



THE COURT OF APPEAL

Record Number: 35CJA/22

**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 -

A.A.

RESPONDENT

JUDGMENT of the Court delivered on the 30th day of July 2024 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency of a sentence of 15 years imposed on counts of rape, s. 4 rape and sexual exploitation and 4 years imposed on counts of sexual assault.

2. The respondent is an uncle by marriage of the complainants, and was convicted of 4 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, 3 counts of sexual exploitation of a child contrary to s. 3 of the Child Trafficking and Pornography Act, 1998, as amended, 2 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, as amended and 1 count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990. We have not used the respondent's or the victims' real initials in the interests of protecting the identity of the children. A and C are the respondent's nephews and B is the respondent's niece. He is married to their maternal aunt.

Background

3. The respondent was tried with six co-accused, five of whom were convicted of various sexual offending in respect of these children. Those convicted included the children's parents, this respondent and a maternal uncle. Undue leniency applications regarding the parents are before the Court. The maternal uncle appeals the severity of his sentence.

4. In respect of this respondent, a headline sentence of 16 years' imprisonment was nominated on the rape, s. 4 rape and sexual exploitation offences. A headline sentence of five years was

nominated for the sexual assault offences. The sentences were reduced for mitigation to 15 years and 4 years, to run concurrently.

5. The offending occurred between the 18th August 2014 and the 28th April 2016 when A was aged between 7 years and 9 years, B was aged between 6 years and 7 years and C was aged between 5 years and 6 years.

6. The children were taken into care due to neglect, and subsequently made disclosures of sexual abuse against their parents and other family members.

7. Given the breadth of abuse in these cases, the Director made an unusual application to limit the details of the offending to protect the children and therefore we do not intend, insofar as it is possible, to set out in detail the nature of the abuse perpetrated on each of the three children.

8. The respondent was convicted of the sexual assault and sexual exploitation of A, the rape and sexual assault of B and the s. 4 rape, sexual exploitation and sexual assault of C.

9. In general terms, this respondent inappropriately touched the children, compelled and instructed them to engage with each other and other persons, raped child B and committed s. 4 rape on child C. All children were young and vulnerable.

Personal Circumstances of the Respondent

10. The respondent was 49 years of age at the time of sentencing. He has no previous convictions.

Sentencing Remarks

11. The sentencing judge listed the aggravating features of the respondent's offending as the gross betrayal of trust, the very young age of the children and the damage and suffering inflicted upon them which is continuing.

12. The judge considered that the number of inter-related adults involved in the offending resulted in there being no adult figure within the family to whom the children could turn. He stated that the isolation, abuse and control of these children by the adults in the course of the neglect or sexual abuse was total.

13. In mitigation, *inter alia*, the judge took into account the respondent's lack of previous convictions, his constructive involvement in the community, his history of ill mental health and hospitalisation.

Grounds of Application

14. The Director relies, in essence, on two grounds; that the headline sentences nominated for each count and the sentence imposed does not reflect the overall gravity of the offending.

Submissions of the Parties

The Applicant

15. The Director's position is that the respondent was a central player in the abuse. It is outlined that the respondent put himself forward as a representative of the parents' interests in meetings between Tusla and the parents and that he was a point of contact for the social workers with the family.

16. It is said that the headline sentences nominated on the sexual offending, particularly, on the sexual exploitation, rape and s. 4 rape counts, do not adequately reflect the exceptional depravity and gravity of the offending. Specific aggravating factors are listed, including the relationship between the respondent and the complainants, the gross breach of trust, the various types of abuse, the involvement of other adults in the abuse, the instruction to the children to engage in sexual acts,

the prolonged offending, the age of the children, the psychological and emotional damage on the children, the division of the siblings, directing the children not to reveal the abuse and taking advantage of the appalling neglect of the children to sexually abuse them.

17. The Director agrees with the placement of the sentences in the top range of 15 years to life but disagrees with the nomination at the lowest point of that range.

18. Reference is made to the Supreme Court's judgment in *People (DPP) v FE* [2021] 1 IR 217 and it is argued that many of the additional features expressly set out in the analysis of *People (DPP) v WD* [2008] 1 IR 308, requiring penalties of up to life imprisonment clearly apply to this respondent.

19. It is submitted that the sentencing judge should have been considering sentences up to life imprisonment and substantially above 18 years in order to reflect the aggravating features present herein.

20. In addition, it is said that where the judge decided against consecutive sentences, the sentences actually imposed failed to reflect the totality of the offending. Ref: *People (DPP) v X* [2021] IECA 168 at para. 50 and Prof. O'Malley's text on *Sentencing Law and Practice*, 3rd Ed. at para 13-35.

The Respondent

21. The respondent relies on the judgment of Edwards J in *People (DPP) v Byrne* [2017] IECA 97 and says that the judge was best placed to nominate the headline sentence. The respondent says that the judge considered all the aggravating factors and that his assessment of the headline sentence was within his discretion and did not represent an error in principle.

22. It is said that the judge properly considered the issue of consecutive sentences, that he considered the principle of totality and decided that the sentences imposed reflected the overall serious nature of the offending. It is submitted that the decision not to impose consecutive sentences was within the realm of appropriate discretion of the sentencing judge and did not represent an error in principle.

