THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

250/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J. S.

Appellant

Judgment of the Court (ex tempore) delivered on the 2nd day of November 2015 by Mr. Justice Edwards

1. This is an appeal against the severity of three consecutive sentences of two years imprisonment, making in total an overall sentence of six years imprisonment, imposed upon the appellant in the Circuit Criminal Court in respect of three counts of defilement , contrary to s.3(1) of the Criminal Law (Sexual Offences) Act, 2006, to which the appellant had pleaded guilty.

2. The appellant has presented a summary of the salient facts in written submissions filed on his behalf, in respect of which the respondent takes no issue. Accordingly, the Court will adopt the said summary for the purposes of this ex tempore judgment.

3. There were three separate victims all of whom were teenage girls. In respect of each of the three girls, contact was first made by the appellant through a social networking website called "Tagged". This website had two sections, one for those over the age of 18 and one for those under the age of 18. In order to access the section of the website for those under the age of 18, a user had to establish a profile with his or her date of birth which would put the user as being under the age of 18. In this case, the appellant made initial contact using the moniker "Connor W" which included a profile picture of a teenage boy.

4. The first injured party was Ms C. On the 1st May 2011, Ms C set up an account on the "Tagged" social network site and on the 6th May 2011, Ms C was contacted by the appellant and invited to send the appellant a text message. Ms C was 16 at the time. Ms C sent the appellant a text message - "This is C from Tagged" and the response was "Well I'm J and I'm not on Tagged". At this stage various personal details were exchanged between the parties via text message. Ms C was asked her age and she said she was 16. The appellant was asked for his age and he said he was 36. The appellant said that Ms C was very attractive and suggested that they meet up. The appellant asked Ms C if she would have sex with him and she said no, not at this point.

5. Ms C agreed to meet the appellant in a town in Leinster and having told a few of her friends, they hung around to make sure everything was ok. Ms C and the appellant met at an agreed location in the said town. Some conversation ensued and Ms C sat in the appellant's car. They kissed and the appellant asked her if she wanted to go for a drive but nothing further happened on that occasion. A second meeting occurred in a different area of the same town, a more isolated industrial business area. The appellant kissed Ms C and asked Ms C if she wanted to have intercourse, which she replied that she did. Ms C and the appellant then proceeded to have unprotected sexual intercourse. This lasted for approximately 10 minutes and afterwards they said goodbye to each other. Further contact occurred over the coming days both via text message and on social networking sites and the appellant invited Ms C to her house. In fact, they met again in the said industrial business area about a week later. The appellant again drove to the town in question to meet Ms C and again sexual intercourse took place.

6. The second injured party was Ms B. Ms B was also contacted via the "Tagged" social networking site by the appellant. She was 15 at the time. Again, the appellant invited correspondence via text message and the appellant identified himself as "J". Correspondence by text message ensued for the following number of weeks and the appellant ultimately revealed his age of 36. The contact between them became sexualised and the appellant requested that Ms B send him sexy pictures. The appellant also sent phone credit to Ms B to keep up the contact. The appellant first met Ms B in a car park in a supermarket and thereafter they proceeded to an isolated area where there was a certain amount of sexual contact but not including intercourse. This included the taking of a photo and masturbation. On the next occasion, two to three weeks later, in an isolated rural area outside of a town in Munster, they pulled off the main road and had sexual intercourse. Ms B described that she didn't feel comfortable but that she didn't want to upset the appellant. On the next occasion the appellant again initiated contact and the appellant drove Ms B to an isolated area where sexual intercourse took place, including oral sex. Ms B agreed to this but did not feel particularly comfortable. On the next occasion they met, the appellant again collected Ms B in a carpark and drove to an isolated area where they had sexual intercourse. The fourth occasion occurred some time later and again the appellant collected Ms B in a carpark and drove to an isolated area where they had sexual intercourse. Thereafter Ms B broke off contact with the appellant.

