



THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

The People at the Suit of the Director of Public Prosecutions

V

M.R.

48/13

Respondent

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 9th day of February 2017 by Mr. Justice Birmingham

1. On Monday last this court delivered a reserved judgment in which an appeal against conviction was dismissed. That judgment set out in some detail the background to the case and it is not proposed to repeat that exercise today. The hearing this morning was concerned with the sentence aspect. It will be recalled that the sentences imposed which were the subject of appeal, were sentences of 18 months imprisonment of each of two counts of indecent assault in respect of the summer of 1980 and sentences of four years imprisonment in respect of each of two counts referable to the summer of 1982 but with the final year suspended. A number of issues have been raised in the course of the appeal hearing. First of all it is said that not enough attention was paid to the appellant's medical situation though it is accepted that this ground of itself is unlikely to be dispositive of the appeal. The judge dealt with that aspect at p. 6 of the transcript where he said

"Now, it is said here that since these matters were commenced, so to speak, he has suffered immeasurable mental anguish and he has presented with forms of stress, anxiety, worry and insomnia. I have to say I attach very little significance to those. One would have to cast about for some theoretical ideal accused if one were to attach any significant weight because one would have to say, oh well, if weight is to be attached to these of any significance one would have to distinguish such a person from someone who was not, as it were, suffering mental anguish, for example as a result of these matters. It is accordingly not a significant factor but nonetheless a factor."

2. Secondly it is said that the way in which the court dealt with the previous character of the appellant was inappropriate and that what the court had to say in this regard served to minimise the significance of the undoubted previous good character. Again the judge dealt with it in these terms-

"And he therefore is a person, it seems, of exemplary good character who has made a worthwhile contribution to society apart from these offences. Now of course the difficulty in this regard is that these are commonly known as secret crimes and time and again the accused in these cases are people otherwise of good character, and it is not that one disregards it, but it is part of the background so to speak which one must take into account in respect of sentencing. The position, it can be seen, would be radically different if a person was, say, being prosecuted for some offence of dishonesty and was a person who is otherwise honest. There is a difficulty which one cannot ignore in these cases. Therefore the extent to which people are otherwise of good character is not as significant a factor as it would otherwise might be."

3. Counsel on behalf of the appellant says that those remarks fail to take into account the fact that since the last offence charged, in 1982, a very significant period of time has elapsed and that certainly during that period there is every reason to believe that the appellant has been a person of good character.

4. Then another point that is raised is the manner in which the judge adverted to the possibility the pleas might have been entered. He did so in these terms:-

"Now in relation to the manner in which the case was approached, it was of course proper to contest the offences other than those which arose in 1980 and 1982 and obviously the approach I take is not in any way diminished or effected by the fact that these matters were contested but the accused could reasonably have pleaded guilty to the events of 1980 and 1982 notwithstanding the fact that he was contesting the other matters. To put those remarks in context it is necessary to recall the fact that the indictment had covered offences alleged to have occurred during each summer between 1975 and 1982 and the convictions were recorded in respect of the offences at the latter end of that period. There was some doubt as to whether the family had travelled from England during the summer of 1981. Again to offer context it is necessary to recall that an unusual feature of the case was that the accused man admitted engaging in inappropriate sexual activity with his niece but had contended that he had done so at a time after she had turned 15 years of age and so was in a position to consent to certain sexual activity."

5. The court is not satisfied that any of these points, either taken in isolation or in combination, could justify intervention. These were offences of very considerable seriousness. They involved a grave breach of trust. It is clear from a reading of the transcript that these offences have had a very considerable impact indeed on the injured party. It is true that the trial judge found himself in a difficult position when it came to addressing the victim impact report in a situation where the indictment that had been presented was a much more extensive one than the counts that resulted in convictions and where the indictment of course contained one more serious offence which explained why matters were being dealt with in the Central Criminal Court. The Court, though, is satisfied that these were serious offences and that the sentence chosen by the trial judge was not an inappropriate one.

6. A further issue has been raised and this arises in these circumstances. On 28th July, 2014 the appellant was admitted to bail by the Court of Criminal Appeal. At that stage he had spent some 17 months in custody and we have been told that he was within 9 or 10 months of his release date.

7. It is urged that to send him back into custody having been at liberty in the community for the past 2 and a half years or something in excess of that would be harsh indeed. There has been reference to the jurisprudence of this court on applications to review sentences on the grounds of undue leniency pursuant to s. 2 of the Criminal Justice Act. The court does not feel that that analogy is

a true one. In the case of applications to review sentence on grounds of undue leniency the person who is being sentenced had gone through an earlier sentence hearing which had come to a conclusion and he had left court either to return home or to begin his sentence believing that he had been dealt with and believing that he knew his fate. It is in those circumstances that the court has on a number of occasions indicated that it would reflect in the sentence that it was imposing the fact that this was the second sentencing process that the individual had to go through and that that was by definition burdensome.

8. The situation, on the other hand, of someone who having been convicted and sentenced then takes steps to interrupt the sentence by way of an application for bail is very different. If the eventual outcome is that the appeal is unsuccessful leaving the sentence to be served, then the individual must expect to have to return to custody. However the court does feel that there are some unusual features, even perhaps unique features, present in the present case. The admission to bail by the Court of Criminal Appeal was in a situation where the full sentence would in all likelihood have been served before a date could have been provided for the hearing of the conviction appeal that that should be the situation amounted to system failure. It is a situation that is unlikely, one would like to think very unlikely to arise in future years given the extent of progress that has been made with regard to listings since the establishment of the Court of Appeal.

9. The court feels that when the release on bail arose out of system difficulty that to simply send the appellant back to jail now would be harsh. It is the view of the court that the interests of justice require that some account should be taken and that that is so particularly in a situation where matters have hung over the head of the appellant for 6 years almost to the day since he was confronted in relation to this matter by members of the gardaí.

10. The court proposes to address this issue to a limited extent only and will do so by increasing the suspended portion of the sentence. In deciding to adopt this approach it has had regard to the updated medical reports that have been made available and also to a letter from the R. family which leaves no room for doubt about how difficult he found prison while serving his sentence and no room for doubt about the extent that these matters have continued to impact on him, even since the date on which he was released on bail. What the court is prepared to do is to increase the period of the sentence that will be suspended from 12 months to 17 months, so increasing the suspended sentence portion by 5 months.