THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

153CJA/2017

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

V

M O'N

Respondent

JUDGMENT of the Court (ex tempore) delivered the 26th of February 2018 by Mr. Justice Edwards.

Introduction
1. On the 5th of July 2016 the respondent was arraigned and pleaded guilty to 17 counts of sexual assault occurring between April 1998 and April 2002. On the 19th of May 2017 he was sentenced to 2 years' imprisonment in respect of Count 1, with Counts 2 – 14 to be taken into consideration in that regard. He was further sentenced to a concurrent term of 2 years' imprisonment in respect of Count 15, with Counts 16 and 17 to be taken into consideration in that regard. All sentences were fully suspended for a period of six years on conditions, inter alia, that the respondent undergo therapy.

2. The applicant, the Director of Public Prosecutions, seeks a review of the said sentences under s. 2 of the Criminal Justice Act 1993 on the basis that they were unduly lenient.

The Relevant Facts
3. The injured party was born on the 4th of April 1992 and is the respondent's granddaughter. When she was very young her parents separated and her father moved in with his parents – the respondent and his wife. The injured party would visit her father at her grandparents' house most weekends during that period. On those occasions, when she was aged between six and nine years, she would frequently be left in the sitting room alone with her grandfather, the respondent.

4. She described the first instance in which she was abused in the following terms:

> *"I was sitting on his lap and he started to tickle me. He was tickling me for about 15 to 20 minutes. He started to tickle me a little lower down on my belly and at the top of my legs and the inside of my thighs. This went on for a few minutes again. I think I was wearing jeans. He opened the top bottom button of them and slipped his hand down the front of my jeans. His hand stayed there at the top of my genital area for a good few times. His hand was rubbing the top of my genital area. After a few minutes his hand went lower in front of my vagina, continued to rub against my vagina."*

5. Over the next number of years, the respondent repeatedly engaged in this type of behaviour. The behaviour involved extended rubbing of the injured party's vaginal area but there is no suggestion of any digital penetration. The injured party also recalled a later incident in which the respondent was almost caught when her grandmother came into the room with some food. After this incident the offending became less regular as the respondent became more careful. As the injured party became older she increasingly managed to avoid being alone with her grandfather and similar incidents therefore became less frequent. After she had reached the age of nine the offending had stopped.

6. When the injured party was approximately 17, she mentioned the offending to one of her cousins while under the influence of alcohol. This resulted in her parents learning what had occurred, and they notified the HSE and the Gardaí. At that stage she declined to make a formal complaint. However, at the age of 22 she decided to proceed with doing so.

7. The respondent was arrested and interviewed in the course of the investigation. He denied all allegations in the course of those interviews. However, when the matter was returned for trial on the 5th of July 2016, he pleaded guilty to all 17 charges.

The Victim Impact
8. In a statement read to the sentencing court, the injured party told the court of the difficulties she has experienced as a result of the abuse. She told the court how her grandfather had told her the abuse was a secret and that she did not understand it. Even though she had an idea that what her grandfather was doing was wrong, she thought it would be more wrong for her to tell anyone. She started drinking by the age of 12. Spending most weekends at her grandparents' house, she would drink to cope with her feelings. She thought she would not be believed and would cause trouble within the family if she told anyone. By 16 she was drinking so heavily that her attendance at school was affected. Only after 50 days of absence did the school contact her parents. She said that only when she was drunk could she confide in others about the abuse.

9. When the abuse emerged she felt guilty, not wanting to tear her family apart as half of the family did not believe her. She was made to feel like a liar. She decided to attend counselling. However, after a few weeks of counselling she stopped attending. She moved out of home and went to college and for a time was able to forget what had occurred. On moving back home she became depressed and suicidal. Her GP prescribed antidepressants for her but she declined to take them, instead identifying the real issue as trauma related to the abuse. It was at this point that she decided to make a complaint against the respondent.

10. The injured party described how she still felt guilty for waiting so long to take any action, and that she has worried about leaving her grandfather to possibly have access to other children. However, the investigating Garda told the court below at the sentencing hearing that gardaí have no reason to believe that the respondent abused any other party. The injured party struggles with relationships and says that alcohol will always be an issue for her. She also said that she never truly knows whether she is happy and feels that she never will. She currently works abroad in a very responsible career.