7. The third injured party was Ms H. Again contact was initiated via the "Tagged" social networking site and what was described as an identical *modus operandi* was adopted. Ms H was 15 at the time. The appellant met Ms H in a well-known pub on the north side of Dublin. Ms H was standing outside of the pub while a friend of hers was nearby to keep a lookout. The appellant collected Ms H in his car and asked Ms H if she "wanted an interview" (at the time the appellant was the manager of an area chain of convenience stores). The appellant drove to a street of redbrick houses and asked Ms H to perform oral sex on him. Ms H described the experience as unpleasant but the appellant kissed her and told her she was pretty. After this, the appellant and Ms H engaged in sexual intercourse, which Ms H described as being physically uncomfortable. Ms H was then returned to the Dublin City Centre Shopping Centre. She there met her friends and shortly later the appellant again pulled up his car and said that he needed to "re-interview" Ms H. The appellant drove Ms H to an isolated area in the Phoenix Park where sexual intercourse took place. On the next occasion the appellant and Ms H met at a hotel where oral sex took place. Again contact was initiated by the appellant.

8. By virtue of a complaint made by Ms C's father to the Gardaí, the appellant was identified and arrested. Over the course of three interviews he accepted in broad measure the contact with Ms C but denied that sexual intercourse took place. Approximately 10 days later the appellant made contact with the Gardaí and presented himself by arrangement. At interview he indicated that what he had said on the previous occasion was untrue and that he had, in fact, had sexual intercourse with Ms C. He also nominated Ms B and Ms H and gave their details as two other girls with whom he had had contact. As a result of these voluntary admissions the investigation

into the latter two injured parties was initiated. Thereafter the appellant was again arrested and interviewed in respect of Ms B and Ms H and the appellant made full admissions in respect of these injured parties. The appellant was cooperative throughout the investigation and it is accepted that he intimated an intention to plead guilty, and did in fact plead guilty, at the earliest opportunity.

9. The sentencing judge also received evidence that the appellant had no previous convictions, had a track record of work and was from an ordinary respectable background. It was elicited in cross-examination of the investigating garda that despite an initial representation by the appellant that he was a teenage boy, he did reveal his actual name, age and details to the injured parties very early on in each case. It was further elicited that at the first interview the appellant straightaway accepted that he had had sexual contact with Ms C but denied that sexual intercourse had taken place. However, he later returned to the Garda station of his own initiative and on this occasion told the gardaí that sexual intercourse had taken place. It was on this occasion that he volunteered details of offences also having been committed against Ms B and Ms H, even though no complaints had been received from or on behalf of those injured parties.

10. The Court further heard that the appellant was apologetic and remorseful, and that the appellant had psychological difficulties that had lead to or contributed to his offending, and that he had had therapeutic interventions aimed at addressing those difficulties. The sentencing judge was provided with a report from Forensic Psychological Services detailing their assessment and treatment of the appellant. While in submissions before this Court counsel for the appellant has sought to characterise her client as suffering from a sexual addiction, that is her wording and the Court notes that the psychologists' report does not use that characterisation or labelling. The report does, however, identify the appellant as suffering from emotional vulnerability and as having deep seated issues related to his emotional life. It assesses him as being of low risk of re-offending.

11. The sentencing judge was in receipt of victim impact reports from all three injured parties. Ms C emphasised in particular that her relationship with her parents had been very damaged as a result of her having become involved with the appellant, and says that the trust that was there before between her and her parents has gone. She believes that she was vulnerable, naïve and was taken advantage of by the appellant.

12. Ms B stated that the incident has made her less trusting of people and more wary, and that it has changed her as a person. She also claims that her relationship with her parents has been affected and laments that they don't really trust her any more. She also contends that she was vulnerable and was taken advantage of by the appellant, and says that the whole episode has taken a lot out of her mentally and physically.

13. Ms H stated that following the offences involving her she became depressed and kept breaking down. She attempted self harm by overdosing. She further became an alcoholic, although she no longer drinks. She has been seeing a counsellor once or twice a week for the past year, and her psychological welfare has been improving. However she says that she has no confidence.

