THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

171/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

F.P.

Appellant

JUDGMENT of the Court delivered on the 17th day of June 2016 by

Mr. Justice Sheehan

1. This is an appeal against severity of sentence.

2. On the 2nd April, 2014, the appellant pleaded guilty to an offence of sexual assault on a female child on the 25th May, 2012 and was sentenced to a term of detention of two and a half years with the final six months suspended on condition that he keep the peace and be of good behaviour for that period.

3. On the day following the imposition of this sentence at Wicklow Circuit Court, the Court of Criminal Appeal granted the appellant bail pending the determination of his appeal against sentence.

4. The maximum sentence for this offence is fourteen years imprisonment. At the time of the offence the appellant was fifteen years old and the victim was eight years old. The appellant pleaded guilty when he was seventeen and was sentenced when he was eighteen years old having admitted to the gardaí on the day he committed the offence that he had done so.

5. At the hearing of the appeal counsel for the prosecution agreed with counsel for the defence's submission that the Children Act 2001 applied to this case.

6. In the course of lengthy written submissions on behalf of the appellant 21 separate grounds were filed. The essential argument advanced to this Court was that the sentence imposed by the trial judge did not give due weight to the mitigating factors and therefore was excessive and furthermore that the trial judge erred by failing to have adequate regard for the provisions of s. 96 of the Children Act 2001.

7. In order to consider the grounds of appeal it is necessary to set out the background to the offence, the effect on the victim, the personal circumstances of the appellant and the trial judge's pre-sentence remarks and approach to sentence.

Background
8. Garda Paul Dowling gave evidence in relation to the offence at the sentence hearing on the 30th July, 2014. He told the court that on the 26th May, 2012, the mother of the injured party had seen the appellant sexually assaulting her child. The offence had occurred at a laneway close to the homes of both the appellant and the injured party at a location in Co. Wicklow.

9. On the particular occasion the appellant had been playing football on the street with the injured party and he requested that she pull down her clothing and underwear. The appellant was lying on the ground at the time and the injured party got onto his lap in the course of which the appellant felt her bottom and then around her vagina and inserted the tip of his finger into her vagina. The assault lasted approximately 20 seconds. The injured party was not physically injured as a result of the assault.

10. Garda Dowling told the court that the mother of the injured party confronted the appellant and told him that the gardaí would be called. She recognised him from the locality. The gardaí were called and went to the home of the appellant who immediately admitted what he had done and gave a statement of admission to the gardaí in the presence of his own parents.

11. The injured party's mother prepared a victim impact report on behalf of her child and she stated *inter alia*, that the injured party had been severely affected by the incident, and had become frightened and scared as a result of it. She also told the court that the injured party had missed a month of school and had to be admitted to Tallaght Hospital for a period of time.

12. Seven months after the incident the appellant attended voluntarily at his local garda station for the purpose of giving a voluntary cautioned statement in which he reaffirmed his involvement in the offence and made full admissions.

13. Garda Paul Dowling indicated that the appellant had no previous convictions and had not come to the attention of the gardaí since the incident.

14. In reply to questions by counsel on behalf of the appellant, Garda Dowling confirmed the following matters:

(i) The appellant admitted his involvement immediately.

(ii) The appellant and his parents cooperated fully with the gardaí from the outset.

(iii) The appellant could not have provided any more assistance than he did.

(iv) The appellant, although having made admissions in May and December 2012, was not charged until January 2014.

(v) The appellant had, prior to being charged already attended counselling through the HSE and had begun a course of rehabilitation and therapy with the Southside Inter Agency treatment Team, which specialises in dealing with young persons involved in sexual offences.

(vi) The appellant is undergoing a course of treatment which was due to finish in October 2015 and was structured to assist him in dealing with a range of issues that had arisen for him.

(vii) The appellant had been a victim of bullying in school.

(viii) The appellant had gained notoriety in the area where he lived which had an isolating affect resulting in him spending most of his time in the family home.

(ix) The appellant as a result of bullying and the awareness of others regarding his offence had felt obliged to leave school after his Junior Certificate because of the incident.

(x) The appellant had expressed a deep sense of empathy, remorse and insight for the injured party.

(xi) The appellant and his family took the offending behaviour very seriously and cooperated throughout the investigation.

(xii) The appellant had the prospect of working in his father's workplace in the locality where they lived.

