THE COURT OF APPEAL

[264 CJA/17]

The President
Hedigan J.
McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

GERRY CULLEN

RESPONDENT

JUDGMENT of the Court delivered on the 31st day of July 2018 by Birmingham P.

1. This is an application brought by the DPP pursuant to the provisions of s. 2 of the Criminal Justice Act 1993, seeking to review, on grounds of undue leniency, a sentence imposed on the respondent, Mr. Gerry Cullen, on 16th November 2017. The sentences sought to be reviewed were imposed in respect of twelve sample counts of sexual assault and five sample counts of defilement of a girl under the age of 17 years. The respondent was sentenced to four years imprisonment in respect of the sexual assault counts and three years imprisonment in respect of the defilement counts, to run concurrently. The final three years of the sentence was suspended. The appellant came before the Court on foot of signed pleas of guilty which he confirmed.

Background Facts

2. The respondent was a close friend of the family of the complainant. She had grown up without a father figure in her life and there were tensions and difficulties in her family home. When there were difficulties or arguments in the home, she would confide in the respondent. In or about April 2013, when the complainant was aged 13 years, the respondent became close to her. He began kissing her and that quickly escalated to full sexual intercourse. This began towards the end of the complainant's first year in secondary school and continued throughout her school career and into adulthood.

3. The Director says that the offending here was very serious and that the sentence imposed, an effective sentence of one year's imprisonment, wholly fails to reflect that. In stressing the seriousness of the offending, the Director points to the young age of the complainant when the activity began; the age disparity – the respondent was 45 years old; the duration and intensity of the offending behaviour; the abuse of trust and the fact that the respondent inveigled himself into a relationship, having engaged in grooming the complainant. The Director says that the sentence imposed is significantly out of line with sentences imposed in comparable cases. Counsel on behalf of the respondent accepts that the offending is serious and acknowledges that the sentence imposed was a lenient one, but not so unduly lenient as to require an intervention by this Court. She points out that her client has a release date in the coming weeks and she says that to extend his period of incarceration at this stage would be harsh. Accordingly, she says that if this Court finds it necessary to declare that the sentence was unduly lenient, that it should not extend her client's period in custody.

4. There is no real dispute between the parties in relation to the legal principles applicable when an appellate Court is asked to review a sentence on grounds of undue leniency. Indeed, those principles have not been the subject of any controversy since the first such case, that of DPP v. Christopher Byrne [1995] ILRM 279. There, O'Flaherty J, giving the judgment of the Court of Criminal Appeal said:

> "In the first place, since the Director of Public Prosecutions brings the appeal, the onus of proof clearly rests on him to show that the sentence called into question was 'unduly lenient'. Secondly, the Court should always afford great weight to the trial judge's reasons for imposing the sentence that is called into question. He is the one who receives the evidence at first hand: even where the victim chooses not to come to Court, as in this case . . . he may detect nuances in the evidence that may not be as readily discernible to an appellate Court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced, what Flood J. has termed the 'constitutional principle of proportionality' (see People (DPP) v. WC [1994] 1 ILRM 321) his decision should not be disturbed. Thirdly, it is, in the view of the Court, unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr. Grogan SC, the test to be applied under the section is not the converse of that the Court makes whether as an appeal by the appellant. The enquiry the Court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'. Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

Some Comparator Cases

5. The case *of DPP v. Anderson* [2015] IECA has some similarities to this case. Its particular significance lies in the fact that, there, the trial judge had imposed not insignificant sentences; four years for defilement and three years for sexual assault, but had suspended all but six months. At para. 43 of the judgment, Peart J. commented:

> "This Court is satisfied that there was an error in principle in suspending two and a half years of the 3-year sentences and three and a half years of the 4-year sentences. In this Court's view, there was an inadequate basis for suspending such a lengthy portion of each sentence. That is not helped, in the Court's view, by the fact that the sentencing judge had not explained in her sentencing remarks precisely how such a lengthy period of suspension was justified. In this

> Court's view, the sentence is unduly lenient as a result of the unwarranted length of suspension and the Court will proceed, therefore, to a resentencing hearing as soon as possible."