14. In presenting a plea in mitigation counsel for the appellant drew attention to the following points:

a) The level of cooperation and admissions, including the fact that the appellant volunteered to the Gardaí about his having had sexual intercourse with two girls other than the girl whose family had made a complaint to the Gardaí;

b) The early guilty plea;

c) The lack of previous convictions and previous good character;

d) The appellant's personal circumstances which included the fact that following his formal education he had worked consistently;

e) That following these events he admitted to his friends and family of the offending (including his mother for whom he cares) owing to his shame for the offending and the fact that he wanted to face up to what he had done;

f) The damage done to his own family, while acknowledging the hurt caused to the injured parties and their families;

g) That following contact from the Gardaí he made very early contact with the therapeutic process in late 2011 and engaged in early course with same;

h) That there was a conflict between the hard working and law abiding person on one side and the offending in this case and the reasons behind this are laid out in the therapeutic progress report of Dr Jeanine De Volder of the 23rd October 2013;

i) That he had engaged in some 230 hours of group psychotherapy to date;

j) That following the Court's adjournment of the matter in May 2013 to allow for continued therapy, there had been a breakthrough in the appellant's understanding and insight into his behaviour, according to his therapist;

k) That the appellant was assessed as being in the low risk range of re-offending;

l) The appellant's remorse and shame for his actions;

m) That there was now a significant level of opprobrium and reputational damage attaching to the appellant;

n) The appellant's certification as a sex offender;

o) A letter from the appellant's brother in relation to the appellant's character, setting out the family's shock and devastation at these offences and the appellant's improvements in recent months;

p) A letter from a former employer of the appellant attesting to the appellant's high level of work, describing his own shock at learning of the offences, and stating that he would be willing to employ him again in the future.

15. In the course of sentencing the appellant the sentencing judge, having summarised the facts of the case, made the following remarks:

C, B and H were young girls and they were very vulnerable young girls and adult men contacting them -- they may have thought nothing of it or was there some degree of excitement, I really don't know, but he was in a dominant position by reason of his age. These were young, young girls. They should be protected by any adult person, including J. S. They should not be exploited by an adult by reason of their age and by reason of being young children. In many ways the system of contact, Mr S acted as a predator in respect of the girls which were simply his prey. The contact, the purpose of the contact and the intention of the contact was for the sole purposes of having sexual intercourse with the respective girls being C, B and H.

The effect on the girls, and the reports have been read out to the Court and I have read the reports, in respect of C firstly, it has been very serious for her, the effects of this sexual abuse and having sexual intercourse with J. S.. Likewise, in respect of B, it's been extremely serious for her, the effects of what occurred to her caused by J. S., and H, likewise, the effects on H arising out of the offence and the sexual intercourse that was committed by the accused, J. S.. What even makes the case even more sinister, as I said, I am satisfied he acted as a predator in respect of the girls who were simply treated like prey for the purposes of sexual intercourse, but he was aware of their ages. He was aware when he contacted them. He was aware when he met them. He was aware before sexual intercourse took place of their respective ages but he nevertheless proceeded to defile them, sexually abuse them, and this category of offence can only be described as disgusting, horrific sexual abuse and sexual violation of these young girls C, B and H.

When the guards commenced their investigation I am satisfied that he did fully cooperate with the investigation and indeed made substantial indeed full admissions which were extremely beneficial in bringing this case to a successful conclusion in respect of the charges against him, and I'll deal with it in mitigation, but I'm also satisfied that the pleas of guilty and the cooperation in this type of case, it was of substantial benefit to the victims C, B and H because they had been saved the trauma and anxiety of having to get into the witness box to give evidence if the offences were contested and of course every accused person is entitled to cross examine witnesses and indeed entitled to put his or her case but the girls have been saved substantial trauma by reason of the course he took and I will deal with that in mitigation.

In respect of count No. 1 the maximum custodial prison sentence is five years and I'm to decide where does this count lie in respect of the maximum sentence. I'm satisfied it would be in the it would be in the higher range. In respect of count No. 4 the maximum custodial prison sentence is five years and I am to decide where does this count lie in respect of the maximum sentence. I am satisfied it would be in the higher range. And in respect of count No. 7 the maximum custodial prison sentence is five years and I'm to decide where does this count lie in respect of the maximum sentence. I'm satisfied it would be in the higher range. Then I must have regard to Mr J. S.'s personal circumstances. He is now aged 39 years. He is an area manager with [a chain of convenience stores]. Having regard to the reference handed into court, he is an excellent worker and has an extraordinary strong work history and been very successful at the work that he was involved in. It appears that currently he is on medication for depression.

