THE COURT OF APPEAL

Record Number: CCACJ0116/2018

Birmingham P.
Baker J.
McCarthy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

STEVEN McGINTY

RESPONDENT

Judgment of the Court delivered on the 30th day of January, 2019 by Mr. Justice McCarthy

1. This is an application for a review on grounds of undue leniency of two sentences imposed by the Circuit Court on the 15th March 2018 of eighteen months' imprisonment on a count of possession of child pornography contrary to s. 6 of the Child Trafficking and Pornography Act 1998 and two and a half years on a count of distribution of child pornography contrary to s. 5(1) of the same Act. The sentences were to run concurrently and were suspended in their entirety for a period of eighteen months *inter alia* on a term to the effect that the Respondent should place himself under the supervision of the Probation and Welfare Service. He had pleaded guilty at the first available opportunity. His name was entered in the Sex Offenders Register.

2. The accused was identified in October 2013 as an online participant in a chat room and an investigation commenced; the gardai searched his home on the 24th of October under warrant. Amongst the items seized were two laptop computers, a Dell and a Toshiba. Between them they contained a total of 260 images and 4 video files which had been shared from the devices on a number of ocassions from May 2007 to April 2008. The Dell contained 148 of the images, 82 of which involved children under the age of seventeen engaged in oral or penetrative sexual activity. Twenty of these, in turn, involved pre-adolescent girls. The remaining images on that computer were pictures of boys and girls with exposed genital areas. The video files also found on it showed girls under seventeen stripping and performing sexual acts. A fifth video which had been deleted had a title suggestive of pornographic images of a seven-year old child. The Toshiba had 112 images, 25 of which were of pre-adolescent girls engaged in oral sex with adult males; three of these involved infants The remaining 85 images were of the exposed genitalia of girls under the age of seventeen. Forensic analysis showed that a number of the images had been shared on occasions between August 2012 and January 2013. Further, two Skype chats were recorded and these were of a sexual nature. For their purpose the respondent adopted the user name of "Dadlovesdaughter"and the name "Daddyloveskaty" to distribute the images. In these messages the respondent discussed his own sexual experience with someone who appeared to be a thirteen-year old child and enquired of another child of apparently fourteen years as to the sexual acts in which they would engage if they met. In the latter the respondent also made a request to have sex with the child's nine-year old sister.

3. On the day after the seizure the respondent and his wife attended at Swords Garda Station and he made full admissions to the offences. He described the nature of the messages. He told the gardai that he wanted to get help, that he hated himself. He provided details in respect of the laptops including passwords whereby the offending material could be found. Subsequently he was interviewed on the 4th November 2013 when he made further extensive admissions to the effect that he had been engaged in the use of child pornography for a number of years. He was described as co-operative with gardai.

4. Unfortunately, the laptops seized were not examined until October 2015 due to lack of garda resources. Following their examination, but only in April 2017, this prosecution was commenced. It appears clear that at all times the accused intended to plead guilty. His remorse appears to be genuine.

5. The accused is described as being "proactive" in the manner in which he sought therapy to address his interest in such pornography from March 2014 extending to June 2017 as appears from a report furnished by an organisation called "Forensic Psychological Services". Two psychiatrists' reports were also furnished to the sentencing judge: from them it is apparent that he was a patient of the mental health services between 2005 and 2009 and again between 2011 and 2015. Those issues were anxiety disorder, panic disorder, agoraphobia and depression: he received medication and it appears that during the first period he was on sick leave from his work. He had retained, at the time of sentence, the support of the family and still does so. Whilst his conduct attracted the attention of the Child and Family Support Agency, Tusla, he continues to live in his home with his wife and young child to whom he has access under his wife's supervision; Tusla has a continuing engagement with the family. Due to the nature of the offences he lost his career as a nurse – he had an impressive work history. He is 45 years old and has no previous convictions. It was conceived at the sentencing hearing that he would lose his job as a nurse (he had been suspended after these matters came to light) and we proceed upon the basis that this loss of career has occurred. The sentencing judge also had the benefit of a comprehensive and favourable probation report. The evidence is that the risk of re-offending is low. He has no previous convictions but as with all the so-called "secret crimes" of a sexual nature any criminality other than the sexual offences which are the subject of charges are rare. The accused's co-operation must, of course have been valuable to the Gardaí but nonetheless it was felt necessary for the purpose of the proper investigation of the offence to obtain expert analysis of the contents of the computers.

6. The Director's grounds of appeal are as follows:

(1) The sentence imposed was unduly lenient and amounted to a substantial departure from an appropriate sentence in all

the circumstances of the case. In particular, it is submitted that the sentencing judge erred in principle in failing to attach a sufficient weight to the aggravating factors or placing too much emphasis on the mitigating factors.

