THE COURT OF APPEAL

[34CJA/19]

The President
McGovern J
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

NM

RESPONDENT

JUDGMENT of the Court delivered on the 3rd day of February 2020 by Birmingham P

1. This is an application brought by the DPP seeking to review sentences on grounds of undue leniency. The sentences sought to be reviewed were imposed on 8th February 2019 in the Central Criminal Court in respect of s. 4 rape (oral and anal), sexual assaults and a single offence of possession of child pornography. The effective sentence was one of nine years' imprisonment with the final two years suspended with lesser concurrent sentences.

2. The offending spanned the period 1st September 2005 to 30th September 2012 at addresses in Tallaght and Clondalkin as well as, in one case, at an unknown address in Athy, County Kildare. The sexual assaults consisted of offences of performing oral sex on the complainant and forcing the complainant to penetrate the respondent's anus with the his penis. Pleas of guilty were entered to eight counts of s. 4 rape, four oral and four anal. To put the offending in context, the respondent is the stepbrother of the complainant, there is a ten-year age gap between them, and the complainant was seven years of age when the offending behaviour commenced.

3. As to how these matters came to light, it should be explained that on 11th September 2012, Gardaí were contacted by the Managing Director of a company based at Ballymount Industrial Estate who informed the guards that a member of his staff was viewing images of child pornography at his work station. On 20th September 2012, the respondent presented himself at Tallaght Garda station where he made a voluntary statement. Subsequently, he was arrested, detained and questioned.

4. In the course of one of the interviews, he accepted that there had been communications between him and a third party regarding his stepbrother, the complainant in the proceedings. The communication was on a chat forum and the third party was located

outside the jurisdiction. As a result of these admissions made by the respondent during interview, members of the Gardaí met with the complainant and took a lengthy statement of complaint.

5. The complainant stated that his first recollection of untoward activity was when he was seven or eight years of age on an evening that his parents had gone to Church leaving him alone with his stepbrother. The respondent had called the complainant upstairs to his bedroom. When the complainant went upstairs, the respondent was, in fact, in their parents' bedroom, sitting in front of a computer. He told him to come into the bedroom and lock the door. He told him to look at the computer screen which was showing gay pornography. The respondent then took off all the complainant's clothes, including his underwear, and performed oral sex on him. The complainant described the respondent penetrating his mouth with his penis and that the respondent then changed position and penetrated the complainant's anus. Similar activity occurred at the same address some days later. It then continued on a weekly basis from when he was seven or eight years of age until he was 11 years of age when they moved to a different address. The complainant indicated that at times, the activity would be rougher and that on other occasions, he would be allowed play with the respondent's new mobile phone which had Internet access when he continued to engage in what he called "the sexual stuff". The complainant indicated that he was adversely affected by this activity, to which he never consented, to the extent that he stopped washing and cleaning himself in the hope that if he had poor personal hygiene that the respondent would not want to approach him. The complainant had specific and detailed recollections of what occurred on Christmas Day 2008, and also as specific memory in relation to St. Patrick's Day 2012, when the activity took place at a house in Athy where they were visiting family friends.

6. The respondent was arrested on 4th May 2016 in relation to the child pornography offences and again on 12th September 2016 in relation to the rape offence. He was later charged in September 2017. In terms of the respondent's background and personal circumstances, he had worked as an architectural student until 2012 and had also been active as a male model. He was estranged from his family since the child pornography issue emerged. The respondent had lived in a central African state until he was 14 years of age when he had come to Ireland. He says that he was a victim of sexual abuse himself at the hands of a number of individuals while living in Africa.

7. Stepping back to take an overview, the period of time covered by the indictment was six years and eight months. The injured party was abused from the age of seven/eight to 14 years of age. The respondent was 17, but very close to his 18th birthday when the abuse commenced, and it continued until he was 24 years of age. In a situation where, at the time of the sentence hearing, the injured party had only recently started attending counselling, limited information was put before the Court about the impact on the injured party. The Detective Sergeant, summarising the case, referred to the fact that the injured party was struggling and was finding education extremely difficult. The very experienced Sergeant described the injured party as one of the bravest young men he had ever met. He said that taking the original statement from him was probably one of the worst

encounters he had ever come across with any member of the public. Clearly, it was and is appropriate to approach this case on the basis that the impact on the injured party was very severe indeed.

8. In the course of sentencing remarks, the judge indicated that the nature of the offending in issue was particularly serious, involving humiliation, fear and force. He accepted that there were very substantial mitigating circumstances present. A plea had been entered at the earliest possible opportunity. The accused's background was a very difficult one, brought up in Africa until 14 years of age, moving to Ireland, but in Ireland had done very well in the educational system and had an impressive work record. The Court felt that an appropriate headline sentence would be one of 14 years, but that there was scope for substantial mitigation, primarily because of the respondent's youth and his background circumstances. This culminated in the imposition of an effective sentence of nine years' imprisonment with the final two suspended.