(xiii) The appellant had undertaken voluntary work at a local tourist centre in order to occupy himself.

15. In the course of his sentencing remarks the sentencing judge appears to have identified the appropriate sentence as being perhaps one of seven or eight year's imprisonment. He stated the following:-

> "Fourteen years is the maximum custodial prison sentence. Then I must decide where does this count lie in respect of the maximum sentence and I am satisfied it would be in the middle, may be a slightly higher range."

16. He then went on to say immediately after this:

> "Then I must have regard to his personal circumstances . . ."

17. Following this the trial judge stated:-

> "The aggravating factors in the case are that this is a serious offence."

18. He repeated again that:-

> "The sexual assault and abuse perpetrated by the offender was disgusting, revolting, horrific, embarrassing and humiliating."

19. He then noted the young age of the victim and held that the aggravating factors were substantial. He then said:-

> "I am also satisfied having regard to the age of FP at the time that I should have regard to the provisions of the Children Act which I will do in respect of this."

20. Counsel for the respondent relied on the victim impact report of the mother of the victim to justify the sentencing judge's finding that there were substantial aggravating factors in the case. While he conceded that the Children Act was relevant, he submitted that the sentencing judge correctly balanced the matters to which he had to have regard. He concluded by saying "that this was an extremely serious offence".

21. Section 96 of the Children Act 2001, provides as follows:-

> "(1) Any court when dealing with children charged with offences shall have regard to –
>
> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
>
> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible –
>
> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes,
>
> any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.
>
> (3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature

of any penalty imposed, unless the penalty is fixed by law.

(4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.

(5) Any measures for dealing with offending by children shall have due regard to the interests of any victims of their offending."

22. As can be seen from the above para. 96(2)(d) of the Act provides that a period of detention should be imposed only as a measure of last resort.

23. It appears to us on any examination of the sentencing judge's remarks that it remains at best unclear that adequate consideration was given by him to the guiding principles enacted by the legislature with regard to the exercise of jurisdiction in a case such as this.

24. We of course agree with the trial judge that this was a serious assault which had serious consequences, but we do not understand on what basis the sentencing judge concluded that this offence lay in the mid to upper range by reference to the maximum sentence for this offence.

25. It is essential for an Appeal Court when engaging in a review of sentence that it can readily discern the trial judge's reasoning. It is not clear to us on what basis the learned trial judge identified a sentence of seven or eight years as the appropriate starting point in this case if that in fact is what he was doing. Was the figure arrived at on the basis of the seriousness of the offending solely? When this figure was identified, did it represent the sentence the judge had in mind taking into account the aggravating factors in the case, but without reference to mitigating matters? Did he have any comparators in mind when he identified this as the appropriate starting point? It is relevant at this point to note an earlier ex tempore judgment of this Court delivered by Edwards J. on the 4th December, 2015, in The People at the Suit of the *Director of Public Prosecutions v. Davin* Flynn where in he stated the following:-

"14. There is a strong line of authority starting with *The People (Director of Public Prosecutions) v M* [1994] 3 I.R. 306 ; and continuing through *The People (Director of Public Prosecutions) v Renald* (unreported, Court of Criminal Appeal, 23rd November 2001); *The People (Director of Public Prosecutions) v Kelly* [2005] 2 I.R. 321; and *The People (Director of Public Prosecutions) v Farrell* [2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in *The People (Director of Public Prosecutions) v McCormack* [2000] 4 I.R. 356.

15. Two quotations are sufficient to illustrate the point.

16. In *The People (Director of Public Prosecutions) v M* Egan J. in the Supreme Court said at p. 315 of the report:-

> 'It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence available. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made.'

17. In *The People (Director of Public Prosecutions) v Farrell* , Finnegan J giving judgment for the Court of Criminal Appeal, reiterated yet again (at p.2 of the judgment) that:

> 'A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered.'

18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question."

26. Apart from his remarks emphasising the seriousness of the offence we are unclear as to the reasons that led the sentencing judge to locate the offending behaviour in the mid to upper range of available penalties and further to conclude that a sentence of two and half years detention with the final six months suspended was the appropriate outcome. In our view this amounts to an error in principle. Even more importantly we find that the trial judge failed to demonstrate that he had adequate regard for s. 96 of the Children Act 2001. There is no evidence from his sentencing remarks to show that he considered that there was no alternative to an immediate custodial sentence nor was there any reference to the other relevant aspects of section 96.