The Respondent's personal circumstances

11. The respondent was born on the 14th of February 1936 and is 82 years of age. He has no previous convictions, had never come to any adverse Garda attention before and had worked for many years at a local business. He is the primary carer for his seriously ill wife, who underwent treatment for breast cancer in 2015 and suffered a stroke and two falls in 2016. He himself has significant health issues, suffering from ischaemic heart disease with angina; diabetes; severe nerve pain post shingles; kidney, bladder and prostate issues; and severe pain and reduced mobility due to osteoarthritis particularly in his back.

12. The court below heard that there was no evidence that the respondent had abused any of his other grandchildren. According to the Probation Service he is at low risk of reoffending. He has been receiving treatment from a therapist, a Dr Jeanine de Volder. He has co-operated fully with her and, at the time of sentencing, Dr de Volder said that he may benefit from further therapy and, should he not receive a custodial sentence, referral for a number of therapeutic sessions would be of benefit to him. She also recommended that the respondent only be permitted supervised access to his grandchildren.

The sentence imposed

13. In passing sentence, the sentencing judge made the following remarks:

> *"JUDGE: This is the sentencing hearing of [M'ON]. [M'ON]has pleaded guilty to 17 counts of sexual assault on his then very young granddaughter. These incidents occurred over a three-year period, beginning when she was six years of age. The level of abuse must be judged according to a spectrum of seriousness and having heard Garda Patrick Cosgrave outline the facts, it is abuse which is at the lower end of the scale in terms of seriousness, for while it involved [M'ON]placing his hand under his granddaughter's clothing and tickling and touching her genital area, it did not involve digital penetration of her vagina, nor is there any suggestion that [M'ON]sought to advance the abuse beyond that inappropriate touching that he engaged in.*
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> *That is not in any way to underestimate or play down the very serious consequences of the abuse on the victim and I have carefully considered her victim impact statement, which she prepared shortly after the guilty pleas were entered. The victim clearly struggled with her own emotions, which I can have no doubt were directly attributed to the hurt and the ruination of her childhood and early adult years that she refers to in her statement. She started to drink at a very early age and had difficulties with her education and while I'm very pleased to hear that she has managed to overcome most of her demons - I am told indeed that she is working abroad in a very responsible position - she still has scars. She writes in her victim impact statement, 'I still struggle to hold down a relationship and have actually still never been in a proper relationship, as I am very confused about what real love is. I have a hard time trusting anyone and especially when someone tells me they love me; I just push them away. I keep only the bad people in my life who use me and I push away kind, decent people.'*
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> *And that is a terrible situation that this young lady finds herself in and that is as a direct consequence of the abuse that [M'ON]imparted on his granddaughter. [M'ON]'s granddaughter is obviously an exceptional person, so unlike her grandfather. She has had the courage to make these disclosures and she has been resilient enough to choose not to shelter behind anti-depressant medication that she had been prescribed.*
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> *While the abuse was at the less serious end of the scale, any sexual abuse is serious and in this case, there are a number of aggravating factors. There was a significant breach of trust. The bond and love that should exist between a grandfather and granddaughter was shattered for ever. There was a significant age disparity between the two. [M'ON] was practically half a century older than his granddaughter. The granddaughter was vulnerable at the time of the abuse. Her parents had just separated and [M'ON] took advantage of that by deliberately exploiting both her age, her vulnerability and the access that he had to his granddaughter when she was staying in the home that her own father had to go back to following that separation.*
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> *The duration and the persistence of the abuse over three years is an aggravating factor. It was not a one-off incident. It was not as a result of an over indulgence in alcohol on one occasion, but it was persistent and Garda Cosgrave referred to it as being almost every Saturday for three years. The attempts to keep the abuse hidden aggravates the offences, which the grandfather told his granddaughter to 'keep this our little secret'. The traumatic effect on the victim is an aggravating factor.*
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> *As a starting point in the sentencing process for any convicted abuser, whether pleading guilty or found guilty by a jury, such a person can expect to receive a custodial sentence. And in view of the aggravating factors of this abuse, which is admittedly at the lower end of the scale of seriousness, the appropriate term of imprisonment for a first time offender in relation to any of the first 14 counts is 18 months' imprisonment and in relation to any of the remaining three counts is three years' imprisonment.*
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> *Now, in our system of law I am, however, not entitled to sentence the offender taking into regard just the offence and the victim. I am obliged in law to look at the mitigating factors and these have been ably set forth by Ms de Bruin. I am obliged to give credit to the fact that [M'ON] pleaded guilty. This action, taken so late in the day, is however and nonetheless of enormous assistance. It's assistance to the State because it avoids any of the unforeseen pitfalls in a criminal prosecution, but it also must give significant emotional comfort and relief to the victim and save her the trauma of having to give evidence, which might be challenged under cross-examination at a trial. It also gives the victim comfort to see that there is at last an acknowledgement by [M'ON]that he has done wrong, a very great wrong to his granddaughter.*
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> *It is a mitigating factor that [M'ON] has fully co-operated with the process once he was charged, the judicial process once he was charged, although that cooperation did not exist from the point of view that he did not make admissions during the investigation process when he persisted with his denials. It's a mitigating factor that for somebody, who has lived for over eight decades, that he has no previous convictions. That he has indeed not even come to adverse garda notice throughout that long life, for any matter other than of course the matter that now brings him before the Court, and for these mitigating factors, I will reduce the sentence on one count in relation to the first 14 counts, from 18 months to 12 months' imprisonment and in relation to one count of the final three counts, from three years down to two years' imprisonment.*
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> *In addition to the mitigating factors, I am also obliged in law to look at the particular personal and family circumstances*

