

6. A second external hard drive contained 110 images and 118 video files. These included 110 Category 2 images of girls aged between six and twelve, and 118 Category 2 videos of girls, aged between six and twelve.
7. One Dell laptop was found with 1615 Category 2 images and two Category 2 video files. The images depicted girls between the ages of six and fourteen in the same manner described above. One of the video files was eight minutes long and showed two girls between ten and fourteen which was particularly explicit. The second video was four minutes and 43 seconds long and showed two girls aged between six and twelve naked in a bath.
8. A further 2,287 Category 3 CGI images were found on the laptop, in a password encrypted TrueCrypt container, which depicted girls aged between eight and fourteen in various positions which were sexual in nature.
9. The respondent was arrested on the 15th August 2018. In his interviews, he confirmed that he was the only person to have access to the computers. In respect of the CGI images, he said, “I didn’t think they were illegal. Fantasy images, risqué, skirting the boundaries of what is legal”. The matter was listed on the 22nd of October 2020, on which date the respondent pleaded guilty to the above-mentioned counts.

Personal circumstances of the respondent

10. The respondent had no previous convictions at the time of the offending. He was previously employed in the technology sector. It is accepted that he cooperated with the investigation and made admissions. Psychological reports prepared for the Court state that he attended and engaged well with counselling and rehabilitation; he attended significant counselling and rehabilitation regarding his offending. It is also said that he suffered from significant anxiety. The sentencing judge took into consideration the fact that he had for a long time long suffered from a skin disorder which was described as “disfiguring”. He is said to

have lived an isolated life since his teens because of this, and his ongoing anxiety issues. He is assessed as being at low risk of reoffending.

The sentence imposed

11. In identifying a sentence, the sentencing judge considered the significant number of images possessed and produced by the respondent. On the count of possession, the judge identified a headline sentence of three and a half years. While they contained no evidence of sexual acts, they depicted real children and she deemed their contents to constitute a “gross exploitation of children and an affront to human decency”. On the count of production, the judge stated that the images showed some penetrative acts and exposure, but were animated and therefore at the lower end of the scale in terms of gravity, identifying a pre-mitigation sentence of three and a half years. The judge noted that they were produced in September 2014 and retained until found by the Gardaí over three years later, and that the respondent had attempted to conceal his address when searching the images online. It was also noted that there was no evidence that any of these images were shared.

12. The sentencing judge considered as aggravating factors the use of his skill in computers to create pornographic animated content debasing prepubescent children, the number of images and videos found in the respondent’s possession, and the fact that he sought the images out with certain codes. In respect of the possession offences, she took into account the young age of the children involved and the nature of the activity.

13. In terms of mitigation, the judge took into account his remorse, his early guilty plea, his good work history, and the absence of previous convictions. It was also noted that he was assessed as being at a low risk of reoffending, and had undergone significant counselling and rehabilitation with which he had engaged well. She reduced the sentence on each count to one of two and a half years. She then suspended the sentences in their entirety on the condition that

the respondent engaged in therapy as directed by the probation services, under whose supervision he was to remain for a period of three years. It was also directed that he undergo assessment for a sex offender treatment programme.

Grounds of application

14. Whilst several grounds of application have been filed, in essence the Director contends that the judge erred in failing to take adequate account of the aggravating factors, had excessive regard to the mitigating factors, and failed to properly consider the principle of deterrence. In truth, the gravamen of the Director's appeal lies in suspending the sentence in its entirety.

Submissions of the applicant

15. The Director says that the sentence imposed by the judge was unduly lenient having regard to the nature, circumstances, and gravity of the offences. She relies on the significant number of the images involved, the nature of the images, the fact that the respondent sought to minimise his responsibility for the offending, how he utilised his technical skills to engage in a form of browsing which made detection less likely by disguising his location, and how he used these skills to create the animated images. In suspending the entire sentence, it is said that insufficient regard was had to deterrence. Counsel for the Director highlights the above factors in contending that the judge failed to take proper account of the aggravating factors.

16. Furthermore it is said that the judge erred in ascribing excessive weight to the respondent's admissions and plea of guilty, in that he sought to minimise the nature of the offending in circumstances where he referenced "skirting the boundaries of what was legal", and questioned whether the production of CGI images was illegal. Moreover, his plea of guilty was entered having taken a trial date.

Submissions of the respondent

17. It is submitted by counsel for the respondent that the Director has failed to discharge the burden of establishing that the sentence imposed by the learned sentencing judge in the present case represents a “substantial departure from what would be regarded as the appropriate sentence”, per *The People (DPP) v. Byrne* [1995] 1 ILRM 279, at para. 41. The respondent maintains that the sentence imposed in this case was within the appropriate range in all the circumstances.

18. The respondent rejects the argument put forward by the Director that the sentencing court failed to take account of the seriousness of the offending or the importance of deterrence for this type of offending. It is argued on behalf of the respondent that the sentencing judge did take deterrence into consideration, as evidenced in her remarks:

“Obviously, in the context of sentencing in these cases, there has to be deterrence, both personal and general. Children, because of their age and dependence, are vulnerable and must be protected by the courts”.