In mitigation there was pleas of guilty. He fully cooperated with the investigation and made admissions. I am satisfied that the guilty pleas and the admissions, cooperation and admissions, were of substantial benefit to the victims C, B and H in that they did not have to give evidence in a trial and have been saved the trauma and anxiety not having to give evidence in a trial. He has expressed remorse and he underwent or he attended the forensic psychological service group -- their programme firstly in November 2011 which was extremely intensive. It appears that initially he had significant difficulty engaging in the therapeutic process; however, he kept with it and made substantial progress or strides in the therapy and has been described, having regard to the report, that he made significant strides in therapy but he will require or I should use the word it's anticipated that he will remain in therapy for some time yet. The therapy was also of substantial benefit in that during the therapy, in dealing with his emotions and other relevant matters, that he was able to acknowledge that his offending behaviour was wrong. The assessment by the experts say that the level of risk for future sexual offending is within the low range and he has no previous convictions, meaning that he has never come to the attention of the guards before these offences or hasn't come to the attention of the guards since the offences but he has no previous convictions.

The aggravating factors in the case is that these are serious offences. A series of similar type offences. The manner of the offences relating to the girls C, B, and H. The identical pattern of contacting the girls by the social networking site Tagged where the girls gave their profile or profiles, meaning giving their names and dates of birth. He referred to himself as Connor W being a teenager. When they contacted him he gave his name as J., and he gave his age. He had sexual intercourse, meaning unlawful sexual intercourse amounting to defilement of the respective girls, C, B and H. Defilement of a child, being sexual intercourse of a child under the age of 17 years of age, is a disgusting, horrific, sexual abuse and sexual violation. It was a disgusting and horrific sexual abuse and sexual violation of the girls, C, B and H. He acted as a predator in respect of the girls who were vulnerable and he exploited the girls having regard to their respective ages. He was aware of their ages. He was aware when he contacted them that he was meeting young girls. He was in a dominant position having regard to his age and to the respective ages of the girls. The purpose and intention for the contacting and the meeting of the girls was for the purposes of having sexual intercourse. The effect of the offences on the girls, C, B and H, which has been extremely serious, this was multiple offending and multiple victims. There are substantial aggravating factors in the case.

Then I must have regard to the seriousness of the offences and to the substantial aggravating factors and balance it against the mitigating and the personal circumstances and I am required by law to have regard to the mitigating and the personal circumstances and I will have regard to the mitigating and the person circumstances but the aggravating factors in the case are substantial in the extreme.

In addition I would have regard to the proportionality and totality principle in respect of the sentencing but I am satisfied that it is not a case for concurrent sentencing. It is a case for consecutive sentencing having regard to the victims in the case, having regard to the type of offences, that these were individually selected, that it is appropriate that there should be a sentence in respect of each individual person, girl, meaning C, B and H and the sentences I will impose will run consecutively.

In respect of count No. 1 I'm imposing a the sentences will run from today's date. In respect of count No. 1, I am imposing a two years' custodial prison sentence. In respect of count No. 4, I am imposing a two years' custodial prison sentence. In respect of count No. 7, I am imposing a two years' custodial prison sentence. All the sentences to run consecutively, meaning that they will that would be two years, two years and two years will amount to six years and the six years to run from today's date."

16. After sentence had been pronounced, the following further exchange took place between the appellant's counsel and the sentencing judge:

> *MS NÍ RAIFEARTAIGH: Judge, would you consider suspending any portion and perhaps invoking the post release supervision?*
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> *JUDGE: No, I believe that if I suspended any portion I'd be very concerned that I might do an injustice to any individual girl because on the basis I would not want to say that I should suspend portion in respect of one and I believe that giving the two years it was open to me to give a higher sentence and suspend portion. I am giving a clean sentence in respect of each count and I believe that it reflects the victim and it reflects the totality of matters.*

17. In argument before this Court, counsel for the appellant has helpfully distilled her client's case down to a two faceted complaint that the overall sentence was unduly severe and had failed to respect the totality principle (i) because the trial judge had failed to properly weigh the respective aggravating and mitigating factors in the case, and (ii) had, in structuring the sentence in the way that he did, failed to give proper consideration to the option of suspending a portion of the sentences in the interests of incentivising rehabilitation, and in particular had been inappropriately influenced by a desire not to be perceived as doing *"an injustice to any individual girl."*

18. Counsel for the appellant submitted that while the three offences were undoubtedly serious it was an error of principle to rate them at the higher end of the scale of seriousness in all the circumstances of the case. Counsel also submitted that they ought more appropriately to have been assessed as belonging in the mid range in terms of their seriousness. It was further submitted that such was the level of extraordinary co-operation in this case, coupled with the appellant's psychological problems, genuine remorse, commitment to rehabilitation and low risk of re-offending that more weight should have afforded to the mitigating factors.