9. The legal principles applicable to undue leniency reviews such as this were not the subject of any serious dispute between the parties, and indeed those principles have not been really in controversy since the first such case, that of DPP v. Byrne [1995] 1 ILRM 279. In seeking to review the sentences, the Director says that the judge was correct in regarding this as very serious offending. She does not take issue with the identification of 14 years as a headline or pre-mitigation sentence, and indeed says that this is an appropriate sentence. She accepts that there are significant mitigating factors present and that it was entirely proper that the judge would reflect these in the sentence imposed. She says that all of those factors were fully, indeed, generously reflected by the judge in his decision to mitigate the headline or pre-mitigation sentence of 14 years to one of nine years. However, where she is critical of the sentencing judge is that she says that there was no logical reason for the further step of suspending the final two years of the nine years. This, she says, was a step too far and an error in principle that has resulted in a sentence that is unduly lenient so as to call for and require the intervention of this Court. Counsel on behalf of the respondent says that the judge's approach to sentencing was particularly careful and that the sentence was particularly well-structured and well-crafted and that this Court ought not to interfere.

10. This Court sees some substance in the comments of counsel for the respondent about the fact that it was a sentence that was particularly carefully crafted. The probation report which was before the Court commented:

> "Mr. M has many issues he needs to address. He needs to explore the risk factors behind his offending, to understand the level of harm his offending behaviour has had on his younger stepbrother and to come to terms with his own sexuality. I believe that participation in the Sex Offenders Treatment Programme in custody would be of great benefit to him in this regard. Furthermore, following his release, I recommend that he be monitored by the Probation Service in conjunction with Gardaí and also to continue to avail of a sex offender's treatment programme in the community. Mr. M has agreed to participate in such a programme in custody and

expresses his willingness to abide by probation conditions on his release. Should the Court be considering probation supervision as part of sentencing, I would respectfully request that the following conditions be included:

- That Mr. M apply for and participate in a sex offender's treatment programme under the direction of the prison based psychology service.
- That Mr. M be placed on a period of post-release probation supervision and that he continues to avail of a sex offender's treatment programme while in the community.
- That Mr. M abide by all probation directions while under our supervision."

This Court has no doubt that the sentence imposed in the Central Criminal Court was a lenient one. Indeed, having regard to the nature of the offending, to the intensity of offending and to the duration of the offending conduct, it could be seen as particularly lenient.

11. In the course of his sentencing remarks, the judge, having referred to the headline sentence of 14 years, went on to say:

> "[n]ow, the Court is going to substantially mitigate that sentence, primarily because of Mr. M's youth and his background circumstances and the Court considers that the appropriate sentence also has to have an element in it which reflects the matters in the psychological report and the Probation Service report to ensure that Mr. M attends some form of therapy to deal with the sexual issues that he has. The Probation Service report, in particular, stresses that it feels, or the Probation Officer feels, that he has not faced up to the difficult sexual proclivities that he has. To that end, the Court will be suspending a portion of the sentence on condition that he attend, within prison, some courses as recommended by the Probation Service."

The Court indicated that it would be dealing with most aspects of the sentence hearing that day, but wished to hear from the Probation Service Officer in relation to the specific conditions that should be applied and in relation to post-release supervision.

12. At a later stage, the Court heard from two witnesses from the Probation Service, Ms. Muireann O'Higgins, who had produced the original probation report, and Ms. Sarah Hume, who provided information of a more general nature as to the nature of the programmes available in prison and reflected in their recommendations.

13. The Court does not disagree with the submissions of the Director that the judge, having mitigated the sentence from a headline sentence of 14 years to nine years, might well have left it at that. Had the judge done so, and had there been an attempt to appeal severity, it is very unlikely indeed that a Court would have intervened. However, as so many of the authorities in this area make clear, that is not really the point. The Court can well understand why the sentencing judge would have wanted to prioritise Probation Service involvement in this particular case. When counsel for the Director was asked

about this during the course of exchanges with members of the Court, her response was to say that if the judge wanted to achieve that objective, the way to do it was to make a smaller reduction from the headline sentence and then part-suspend. Again, we do not really disagree with counsel that the judge could have done this, and again, we accept that had he done so, there would have been little scope to maintain an appeal against severity. The question, though, is not whether there were other routes that might have been taken by the sentencing judge, routes which might well have been taken by other judges on other days. The question is whether the route actually identified by the very experienced judge who dealt with this case was an impermissible one. We have not been persuaded that is in fact the situation. Undoubtedly the sentence is a lenient one, indeed a very lenient one, it might be thought and said that it is at the outer limits in terms of leniency, but we have not been persuaded that it is so lenient as to amount to an error in principle.

14. Accordingly, we refuse the Director's application for a review of sentence.