THE COURT OF APPEAL

Ryan P.
Mahon J.
Edwards J.

Appeal Number 113CJA/11

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

Between/

The People at the Suit of the Director of Public Prosecutions

Appellant

- v -

J.P.

Respondent

Judgment of the Court (ex tempore) delivered on the 15th day of December 2014, by Mr. Justice Edwards

1. In this case the Director of Public Prosecutions appeals against the leniency of a sentence imposed by the Circuit Criminal Court, following upon the respondent pleading guilty to five counts of engaging in sexual intercourse / engaging in a sexual act with a child under the age of fifteen contrary to s. 21 of the Criminal Law Sexual Offences Act 2006 and two counts of sexual assault contrary to s. 2 of the Criminal Law Rape Amendment Act of 1990. The sentencing judge imposed a sentence of three years imprisonment which he saw fit to suspend in its entirety. The case is made by the Director of Public Prosecutions that the sentence was unduly lenient and this Court is asked to find that there has been an error of principle in that respect and, if the court sees fits, to substitute an appropriate sentence for the sentence imposed.

2. The Court of Criminal Appeal in *The People at the Suit of the Director of Public Prosecutions v. Byrne* [1995] 1 I.L.R.M.279 set forth some general guidelines relevant to this type of appeal. Giving judgment for the court, O'Flaherty J said that the Court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He went on:

> *"He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case – both women were adamant that they did not want to come to court – he may detect nuances in the evidence that may not be as readily discernible to an appellant 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, which in another case Mr. Justice Flood had termed 'the constitutional principle of proportionality' (see People (DPP) v. W.C. [1994] 1 I.L.R.M. 321), the decision should not be disturbed".*

3. It will be plain from that passage that the facts of the case are all important and it is necessary in those circumstances to rehearse the facts of this particular case which the learned trial judge characterised as peculiar and unusual, a characterisation that this court agrees with.

4. The evidence was that the offences concerned the sexual assault and defilement of the daughter of the respondent's erstwhile girlfriend.

5. It occurred at the time when the victim was thirteen years of age and while the respondent, who was twenty three, continued to reside in her mother's house. These living arrangements had commenced when the respondent became involved in a sexual relationship with the injured party's mother. The respondent was fifteen years old when that relationship began. The injured party also resided in the same house with her two sisters and her old brother. On numerous occasions the respondent was left, on his own, with the injured party, either while babysitting her or simply on account of the other residents being out at the time. The injured party described a history of intimacy with the respondent that began with kissing and then progressed to sexualised contact. The respondent apparently described himself as her boyfriend. It was clear from the evidence that no stage did the respondent use physical force to engage in sexual acts with the child. It was also clear that she was a willing participant in the engagements. After a period of time during which their involvement went no further than kissing and fondling it seems that the injured party spoke to the respondent about sexual intercourse. The evidence was that they discussed having sex together but that the respondent had told her that he would "wait until she was ready". Some weeks after this conversation the respondent had sexual intercourse with the injured party. This occurred at a time when the injured party's mother was out of the house and the respondent had been left to mind the child. There were two further instances of sexual intercourse between the two after this occasion. Evidence was also given that on a number of occasions the injured party performed oral sex on the respondent and the evidence was that on all occasions these acts occurred when the injured party's mother was outside the home.

6. Subsequently, the respondent was asked to move out of the injured party's mother's home. At the time her mother was unaware of the sexual acts that had been taking place between the respondent and her daughter. After the respondent moved out the injured party was noticed by her mother to be very upset and withdrawn. The injured party eventually disclosed to her the acts that she and the respondent had engaged in. The matter was reported to the gardaí and ultimately on the direction of the DPP the respondent was charged with various offences and sent forward for trial.

7. Other pertinent facts are that the respondent was entirely co-operative in the matter of the investigation, and, indeed, pleaded guilty in this matter at a very early stage. I will come back to that at the moment.

8. Against all of that background it is necessary to look at what the sentencing judge both said and did in the course of sentencing the respondent. However, before coming to that, the Court must also allude to the Victim Impact Statement completed by the injured party in this case, and in respect of which evidence was given at the sentence hearing. The evidence given was that the injured party is lacking in confidence and self esteem as the result of what happened, that she has a fear of interacting with new people arising out of her experience, and that after all of this came out into the open it had been decided by her mother that the only appropriate course of action was for the family to leave the jurisdiction and return to the U.K., from whence they had originally come, for a period time. That led to a certain amount of upheaval in the family. The injured party feels that she will never be ok again after what happened. She has found it very hard to deal with what happened.