Discussion

23. We have considered the totality of the written and oral submissions of both parties.

24. Whilst cases with facts of the utmost seriousness come before this Court, it cannot be gainsaid that the proliferation of aggravating factors in the present case renders this among one of the most serious cases to come before us.

25. There was a gross breach of trust, not only from the perspective of abusing young children within a family, but also in the context of the overall family dynamic and the appalling neglect visited upon these children, physically, emotionally and psychologically.

26. In addition, this man was manipulative and duplicitous in the manner of his approach to the social workers trying to assist these children by representing himself as assisting the social services while engaging in the appalling abuse and manipulation of these children.

27. All the above is aside from the depraved nature of the abuse, in particular the nature of the sexual exploitation counts. Those offences are particularly egregious, two of the sexual exploitation offences were effected with the children's parents present, and in one instance, the respondent acted on his own. The children were humiliated and isolated. As the trial judge observed, there was simply no one within the family to whom they could turn. The horror visited upon these children continued

for a prolonged period with abuse occurring when they were alone, in the presence of each other and in the presence of other adults.

28. The reports on the victims make for disturbing and very sad reading. It is not an exaggeration to say that the actions of this man and others had a devastating impact on them. The saving grace is that of the input of the wonderful people who took over their care. The children were totally neglected and frightened when first taken into care, and this is aside from their lack of any basic skills. The three children were neglected and traumatised, and the respondent's conduct in abusing them in an environment of neglect is egregious.

29. The principles concerning undue leniency reviews are well-established, commencing with *People (DPP) v Byrne* [1995] 1 ILRM 279 and continuing with a synopsis of the principles in *People (DPP) v Stronge* [2011] IECCA 79. The burden rests with the Director to establish that a sentence is unduly lenient to the extent that the divergence between the sentence imposed and that which ought to have been imposed amounts to an error in principle. Only then will this Court intervene. The sentence imposed must be proven to constitute a substantial departure from the norm.

30. The aggravating factors, as mentioned, are numerous, the abuse of trust on so many different levels and the impact on the children cannot be overstated. They are fragile people emotionally and psychologically as a consequence of the abuse visited upon them.

31. This respondent is guilty of rape offences and sexual exploitation of a really insidious kind. We believe that the nature of the sexual exploitation was sinister and was, of course, for his own sexual gratification. Encouraging the children to engage as he did is truly shocking. The deep and lasting impact on the children is readily understandable.

32. There is no doubt that these offences fall within the category of cases requiring up to life imprisonment as identified in *FE*.

33. Charleton J. identified certain factors in his earlier decision in *People (DPP) v WD* as including more than usual humiliation, gratuitous sexual perversions, abuse of trust, or misusing a dominant position within a family. The abuse of a particularly young or vulnerable victim increases the gravity. These factors and more are present in this case.

34. The sentencing judge decided to impose a sentence to reflect the overall gravity of the offending and decided against imposing consecutive sentences.

Conclusion

35. The Director contends that the judge was correct in identifying that these offences fell within the top range but erred in placing the notional figure at the bottom end of that range. It is said that while the culpability of the children's father is at a higher level, the respondent's culpability is only marginally lower, due in part to his deceitful and manipulative conduct in his dealings with the social workers and the fact that he played a central role in the abuse.

36. In the circumstances, we are persuaded that the nomination of a headline sentence of 16 years is too low and that the ultimate sentence does not adequately reflect the overall gravity of the offending. The offences cannot be viewed in isolation and cannot be viewed out of context.

37. The respondent abused three children over a prolonged period in a most egregious manner. He preyed upon the children who were trapped within this family of abusers. The children were very young, the nature of the activity was very serious, the breach of trust was gross. The children should have felt protected in the family environment, instead the extended family were involved in the

abuse, in which this man was a central figure. This is against the background of severe neglect of which the respondent was fully aware. He participated in meetings with the social workers who were attempting to assist the children insofar as the neglect was concerned prior to the sexual abuse becoming known. He sexually abused the children while putting himself forward as an advocate for the family.

38. In the circumstances, we find that the sentence constitutes a substantial departure from that which ought to have been imposed and proceed to re-sentence *de novo*.

Re-Sentence

39. We consider the totality of the aggravating factors in the present case. We agree with the argument advanced by the Director where she contends that the difference in culpability between this offender and the father of the children is marginal. This respondent is not the father of the children which serves to differentiate him in terms of gravity from the father and he was not convicted of rape concerning child A. However, he was undoubtedly a central figure in the abuse. Moreover, his conduct vis-à-vis the social workers was duplicitous and manipulative, and he directed and demonstrated sexual acts to the children.

40. We are of the view that his moral culpability is not quite at the same level as that of the father; DD, and therefore we do not consider a life sentence is justified in his case. We believe the appropriate headline sentence to be that of 20 years' imprisonment.

41. In terms of mitigation, he is a man with no previous convictions, however, much lesser weight, if indeed any at all, is given to that factor given the prolonged offending. The mitigation was and is very limited indeed.

42. We consider that a sentence of 18½ years is warranted on the rape offences, the s. 4 rape offences and the sexual exploitation offences. This sentence is one which reflects the overall gravity of the offending. We leave the remaining sentences as imposed by the trial judge. Post-release supervision remains also as imposed by the trial judge.