There are some respects in which the present case might be regarded as more serious than Anderson. There, the offending consisted of the masturbation of a male child, who was then aged 13 years, and the offence of attempted defilement consisted of the respondent's attempt, which was resisted by the child, to insert the child's penis into the respondent's mouth. It is also the case that the offending took place on a defined number of occasions over a relatively short period and was not of the duration and intensity that was present here.

6. The case of DPP v. Seamus Buckley, a decision of this Court of 21st October 2016, is one to which the respondent attaches significance. His interest in the case stems from the fact that the Court took the view that a more severe penalty was called for than had been imposed. In that case, the Court felt that a sentence more severe than the 12 months imposed was called for and that the sentence imposed should not have been less than two years actual imprisonment, adding that to mark the seriousness of the offending behaviour, a somewhat longer sentence, though part-suspended, might well have been considered. In the particular circumstances of the case, the Court dealt with it by acceding to the application for a review by the Director, and substituting for the sentence imposed in the Circuit Court a sentence of three years imprisonment, but suspending the final two years of that sentence. The respondent urges the Court to adopt a similar approach if concluding that the sentence was unduly lenient.

7. The case of *DPP v. Ron Tulie* [2016] IECA 325, was an appeal against severity in a defilement case where a sentence of seven and a half years imprisonment, with the final two years of the sentence suspended, had been imposed. The background to the case was that the appellant, who was a fireman, had visited a secondary school where the complainant was a transition year student, in relation to a first aid and fire safety course. After the course, the appellant and the complainant and some of her friends "kept in contact". A major issue in the case was whether the respondent was properly to be regarded as a person of authority, thus triggering the higher maximum penalty. However, in relation to sentence, the Court felt that a sentence of four years imprisonment was the appropriate starting point and suspended the final two years of those four years.

8. The case of *DPP v. Gerry Broughan* [2017] IECA 165 was another case involving an appeal against severity. A feature of that case was that the offending had a particularly severe impact on the victim. The trial judge had described the impact as catastrophic. The Court found itself in agreement with the approach to sentencing of the trial judge, and intervened only to the extent of suspending twelve months of the longest sentence, the eight-year sentence, in recognition of the fact that the plea was an early one, so early as to obviate the necessity for an application to transfer the case off circuit.

9. If regard is had to the comparators to which we have referred, it does indeed appear that the sentence was a substantial departure from the norm. In the Court's view, this was very serious offending indeed. The respondent was in a position of trust as a close family friend. His home had become a place of safety to which the complainant resorted, and yet it was there that she came to be abused. The age gap was very significant; there was a significant element of grooming, the abuse was of very lengthy duration and was very intensive.

10. On the other side of the scales, the Court does accept that there were significant factors present by way of mitigation. In particular, there is the fact that pleas of guilty were entered at the earliest possible stage by means of signed pleas in the District Court. Further, there were expressions of remorse which appeared sincere and were reflected in letters written by the respondent to the complainant and her family. While the Director has taken some issue with the identification of six years as a pre-mitigation starting point, we do not think that the approach of the Circuit Court judge in that regard was outside the available range. Again, we believe that the decision to reduce the sentence from six to four years did not amount to an error. Indeed, we are prepared to accept that having done that, there was some scope for partial suspension. However, we believe that the judge erred in going so far as to suspend three years of the 4-year sentences, reducing the sentence to an effective sentence of 12 months. We believe there might have been scope to suspend 12 or perhaps 18 months of the sentence, but that the offending was so serious that it was necessary that there should remain a not insignificant sentence to be actually served.

11. The Court is obliged to resentence as of today's date. We are conscious of the fact that we are resentencing someone who is now well into their sentence, and indeed, within weeks of the scheduled release date. In recognition of that, we will go further, and suspend the final two years of the 4-year sentence.

12. In summary, we will set aside the sentence imposed in the Circuit Court and substitute a sentence of 4 years imprisonment on all counts. We do not see any real point in providing for a lower penalty in the case of the defilement charges and we will provide for a suspension of the final two years of the sentences on the same terms as provided for in the Circuit Court.

13. The sentences will date from the same day as the Circuit Court sentences.