27. Accordingly we find two errors in the sentencing judge's approach to sentence in this case and on the basis of these errors we will allow this appeal and proceed to a fresh sentence hearing.

28. In the first instance we note the delay in bringing this case to conclusion. It is regrettable that the injured party and her family as well as the appellant and his family have had to wait so long for finality. One of the reasons apparently for the initial delay in this case was due to the fact that consideration was being given to dealing with the offending behaviour under the Garda Diversion Programme. Be that as it may, this court notes what Prof. O'Malley has to say at para. 15 – 17 *Sexual Offences* (2nd Ed.) 2013 at p. 343. When it comes to a consideration of young defendants and delay:-

> "Prosecutors are especially obliged to avoid any delay in dealing with charges against children and young persons. This principles flows from a more fundamental policy as reflected in the Children Act 2001 that children accused and convicted of crime should be dealt with in a manner that facilitates their rehabilitation and social reintegration. This entirely legitimate policy could easily be frustrated if criminal proceedings become more protracted than was strictly necessary resulting perhaps in a person being convicted and sentenced in early adulthood for a crime committed during childhood. Needless to say the defendant's age and maturity at the time of the offence will always be crucial factors in sentencing and even without any delay a defendant may have reached adulthood by the time of trial. What must be avoided is unwarranted delay."

29. Again in approaching sentence in this case counsel for the appellant urged us in the event that we decided to proceed to a new sentence hearing that we allow ourselves to be guided by s. 96(2) of the Children Act 2001, (set out above) and also by the judgment of the United states Supreme Court in *Roper v. Simmons* 543 US 551 [2005]. In that case the court suggested that the following propositions should guide a court when dealing with young people.

1. Young people (those under 18) are often immature and tend to have an underdeveloped sense of responsibility.

2. Young people are more vulnerable and susceptible than adults to negative influences and peer pressure.

3. The character of a young person is not as well formed as that of an adult.

Prof. O'Malley goes on to say that an important corollary of these principles is that sentencing courts should as far as possible try to select whatever measure seems most likely to help the offender to desist from further criminal activity.

30. We accept that these principles provide the basis for a sensible approach to the sentencing of young offenders.

31. In the present case and bearing in mind s. 96 of the Children Act, we are of the view that in the first instance this was not a case which required the appellant to serve time in detention. It was particularly relevant that by the time the appellant was before the Circuit Court for sentence he had already engaged in a very serious programme of rehabilitation with the support and assistance of his parents.

32. At the conclusion of the appeal hearing the court was furnished with a final report from the Southside Inter Agency Treatment Team. That report confirmed that the appellant had continued with his rehabilitative programme following his release on bail by the Court of Criminal Appeal. It noted that the appellant continued to convey a deep and genuine regret and had a strong sense of shame and guilt that his behaviour had caused so much harm particularly to his victim and her family.

33. The report concluded that the appellant had graduated from the SIATT programme and had been discharged. It stated that the appellant and his family had an excellent attendance record and that the appellant had maintained his place at the Youthreach Programme excelling in many of his educational modules. It noted that he was due to finish his time with the Youthreach Programme in the spring of 2016. The report also noted that the appellant had graduated in December 2014 and at the time had made a formal presentation to his parents, other group members and their parents and the SIATT team on points of learning from his time in the programme and his personal therapeutic journey. The report concluded that the appellant's presentation was impressive and that he demonstrated a confidence reflected through the hard work in his preparation of the presentation itself. It was also noted that his parents were pleased with his progress and hopeful about the future as were the treatment providers at the Southside Inter Agency Treatment Team.

34. The final question that arises for us is whether or not the offence in this case requires to be marked by a sentence of detention albeit a suspended one. We believe that the sentencing judge was right in marking the seriousness of the offending behaviour with a period of detention and only wrong insofar as he failed to suspend that sentence. In view of the fact that the appellant has now successfully completed his rehabilitation programme, there is no need to impose a period of post release supervision nor is there need to suspend any period of detention on special terms. Accordingly the court will substitute for the original sentence a sentence of detention of two years, but suspend that sentence on the usual conditions namely that he keep the peace and be of good behaviour for two years.