19. In reply, counsel for the respondent contended that the case had been properly located in the higher range of seriousness. He pointed to the aggravating factors in the case which can be summarised as follows:

> a) The level of pre-meditation involved in the commission of the offence. The appellant set up a false social media profile and thereafter used it to deliberately target the three injured parties.
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> b) The age disparity between the appellant and the injured parties.
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> c) The fact that the injured parties felt pressurised into having sexual intercourse and were frightened during the experience.
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> d) On each occasion, with one exception, the appellant drove the injured parties to isolated areas, thereby increasing their vulnerability and the dominance of the appellant.
>
> e) The predatory and manipulative behaviour of the appellant.
>
> f) The multiplicity of offences and injured parties and the time period over which the offences occurred.

20. It was further submitted that the overall sentence did not fail to respect the totality principle and the failure to suspend a portion of the overall sentence was a matter of legitimate judicial discretion. In support of the latter point counsel for the respondent emphasised that the trial judge had *said " it was open to me to give a higher sentence and suspend portion. I am giving a clean sentence in respect of each count and I believe that it reflects the victim and it reflects the totality of matters."*

21. This Court has carefully considered the submissions on both sides and is satisfied that the trial judge did err in principle in a number of respects. It would have been more helpful if the trial judge had indicated where precisely he was starting, rather than simply indicating that the case was *"in the higher range"*, as this could mean five years, four years, three years or indeed anything above two and a half years. However, be that as it may, if indicative ranges are to be used we agree with the submissions of counsel for the appellant that the seriousness of the offences, taking into account both culpability and harm, was properly to be located in the mid range rather in the higher range, where the low range is zero to twenty months, the mid range is twenty one to forty months, and the high range is forty one to sixty months. We are satisfied, on the evidence before us, that from where he ended up the trial judge must be regarded as having located his starting point too far along the scale of seriousness.

22. We also agree that, notwithstanding that the trial judge fairly listed the relevant mitigating factors, he weighed them incorrectly and afforded insufficient discount for mitigation in circumstances where he had decided to have recourse to consecutive sentencing.

23. While it was a matter within his discretion as to whether or not he should suspend a portion of any of the sentences, we consider that he fell into error in being inappropriately influenced by his desire not to be perceived as doing *"an injustice to any individual girl."* The primary focus of a sentencing judge must be on passing a proportionate sentence on the offender, uninfluenced by extraneous considerations. See the *People (DPP) v M*. [1994] 3 I.R. 306 and *The People (Director of Public Prosecutions) v. Kelly* [2005] 2 I.R. 321. While victim impact evidence is admitted is to enable the judge to assess the harm done as an aid to assessing the seriousness of the offending conduct, it is not part of the sentencing judge's remit to seek, in passing sentence, to secure justice for an individual victim or victims. The accused also has an entitlement to justice and that demands that he receive a proportionate sentence.

24. It is necessary in the circumstances to sentence the appellant afresh. In doing so we take into account the additional material submitted to the court today and in particular the letter from the Chaplin's office dated the 8th October, 2015, the contents of which we have read and have taken due note of.

25. This Court would specifically locate each offence considered in isolation as meriting three years on the scale between zero and five years imprisonment, before application of mitigation. Further, we consider that 50% mitigation would be called for in each instance were the offences to be considered in isolation, leaving a net sentence in each case of eighteen months. However, because there were three different victims and there was a course of offending conduct we consider that the trial judge was justified in deciding that a higher overall sentence was required. There were a number of ways in which that could have been achieved. One, which was the route adopted by the sentencing judge, was to have recourse to consecutive sentencing, although the overall sentence would have to respect the totality principle. Another, would be to increase the net sentences in each case but to make all three sentences concurrent. In this case the Court has decided to adopt the latter option. It will impose three sentences of three years, all to run concurrently from the date of the first of the original sentences.