of the accused. He is 81 years of age. I have seen his medical reports and he is in poor health. He suffers from difficulties in relation to his kidneys and he has heart disease. In addition, he is the carer of his wife who is of a similar age, but who is in particularly poor health, having cancer and indeed having suffered a stroke, which appears to have occurred since the judicial process commenced. She is in a particularly vulnerable position and I am told that while there is some family assistance, nevertheless it is [M'ON] who is her principal carer. In these exceptional circumstances, I am prepared to suspend the two terms of imprisonment and I am going to do so for a period of six years, on condition that he undergoes therapeutic counselling for at least the first three years of that term of suspension. Such counselling to be as approved or directed by the psychologist that he has already been involved with, Dr de Volder.

In that regard, I am giving liberty to the State to enquire from time to time that this counselling is being undertaken. In addition, and as a significant punishment to [M'ON], he will live out the remaining years of his life with the shame of knowing that he is a registered sex offender and with the knowledge that because of his selfishness, he has caused a rift and a division in his family which may not be healed in his lifetime and he will have to live with the consequences of that."

Grounds of Appeal

14. The Director seeks a review of the sentence, in essence on two grounds. They are as follows:

i. The sentencing judge erred in failing to have sufficient regard to the seriousness of the offending; and

ii. The sentencing judge erred in suspending such a large portion of the sentence.

The Law

15. The law in relation to undue leniency reviews pursuant to s. 2 of the Criminal Justice Act 1993 is well settled at this stage. The relevant jurisprudence (in particular *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R.356; *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390, and; The *People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279), indicates that before a reviewing court can find the sentence to have been unduly lenient, it must be satisfied that the sentence imposed involved *"a clear divergence by the court at trial from the norm"* that will have been caused by *"an obvious error of principle".*

16. Moreover, the following particular points were emphasised by O'Flaherty J giving judgment for the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Byrne*:

"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 in 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 in question. 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 very 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 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. W.C. [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 the enquiry the court makes where there is an appeal by an appellant. The inquiry 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."

17. In *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 36 Barron J. held (at page 359) that :-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

18. More recently in *The People (Director of Public Prosecutions) v Stronge*, [2011] IECCA 79, McKechnie J. distilled the case law on s. 2 applications into the following propositions:

"(i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

Discussion and De ision

19. In his oral submission to this Court, counsel for the applicant submitted that the only aspect of the case which would have justified it being treated other than as a very serious one - that would have called for the imposition of a custodial sentence - was the comparatively minor nature of actual individual sexual assaults perpetrated by the respondent. These had in all instances involved rubbing of the injured party's genitalia by the respondent with his hand inside her clothing. Further, the violations of this type had not progressed to other more serious forms of sexual assault, a feature frequently seen in these types of cases. In particular, there was no digital or other penetrative sexual assault.

20. However, counsel submitted, in all other respects the offending conduct in this case was very serious. These were not isolated incidents. The four counts to which the respondent had pleaded guilty were representative counts in respect of a pattern of numerous incidents of similar type offending over a four-year period.

21. In addition, the very young age of the victim (she was between six and nine at the time) was an aggravating feature.

22. A further significant aggravating feature was the breach of trust involved in the respondent abusing his own grandchild, with whom she should have been able to feel, and indeed, be protected and safe. Added to that was the fact that the respondent had taken advantage of her extreme vulnerability in the aftermath of her parent's separation.

23. Finally, there was the serious impact on the victim, who had been precipitated into drinking as a coping mechanism consequent upon the respondent's abuse of her and who had developing alcoholism at an extraordinarily young age.