(2) The sentencing judge failed to impose a penalty that adequately reflected the principle of general deterrents.

7. The appellant submitted that whilst the trial judge correctly identified the relevant mitigating factors the loss by the respondent of his career as a nurse and unsupervised access to his child did not count towards mitigation as this necessarily arises from the fact of offending. It was submitted that there was a failure to give due weight to the fact that the respondent had been seeking out child pornography for a period of seven years: she merely made a "passing reference" (or so it is characterised by the appellant) to the "number and type" of the items and failed to give due weight to that aggravating factor. It was also submitted that the imposition of a fully suspended sentence in respect of the count of distribution failed to reflect the serious nature of the offence and that the court having identified a headline sentence of four years mitigated it to two and a half years but thereafter suspended it, fell into the error of double counting, described or characterised as double mitigation.

8. The Director says that while she recognises that many first time offences would often result in a suspended or short custodial sentence, the nature of the images involved in the present case warranted an immediate custodial sentence. She points out that the material involved images of over 100 children under 17 years of age engaged in penetrative sex and that 42 images involved pre-teens engaging in penetrative sex and that three images of these involved infants performing oral sex.

9. On behalf of the respondent it was conceded that the nature of the images and distribution over time are aggravating factors. It is also said, however, that without minimising the seriousness of what was involved, that the case involved a relatively small amount of material, certainly when compared with some other cases, there was no commercial activity involved and distribution was confined to the respondent's involvement and exchange of images in a chatroom. It is said to be contrasted with other cases which may involve distribution for gain or setting up websites or the like. Counsel frankly conceded that the sentence was lenient but submitted it was not unduly so.

10. It is further submitted that the Director has failed to satisfy the criteria for intervention of this court elaborated in *DPP v McCormack* [2000] 4 I.R.356 and in particular to show "a clear divergence by the court of trial from the norm" in terms of the sentences imposed for offences of this kind. The respondent also stresses the considerable delay which occurred between the time of detection and the charge (forensic analysis of the computers was not completed until late 2015 the charge laid some 18 months later) In this regard the respondent relies also on the delay between the date of sentencing hearing of this appeal; he says the application should be refused on this ground alone.

11. The principal ground pursued at the hearing, however, was that the sentencing judge fell into error by failing to impose a penalty that adequately reflected the principle of general deterrence and we think that if there is a ground for intervention it can only be because of a failure to have due regard to that principle by suspension in its entirety of the sentences. In this respect the appellant submits that in child pornography offences, more than in many other serious offences, there is a greater need for general deterrence to discourage engagement with pornographic images involving children. The point is well made that the offence is one which is capable of being committed in private and surreptitiously and there exists a potential that large numbers of offenders may go undetected.

12. We might add that it is of course vital to remember that real children, many of whom live deprived lives in impoverished parts of the world, are victims of vile sexual practices in which anyone viewing this type of pornography, is by, definition, complicit. It is an oversimplification to suggest that anyone engaged in such conduct is, in truth, at arms length from it.

13. How a Court should address the question of sentencing in these cases has been addressed by courts here and in England and Wales. In *R. v. Oliver* [2002] EWCA Crim. 2766, the Court adopted a 5-level or tiered approach to categorising images. In ascending order of gravity, these were images which-

(i) Depicted erotic posing by children with no sexual activity;

(ii) sexual activity between children or solo masturbation by a child;

(iii)non-penetrative sexual activity between adult(s) and child(ren);

(iv)penetrative sexual activity between adults and children and

(v) sadism or bestiality.

The DPP says that it is noteworthy that in the present case, a significant amount of the material is in category (iv).

14. The Irish courts first looked at this in some detail in *DPP v. Loving* [2006]3 IR 355 In the course of its judgment, the Court of Criminal Appeal observed that "*the first question is how serious and numerous were the actual pornographic images*", going on to say that the Court should consider the circumstances and duration of the activity leading to their creation. The Director says that the amount here was considerable, though not involving the enormous quantities that sometimes feature. Moreover, activity, whether involving possession, acquisition or distribution had been spread over a period of some seven years. The Court said that "*where the offence was at the lower levels of seriousness, there was no suggestion of sharing or distributing images, the accused was cooperative and it was a first offence, the option of a suspended sentence should be considered*"

15. In *DPP v. Brian O'Byrne* [2013] IECCA, the Court was dealing with an appeal against the severity of a 3-year sentence. There, there were 3,200 images – and some of the material was of even greater depravity to those here. As here there were strong mitigating factors: the appellant had a medical and psychiatric history, there were reports before the Court suggesting that he was at low risk of reoffending, there had been a long delay in bringing the matter before the courts, and the appellant in had evidently used the time between detection and appearance in Court positively. The Court reduced the sentence to one of two years imprisonment. In the course of his judgment, O'Donnell J. made the following observations:

"13. The nature of the images, their quantity, the manner in which they *were obtained and/or retained, the period over which the images are retained and accessed are all relevant in assessing the intrinsic seriousness of the offence, and in attempting to place it on the spectrum of possible offences under s. 6 and therefore to locate it on the scale of sentencing which the court has prescribed in this case* . .