19. It is submitted that deterrence is but one factor to be considered by a sentencing judge, and it is subject to proportionality considerations. Reference is made to *DPP v. K(G)* [2008] IECCA 110, a case which is relied upon by the applicant and in which the sentencing judge acknowledged that deterrence and the protection of society must be considered “to a limited extent only consistent with the proportionality principle and must not be conflated with a form of general preventive incarceration which is not part of our jurisprudence”. The respondent argues that the judge gave sufficient regard to this principle in the context of the particular circumstances of the offending, and the personal circumstances of the accused. It is said that the full suspension of a sentence is not necessarily indicative of a failure to consider deterrence.

20. The respondent submits that the sentencing judge gave appropriate regard to both the offences and personal circumstances of the accused in a manner that was proportionate. It is

further said that the sentence imposed cannot be seen as representing a substantial departure from what is an appropriate sentence. The respondent opposes the argument made by the applicant that the extent of his cooperation should be interpreted in a way that would lessen its value as mitigation. It is argued that the handing over of passwords in particular represented significant mitigation.

Discussion

21. The law on the review of sentences is well-established: this Court will not intervene in the sentence imposed unless it is satisfied that the sentence constituted a substantial departure from the norm.

22. The respondent pleaded guilty to two counts on the indictment, being a count of possession of child pornography and a count of production of child pornography. A single count of possession of child pornography was preferred on the indictment and the remaining seven counts concerned the production of child pornography. The possession count concerned a date in February 2018, whilst the remaining seven counts of production of child pornography extended from January 2014 to December 2015. The pleas of guilty were accepted on a full facts basis and so the balance of the counts was taken into consideration by the judge in the imposition of sentence.

23. In the recent judgment of *AM*, Edwards J. carried out a detailed analysis of the jurisprudence concerning offences of this nature and observed:

“It is indeed difficult to discern any significant trend in the cases reviewed. The individual cases the subject matter of the review varied considerably in terms of the number of images possessed, the circumstances of their possession, and the nature of them. For example, the offender in [*DPP v. Watters* [2019] IECA 191] had a relevant previous conviction, which was relevant to his culpability.”

24. The offending conduct in each case must be analysed carefully, with reference *inter alia* to the nature of the material, quantity, duration of retention and, in the instance of production, the manner and circumstances of the creation of the material. There are a substantial number of the images and videos in the present case. There are 2,123 Category 2 images and videos which relate to the exposure of children under the age of seventeen years where the genitals and/or a region of the child is exposed, and 2,287 Category 3 CGI images of an explicit nature.

25. The videos and images involved in the present case in Category 2 concerned children aged between six and fourteen years. Some of the images and videos contained a particular watermark which is associated with child pornography. The Category 2 images and videos involved children who were photographed in a studio environment. These offences are not victimless crimes, and this type of activity involves the debasing of children. The present case concerned some very young children who were aware that they were being photographed in this manner. The respondent used his technical skills in order to avoid detection, and also in order to create the CGI images which were of an explicit nature. The applicant contends that, whilst the respondent cooperated with the Gardaí on his apprehension, he nonetheless sought to minimise his involvement and questioned the illegality of some of his conduct.

26. It appears to this Court that the Director's real complaint lies with the fact that the sentence was suspended in its entirety by the sentencing judge, thus failing to properly acknowledge the principle of deterrence or the gravity of the offending conduct. There is no doubt that the concept of deterrence is significant in the context of offending of this character.

27. The aggravating factors are readily apparent in the present case, not least the significant number of the pornographic images and videos. The manner of the creation of the CGI images is also of importance in that the respondent used his own technical skills to create these images. Moreover, he used his technical skills in order to avoid detection by the use of a particular type of browser. Therefore, there is little doubt but that he was aware that the kind of activity in

which he was engaged was illegal. Gravity is assessed with reference to the offender's intention, and the harm done. As stated by Edwards J. in *The People (DPP) v. Kelly* [2016] IECA 204 at para. 34-35:

“34. 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.

35. The intrinsic moral culpability of an offender for an offence depends on the offender's criminal intention at the time he or she committed the offence. The matter is well put in the following passage from O'Malley on *Sentencing*, 2nd ed, at para. 5-15, of which we approve:

‘When assessing culpability, it is generally useful to have regard to the nature of the mens rea which the offender is found, or appears, to have had when committing the act constituting the crime. Intention to cause harm clearly represents the highest level of culpability and the more harm intended, the greater the blameworthiness. Recklessness, in the sense of a conscious disregard of an unjustifiable risk, comes next, and again the greater and more dangerous the risk, the greater the culpability. Negligence would rank as the lowest form of culpability, which is not to say that it should be met with impunity if it has produced serious harm.’”

