



THE COURT OF APPEAL

Record Number: 11CJA/23

**Edwards J.
McCarthy J.
Kennedy 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 -

DENIS NOLAN

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 8th day of June 2023 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency.
2. The indictment contained a total of twenty counts; eleven counts of s. 4 rape and nine counts of sexual assault. The respondent pleaded guilty to counts 1, 4, 6, 7, 9, 10, 11, 16 and 20 on a full facts basis. On the 2nd December 2022, the respondent was sentenced to an effective custodial sentence of 18 months' imprisonment.

Background

3. The offending began when the injured party was 12 years of age. The respondent was a parish priest who was involved in the school attended by the injured party. The respondent asked the injured party to cut his lawns in return for payment. The injured party stated that after 6-8 weeks of this work the respondent began to ask him questions of a sexual nature. The respondent said that he would discuss more money with the injured party if he would do certain things with him.
4. The offending began with incidents of the respondent masturbating the injured party. He told him that this was all a part of growing up. The offending progressed to incidents of s. 4 anal and oral rape. The injured party was in pain and crying during the incidents of anal rape. The respondent paid the injured party after some of these incidents. He also, on occasion, supplied him with alcohol.

Personal Circumstances

5. The respondent was 70 years of age at the time of sentence. He is one of five children. He left home at the age of 19 and joined the seminary. There was recourse to violence within the family home while the respondent was growing up.

Sentencing Remarks

6. The sentencing judge outlined as aggravating factors that there were multiple offences over a considerable period of time, the power imbalance, the breach of trust, the age differential, the impact on the injured party as outlined in the victim impact report, the escalation of offending from sexual assault to s. 4 rape and the grooming of the injured party.

7. In terms of mitigation, the judge noted the pleas of guilty and that there was some cooperation with the investigation, this appears to us to be limited and did not extend to admissions. She also noted that the respondent apologised for his offending, that he leads a solitary existence, his difficult upbringing, his good work history, his age and his engagement with rehabilitative programmes while in custody. The court also had sight of a psychological report.

8. Further regard was had to the fact that at the time of the sentencing hearing, the respondent was serving a six-year sentence imposed on the 15th May 2017 in the Central Criminal Court which was imposed consecutive to a seven-year sentence imposed in Wicklow Circuit Criminal Court on the 21st March 2014.

9. The judge nominated headline sentences of 18 months' imprisonment in respect of count 1, 3 ½ years' imprisonment in respect of count 4, 12 years' imprisonment in respect of count 6, 13 years' imprisonment in respect of count 7, 4 years' imprisonment in respect of count 9, 13 years' imprisonment in respect of count 10, 13 ½ years' imprisonment in respect of count 11 and 4 ½ years' imprisonment in respect of count 16 and count 20.

10. Applying mitigation, the respondent was sentenced to 12 months' imprisonment in respect of count 1, 2 years' imprisonment in respect of count 4, 8 years' imprisonment in respect of count 6, 8 years and 8 months' imprisonment in respect of count 7, 32 months' imprisonment in respect of count 9, 8 years and 8 months' imprisonment in respect of count 10, 9 years' imprisonment in respect of count 11 and 3 years' imprisonment in respect of counts 16 and 20. All sentences to run concurrently with all but the last 18 months of each sentence suspended, save for count 1 which was suspended in its entirety, leading to an effective sentence of 18 months' imprisonment.

Grounds of Application

11. The Director relies on several grounds of application; however, the essence of the review is that the period of supervision was excessive.

Submissions of the Director

12. The Director acknowledges the principles to be applied in undue leniency applications as laid down in the decision of *People (DPP) v Stronge* [2011] IECCA 79. Reference is also made to *People (DPP) v McCormack* [2000] 4 IR 356, *People (DPP) v Byrne* [1995] 1 ILRM 279, *People (DPP) v McGinty* [2007] 1 IR 633 and *People (DPP) v Wall* [2011] IECA 45.

13. It is accepted that the sentencing judge was entitled to have regard to the previous sentences imposed on the respondent however, it is submitted that she erred by being disproportionate in so doing in suspending all but 18 months of the sentence. This, it is said does not reflect the aggravating features of the offending.