16. *The length of time over which these images were accessed is itself significant. It appears that activities took place over at least two years . . .*

19. *Nevertheless, this was a serious case and this Court considers that had no guilty plea been offered and had there been a conviction after a full trial, that in the absence of other mitigating factors, it is a case which could have merited a sentence in the region of four years imprisonment . . .*

28. *Notwithstanding the plea of guilty and absence of relevant prior convictions, this is, on any view, a serious case. It deserves an immediate custodial sentence and the judge was right to impose one. The court recognises that in many cases, which are effectively first offences, a conviction on a plea of guilty to a charge under s. 6 would often lead to a suspended sentence or a very short custodial sentence. However, in a number of cases, custodial sentences have been imposed precisely because of the nature of the images involved and the degree of organisation and sophistication in seeking to obtain the images. Those features were present here and made this a serious offence. Accordingly, the court considers the appropriate course in this case was to set aside the sentence of three years imprisonment and substitute a sentence of two years imprisonment and at the same time make a post-release supervision order*."

16. It seems to us that the images in this instance vary between categories one and four referred to above as quoted in Oliver and adopted in Loving. The only category of images absent were those involving sadism or bestiality. Apart from the plea of guilty, the extent of co-operation, the remorse , the fact that the appellant has undergone extensive therapy and will not, as a matter of reality, offend again (being the principal mitigating factors) a decisive factor in the present case militating against the existence of an error must be the delay between the detection of the offences and the sentencing process; there was no delay in the date given for hearing of the appeal but obviously there was a lapse of time in the ordinary way. Without attributing blame for such delay we think that the sentencing judge was entitled to take into account that which had occurred when she gave her decision and we must have regard to it in the light of the further lapse of time.

17. The sentence was undoubtedly lenient, as Mr. Rahm had to concede, but the ultimate issue, in our view, is whether or not undue leniency exists because of the failure to have proper regard to the principle of general deterrence.

18. The nature and extent of the material in issue meant that a custodial sentence was always likely. On the other hand, there were factors present which weighed in favour of the respondent. First of all his response when detected, making his way to the Garda station, admitting his involvement, and facilitating the investigation by providing passwords and so on. There is also the fact that he has engaged with psychological and psychiatric services and there is every indication he has addressed what is required to achieve rehabilitation. His loss of career is a matter of significance, even if, as the Director argues, this was inevitable. While he continues to have family support for his supervised access to his child, the fact that this is so must serve to bring home to him the seriousness of his offences.

19. Whilst the manner in which the he responded to detection might have been expected to achieve an expeditious resolution this did not happen, and there were long delays in initiating the proceedings. The delay must have weighed heavily on his mind.

20. None of these factors taken alone could provide a basis for a non-custodial sentence, but the question is whether their cumulative effect could justify what otherwise must be seen to be a very unlikely outcome.

21. Cases of this nature are ones where the question of general deterrence must weigh heavily. The fact that the offence occurs in private and is relatively difficult to detect, as well as the fact that the victims are themselves deprived persons with no voice means that deterrence plays a particular part in sentencing, and places a premium on the need to deter those who might be tempted to engage in such conduct.

22. The factors present that militate in favour of the accused could not, taken separately, provide a basis for non-custodial disposal. The question is whether the cumulative impact of the various matters to which we have referred could provide a basis for non-custodial disposal. Undoubtedly there are judges who would take the view that, significant as the factors in favour of the respondent were, the offences were of such seriousness that custody had to follow. Indeed, we can say that had the members of this Court been called upon to sentence at first instance, we would have been minded to impose a custodial sentence.

23. However, as we have made clear on many occasions, that is not the point. The question is not whether a more severe penalty would have been an appropriate option but whether the course of action decided upon by the sentencing judge fell outside the range. Sentencing judges must be afforded a margin of appreciation and only when that margin has been exceeded should an appellate court intervene. In this case the decision to suspend falls at the very outer limit of the margin, but we have not been persuaded that it fell outside the range.

24. We accordingly refuse the application by the Director.