THE COURT OF APPEAL

Record Number: 299CJA/18

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPLICANT

- AND -

GREGORY LORDAN

RESPONDENT

JUDGMENT of The Court delivered on the 14th Day of May 2019 by Mr. Justice McCarthy

1. This is an application by the Director pursuant to Section 2 of the Criminal Justice Act 1993 for a review of a sentence of three years' imprisonment (suspended in its entirety) for possession of child pornography contrary to s.6 of the Child Trafficking and Pornography Act 1998, on the grounds that it is unduly lenient.

2. On the 16th of February, 2017 as the gardaí went to the respondent's house to execute a warrant under s.7 of that Act to search it they met the respondent who was on his way home from work. He made admissions at the roadside and in particular admitted that he had an old mobile phone on which was to be found child pornography and that he had accessed it the previous day. He cooperated with the gardaí in the subsequent search and handed over the phone (which was located in his bedroom). Subsequent examination found six hundred and thirty-eight images of child nudity where children between three and four and twelve and thirteen were seen to have exposed genitalia, three hundred and eighty-six images depicting children of three or four years of age and up to thirteen and fourteen years of age, male and female engaged in sexual activity with an adult and/or other children. Furthermore, three images were found depicting a child of seven to eight years engaged in sexual activity with an animal: thus there are one thousand and twenty-seven images in all. At this stage a five level or tiered approach to categorisation of pornographic images of this type has been established and these, set out in ascending order of gravity, are images –

> "*1. Depicting erotic posing with no sexual activity;*
>
> *2. Sexual activity between children solo (sic) or masturbation as a child;*
>
> *3. Non-penetrative sexual activity between adults and children;*
>
> *4. Penetrative sexual activity between children and adults;*
>
> *5. Sadism or bestiality.*"

3. Three of these images fall within the most serious category involving sadism or bestiality, six hundred and thirty-eight fall into the first of them and three hundred and eighty-six fall within the third. The respondent accessed material over a period of two years.

4. The respondent is now twenty-nine. He has no previous convictions and was not known to the gardaí He is in a relationship and lives in Spain. Subsequent to his detection he contacted a Dr. Brinkman, a psychologist, and has undergone psychotherapy. There is some suggestion that he has sought that also in Spain.. Dr. Brinkman says that he is now aware of the abusive nature of the pornography and its consequences for the victims and is sincerely remorseful. She says that he is not a paedophile but this is at variance with her reference to his derivation of sexual pleasure from viewing it. The respondent was also described by her as someone who is very quiet and shy, who struggled with severe social anxiety and insecurity, was bullied at school, has dysfunctional coping mechanisms and was subjected to a form of sexual abuse at the age of ten when introduced to pornography and encouraged to masturbate by a sister's boyfriend. Further, he had a medical difficulty, which resulted in surgery.

5. The sentencing judge had regard to all relevant mitigating factors: the guilty plea, his cooperation and return from Spain to meet the case, his good work history, the fact that he had a supportive family, his early exposure to pornography in an abusive context, the fact that he was bullied and isolated at school, suffered from self-image issues, had a medical condition requiring surgery, suffered from social anxiety disorder (a condition the nature of which is unclear) and had undertaken psychotherapy of his own volition. It was submitted, however, that there was what counsel for the applicant has described as only "*passing reference*" to the "*number and nature of the images*". We do not think that this fact is of any significance as the judge had just heard the evidence and concision in a judgment is welcome.

6. The applicant submits that the learned trial judge erred in failing to have proper regard to -

(1) The gravity and circumstances of the offence for which the respondent pleaded guilty;

(2) The volume of images in the respondent's possession;

(3) The nature and type of images in the respondent's possession; and

(4) The timespan over which these images were accessed;

These grounds may be dealt with together. Ultimately, at the hearing of this appeal, the Director's submission amounted to this: the nature of the images with the consequent gravity of the offence and the failure to have sufficient regard to the necessity for general deterrence gave rise to an error of principle in wholly suspending the sentence imposed. It was accepted that a sentence of three years' imprisonment was appropriate, however, and with this we agree.

7. We do not doubt, as pointed out in *DPP v. O'Byrne* (unreported) Court of Criminal Appeal 17th December 2013, 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.*"

and as also stated by that Court in *DPP v. Loving* [2006]3 IR 355 that –

> "*Where the offence is at the lower level of seriousness, there is no suggestion of sharing or distributing images, the accused is cooperative and it is a first offence the option of a suspended sentence should at least be considered*."

8. We pointed out in *DPP v. McGinty* (Unreported) 30th January 2019 that: -

> "*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.*"

9. It seems to us that having regard to the nature of the images and the consequent severity of the offence, together with the importance of the necessity of general deterrence this is one of those cases where a non - custodial sentence was not appropriate notwithstanding the mitigating factors and that accordingly the learned Circuit Court judge fell into an error of principle in suspending the entirety of the sentence. The threshold which must be reached for intervention by this court on an application for review is a high one, but it has been reached. We accordingly quash the sentence and proceed to re-sentence.

10. We need not repeat the aggravating or mitigating factors, and in particular the nature of the images. We think it right also to say that in *McGinty* the principal factor which motivated the court to suspend the sentence was the long, if not inordinate, delay between the time when the offence occurred and its ultimate disposition as well, of course, as the fact that the images did not extend to those in the most serious category. We think that the appropriate sentence remains one of three years' imprisonment, but having regard to the necessity of a custodial element we suspend the last two years thereof, rather than a suspension of the entirety. In doing so, we also have regard to the jurisprudence of the court to the effect that on re-sentencing after a successful application for a review regard must be had to the fact that the sentence now being imposed is more difficult to bear for the respondent than if originally imposed by the trial court.

11. The suspension will be upon the same terms as those imposed in the Circuit Court and the registration of the respondent on the Sex Offenders Register will of course continue to apply.