28. Insofar as the assessment of gravity of the possession count is concerned, the judge identified a headline sentence of three and a half years; she placed the possession count in the mid-range where the maximum penalty available is that of five years' imprisonment. She took

into consideration that whilst there was no evidence of sexual acts, the offending concerned children, which, in the words of the sentencing judge, constitutes “a gross exploitation of children and an affront to human decency to view children in such poses.” We agree with the judge in this regard. In respect of the production count, whilst the images were animated, they displayed sexual acts between adults and children, and consequently the judge considered a pre-mitigation sentence of three and a half years to be appropriate in respect thereof. The maximum penalty available for the offence of production is one of fourteen years’ imprisonment.

29. There is no doubt but that there were a significant number of images and videos involved in the present case. The material which was the subject of the production count was in existence from 2014. The aggravating factors were correctly identified by the sentencing judge: she was entitled to take into account the nature of the images, their quantity, the duration of retention of the material, and the manner in which the images and videos were created by the respondent. These are factors relevant to the assessment of the intrinsic seriousness of the offending conduct. We are satisfied that the judge identified the appropriate pre-mitigation sentence for the possession count, however, we believe the headline sentence nominated for the production count could have been of a greater order, so to properly reflect the principle of deterrence. However, we must take into consideration that the images and videos were in Category 3 and as such did not involve real children. Nonetheless, the conduct is morally reprehensible and is, of course, illegal, and so it must be marked by a significant censure. While this Court might well have imposed a greater sentence if sentencing in the first instance, it remains our view that the sentence nominated of three and a half years fell within the judge’s margin of appreciation.

30. In short, we believe that the pre-mitigation sentence of three and a half years’ imprisonment for the production count was somewhat lenient, but nonetheless was within the margin of appreciation to be afforded to a sentencing judge.

31. Insofar as it is contended that the judge afforded too great a discount for the mitigation present, she properly took into account that admissions were made at an early opportunity by the respondent, and were followed with pleas of guilty. He was entitled to credit for the pleas, and for his cooperation with the Gardaí at the time of the search. He is a man with no previous convictions and has a good work history. His personal circumstances are such that they have caused him to suffer significant anxiety, and he has lived an isolated and lonely life due to a long-standing disfiguring skin disorder which has affected him emotionally since his teenage years. More significantly perhaps, from a rehabilitation perspective, it transpired in the course of the sentence hearing that the respondent has been in receipt of counselling which commenced some months following his arrest, and he has sought to develop insight into his offending conduct.

32. The respondent commenced individual therapy with Forensic Psychological Services in August 2020 and attended thereafter on a weekly basis. According to the report furnished to the court below and to this Court, the respondent displayed regret and remorse for his offending conduct. Moreover, the psychologist was satisfied that the respondent had progressed in terms of developing insight into the factors which contributed to his offending conduct. The report goes on to state that significant therapeutic work is required to implement those insights into “real-world changes”. This report is dated the 11th December 2020. In a report of March 2021, the same psychologist confirmed that the respondent had attended for a further seven sessions of individual therapy in the early part of 2021, and was willing to join a group therapy programme which the reporter opined was essential in helping him progress further. The Circuit Court judge also had the benefit of a probation and welfare service report.

Conclusion

33. In our view, this is a serious case, not least because of the quantity of images and the degree of organisation involved in creating the CGI images, which included downloading an application allowing him to pre-load animated templates of naked adults and children. However, as we have stated, we are satisfied that the judge identified the appropriate headline sentence in each instance, albeit that the sentence for the production count was somewhat lenient, particularly when the balance of six counts was taken into consideration by the judge. However, the sentence of three and a half years is within the margin of appreciation afforded to a judge.

34. Moreover, when we look to the reduction for mitigation, we do not find that the judge fell into error in reducing the sentence by one year. However, the real issue is whether the seriousness of the offending called for an immediate custodial sentence.

35. There were strong mitigating factors: the respondent's personal history; his medical condition, resulting in isolation and anxiety; and, most significantly, that he had used the time prior to sentence to address his offending conduct, and had actively sought and engaged in counselling in this regard.

36. The respondent indicated a willingness to engage with group therapy and to engage with the probation services to address his offending conduct. He has used his contact with the therapeutic services in a productive manner and has gained insight in this respect. Clearly, the judge was influenced by this approach. We have to consider whether this factor merited the suspension of the entire sentence.

37. The respondent is a man with strong family support, the support of group therapy, and is under the supervision of the probation services. Suspending the sentence in its entirety rendered the sentence lenient, in fact, it could be said to be an extremely lenient sentence. There is no doubt that a custodial element to the sentence was a definite prospect: the only factor which mitigated against such a prospect was the effort by the respondent to address his offending in

an effort to ensure that he does not reoffend in this manner. We have considered whether incarceration would at this point serve the interests of justice. We have concluded, in the circumstances, that it is in the interests of society that the respondent continue with his rehabilitation in the community.

38. While the decision to wholly suspend the sentence renders the sentence a very lenient one, the purpose of this suspension is to further the respondent's rehabilitation, which is in the interests of society. The fact that the judge wholly suspended the sentence was a decision which fell at the very outer limits of the margin of appreciation afforded to a judge, however, we are satisfied that the sentence falls within that margin of appreciation and, accordingly, we will not intervene.

39. The appeal is dismissed.