9. On the first date that the matter was before him for sentencing the judge concerned said the following:

> *"The accused man comes before the court today to be sentenced arising out of a number of offences committed during the years 2007, 2008, involving a young girl who was a little over 12 years of age when the accused man admits to having sexual intercourse with her."*

Counsel for the appellant informed this Court that the first charge to which the respondent has pleaded guilty in fact relates to a period after the victim had turned thirteen, but nothing turns on this. The judge then continued:

> *"There was a considerable lead up to all of this and the plea is taken as a plea involving his close and deep involvement with the young girl over the period of two years involving sex of --sexual acts of varying accounts and detail in circumstances where he knew from the outset, and all along, that what he was doing was wrong."*

10. The sentencing judge then made the following very important statement. He said:

> *"It is no defence or excuse that the young girl was willing, or indeed in some respects, an initiator. It is a factor that can be borne in mind by way of mitigation but it does not in any way offer either an excuse or a defence to what happened. The offences are serious and the legislature provides in respect of some of them the maximum sentence possible of any court, and that is life imprisonment. The legislation is there to protect young women from predators so that they are not brought into a situation that can be very damaging physically and psychologically, simply because it is against their good interests and the interests of the community at large."*

11. The judge went on to point out that there was a significant age gap of over ten years between the accused and the young woman, he was very much her senior and he knew that what was happening was wrong. He further emphasised that it was a serious matter and that it had had a significant impact on the young girl and her family, which could not be ignored. He also went on to point that it could not be overlooked that the respondent's offending had occurred against a background of very unusual domestic arrangements. He further said:

> *"It appears to be common case that at some point when he was still relatively young and a teenager he was taken in - for no better description than a person of domestic convenience- into the home of the victim. There he provided services, including babysitting and others. It was described as a relationship and that is a matter for their own description; it is not one that I particularly agree with."*

12. The sentencing judge went on then to point out that he was satisfied from reading the documentation that the accused man was a person of low intelligence and academic achievement and he commented that it was hard to imagine that the person with whom he went to live, the adult in that house, the mother of the victim in this case, would not have been equally aware and conscious of his intellectual capacity. He pointed out that the accused man had never been in trouble with the law previously or since, he had never put a foot wrong otherwise, he had a good work record, he had a job that he had left aside because the prosecution with which he was concerned was pending, he came from difficult family circumstances, which, while not excusing what had occurred, assisted the court in understanding *"the confusions and absence of guidance that perhaps might otherwise have been available to him as a young developing man."*

13. The judge pointed out that reports provided to the court, including a probation report, suggested that the respondent was a person at low risk of re-offending. He further noted that the respondent will now be on the sex offenders register. The judge expressed himself to be satisfied that there was little or no likelihood of the respondent re-offending.

14. The sentencing judge then went on to point that a sum of €5,000 had been proffered by the defendant as an earnest of his genuine remorse, and for the sole purpose of assisting the victim in paying for counselling resources. The judge was impressed that this sum had come from the young man's own resources.

15. The judge went on to say that there are factors which are peculiar and exclusive in the history of this particular case that made it difficult for him to make a decision as to whether the sentence which he had indicated was appropriate before mitigation was taken into account, *i.e.*, one of three years imprisonment, should be immediately imposed or perhaps suspended in whole or in part.

16. Ultimately the sentencing judge decided to suspend the three year sentence which he had determined should be the appropriate sentence before mitigating factors were taken into account. He decided to suspend it in its entirety.

17. The difficulty for this Court in considering the issue of suggested undue leniency is that this was a very experienced trial judge, who clearly gave great care and consideration to the facts of this case. He characterised them as peculiar and exclusive and the court agrees that they are peculiar, that they are highly unusual and that they are highly exceptional. Although the range of potential penalties that might have been imposed in respect of the offences of sexual intercourse with a child, and engaging in sexual acts with a child, range from non custodial up to life imprisonment we consider that in circumstances where at the low end of that range a non custodial option is available that it is within the discretion of the trial judge in an appropriate case to impose a non custodial sentence. That will probably be a rare eventuality. In most cases of this type, a custodial sentence would be usual and appropriate, but as the learned trial judge pointed out the circumstances of this case were peculiar and they were very unusual.

18. There were very many factors in this case which rendered it so. Amongst those were the fact that this particular appellant moved in with the victim's mother at the age of 15 and began an inappropriate sexual relationship with her at that time. He is a person of low IQ and low intellectual ability. He was also a person who was immature in many ways and himself somewhat vulnerable. In addition,

the appellant in this case did not engage in any kind of grooming or violence of predatory conduct. He made full admissions and faced up to his responsibility in regard to the matter at an early stage and offered an early plea of guilty in the case. There was a positive probation report in the case which rated his risk of re-offending as being low. The court also takes into account the fact that a good deal of time has elapsed since the matter was first brought to notice. These proceedings were heard in the Circuit Court in December 2010 and we are now at the end of 2014.

19. It is appropriate at this point to refer again to the judgment *in People (DPP) v. Byrne*, from which I quoted earlier. O'Flaherty J went on to say:

> *"It is clear from the wording of the section for a finding of undue leniency nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."*

20. Taking into account all of the circumstances of the case this Court does not consider that it is appropriate for it to interfere with the decision and judgment of the sentencing judge. The sentence imposed may have been lenient but it has not been demonstrated to this Court's satisfaction to have been unduly so. There is no doubt but that it was lenient, but it was at the lenient end of the permissible range. The court believes that the learned trial judge engaged in a proper exercise of his judicial discretion and the court finds no error in principle. In the circumstances the appeal is dismissed.