14. It is contended that should all three matters have come before the judge at the same time, in light of *People (DPP) v FE* [2019] IESC 85, consideration would almost certainly have had to be given to the ultimate sentence of life imprisonment.

Submissions of the Respondent

15. The respondent considers the submission of the Director that a sentence of 9 years with the final 18 months suspended would not have been so severe as to warrant being overturned on appeal. It is submitted that such an approach would have provided for a release date when the respondent would have been aged 82 with every prospect of dying in prison and would have involved the sentencing judge ignoring the principle of proportionality and totality of sentence.

16. The respondent further considers the submission of the Director that a life sentence might have been considered should all three matters have come before the court at the same time. It is submitted that same is unfair to the sentencing judge and speculative and that the judge would have been open to criticism should she have considered what her approach would have been in that scenario.

17. It is submitted that the sentencing judge was conscious of the totality principle given the time that the respondent had already spent in custody and that this offending behaviour was the first in time in terms of the three sentences that were imposed on him previously. The respondent relies on the following dicta of O'Donnell J in *People (DPP) v Farrell* [2010] IECCA 68:-

*"The imposition of a consecutive sentence carries with it a particular obligation to ensure what is described somewhat clumsily as the "totality principle" is observed. It is a commonplace of many types of assessment that the consideration of the component parts risks sometimes missing or exaggerating the value of the whole. This observation applies in the context of sentencing because the construction of the sentence involves not just the identification of the harm to victims, but also an assessment of the culpability of the accused. In the field of sentencing, it is certainly the case that there is a principle of totality, which requires that when consecutive sentences are employed, a **court must be careful to take account of the overall impact of the sentence, the moral blameworthiness of the accused and the prospect of rehabilitation, and therefore recognises that the total sentence in some cases should be less than the sum of the component parts.**"* (emphasis added)

18. It is pointed out that regard was also had to the principles of general and specific deterrence by virtue of the reduction in the headline sentences and the principle of rehabilitation by virtue of the significant suspended sentence.

19. The Court of Criminal Appeal's decision in *Farrell* is relied upon insofar as the court amended the length of certain individual sentences without interfering with the sentencing judge's original overall sentence which had had regard to the totality principle.

Discussion

20. This was egregious offending by an individual who comes before this Court as a person who is not of good character. This series of offending was the first of three periods of offending. A sentence of 7 years and 6 years respectively was imposed for the other two periods of offending.

21. The aggravating factors are many; the tender years of the injured party, his vulnerability, the egregious breach of trust, the grooming of the injured party, the provision of alcohol, the offer of payment and actual payment, the forceful nature of the rapes, ignoring the pleas of the injured party, the prolonged nature of the offending and the severe and long-lasting impact on the injured party.

22. We do not believe that the judge erred in her nomination of headline sentences in the region of 12-13 ½ years on the rape counts, nor do we believe she erred in reducing the sentences as she did for mitigation, albeit that her reduction given the limited mitigation was generous, we do not see it as unduly lenient.

23. However, the suspension of all but 18 months of the sentences is an entirely different matter, and this is the focus of this review. It is apparent that the judge took account of the totality principle, the purpose of which is to ensure a proportionate sentence, but suspending all but 18 months of the sentences does not appropriately reflect the gravity of the overall offending.

24. Applying the principles for review of sentence; we are satisfied that the ultimate sentence imposed was a substantial departure from the norm and was therefore unduly lenient. Consequently, we will quash the sentences imposed in respect of the rape offences and the sexual assault offences and proceed to re-sentence.

25. In re-sentencing the respondent, we sentence as of today and consider all factors for that purpose. We consider the sentences imposed prior to suspension to be the appropriate sentence in each instance and that such sentences should be imposed concurrent *inter se* but consecutive to the sentences imposed on the 15th May 2017. In order to reflect the totality principle, we will reduce the sentence imposed on each of the rape counts to 6 years' imprisonment. The suspended portion of each sentence is removed. The respondent remains on the sex offenders register. Post-release supervision is imposed for a period of 5 years, and we will hear submissions on the terms.

26. The net effect of our intervention is that the sentence for each rape offences is now that of 6 years' imprisonment.