24. It was acknowledged that there had been an early plea, and that it had been valuable, and in particular that the injured party had been spared the ordeal of a trial and the necessity to travel home from abroad - where she now works- to give evidence at such a trial. However, counsel for the applicant points out that, while the plea had been early once the respondent had been charged, there had been no initial acceptance of responsibility by him. Indeed, he had initially denied the allegations.

25. Counsel for the applicant accepted that the respondent is in his 80's, in poor health, and caring for his infirm wife, and he accepts that the respondent would be entitled to significant mitigation on that account. However, he says, these factors should not have allowed the respondent to avoid custody altogether, given the seriousness of the aggravating factors in this case.

15. Counsel for the applicant further pointed out that the respondent was already in his 60's when he committed these offences. This was not a case of someone offending as a young man and having to answer for their crimes in their old age. The offending was much more recent in this case.

16. We were referred to this Court's decision in *The People (Director of Public Prosecutions) v Donohue* [2017] IECA 244, an appeal against severity of sentence by an 82 year old man, in poor health, who had received two sentences of two years' imprisonment with six months suspended, for sexual assaults on a neighbour's child, and with three other offences being taken into consideration. While this Court had found the sentence to be unduly severe, and increased the suspended portion from six months to fifteen months, it had still required the applicant in that case to serve an actual custodial sentence notwithstanding his age and infirmity.

17. Counsel for the applicant confirmed that his sole complaint was that the entirety of the sentence was suspended, and that there had been no element of actual custody. He contends that this was outside the norm and unduly lenient.

18. In response counsel for the respondent has pointed to the considerable mitigating circumstances in her client's case, including his early guilty plea, his previous good character, his age and infirmity, and the fact that he is the sole carer for his wife. Her client has also been assessed as being at low risk of re-offending and has been fully co-operating with the therapy requirement imposed upon him. Counsel for the applicant informed the Court that the Gardaí had verified this. She accepts that the sentence was lenient, very lenient indeed, but argues that it was nevertheless within the range of the sentencing judge's discretion and was therefore not outside the norm.

19. We also agree that the sentence was very lenient. However, we must attach great weight to the sentencing judge's reasons for imposing the sentence that he did. He clearly felt that the respondent's circumstances were such as to bring this case within that category of cases in which the imposition of a wholly suspended sentence was justified.

20. In contesting that it was so justified, the appellant has drawn our attention to the judgment in *The People (Director of Public Prosecutions) v McGinty* [2006] IECCA 37. However, it requires to be stated that quotation in *McGinty* relied upon by the applicant in this case, is inapposite as that was a case involving an offence under s. 15A of the Misuse of Drugs Act 1977, in respect of which the Oireachtas has enacted a presumptive mandatory minimum sentence and has sought to emphasise that, as a matter of public policy, such offences are to be regarded as being intrinsically serious. *McGinty* is not, therefore, a decision of general application.

21. The trial judge in the present case characterised the personal and family circumstances of the respondent as being exceptional. That was a view that was open to him to come to on the evidence before him. It is irrelevant that another judge, or court, might have considered it appropriate to impose some degree of actual custody in the circumstances of this case, and that if that had occurred that it is unlikely that it would have been interfered with by this Court. That is not the test. The test is whether the sentence in this case represented a clear divergence from the norm, caused by an obvious error of principle. We are not persuaded that it was. It was undoubtedly lenient, but not unduly lenient in our view.

22. We wish to modify what was said in *McGinty* to the extent of saying that the requirements mentioned therein should be seen as alternatives rather than as conjunctive requirements. In this case the circumstances were not wholly exceptional in as much as infirmity and old age go together, and we relatively frequently find old and infirm persons coming before the courts. Moreover, the circumstance of one old person having to care for an even more infirm spouse or life partner is not unusual, nor indeed is it exceptional. However, we do agree that the circumstances relied upon, although not unusual or exceptional, were significant in that the need to care for his elderly and infirm wife was a substantial burden on the respondent, and it is understandable that the respondent should be anxious, worried and concerned about how any incarceration of him might impact on his wife, and concerning how his wife might cope in his absence. Any sentence to be imposed by the sentencing judge was required to be proportionate not just to the gravity of the offence but also to the circumstances of the offender. Further, in determining what sentence to impose the sentencing judge would have been obliged to bear in mind the separate proportionality considerations specifically arising in terms of the rights under Article 8 of the ECHR of both the respondent, and his wife. Although not articulated in those exact terms, the sentencing judge was clearly concerned about the potential impact on both the respondent and his wife if she was to impose on the respondent a custodial sentence to be actually served.

23. In conclusion, we dismiss the application.