THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

255/14

The People at the Suit of the Director of Public Prosecutions

Respondent

- V -

D. C.

Appellant

Judgment of the Court delivered on the 12th day of November 2015 by Mr. Justice Edwards

1. This is an appeal by the appellant against the severity of a sentence of six years imprisonment with two years thereof suspended imposed upon him in the Circuit Criminal Court on the 2nd of December 2014, following his arraignment and plea of guilty to a count of sexual exploitation of a child on the 23rd of December 2010 by inducing him to engage and participate in a sexually indecent or obscene act, contrary to s.3 of the Child Trafficking and Pornography Act, 1998 (as amended by s.6 of the Criminal Law (Sexual Offences) (Amendment) Act, 2007) as substituted by s.3 (2) of the Criminal Law (Human Trafficking) Act, 2008.

2. The salient facts are that the injured party B was aged 15 at the date of the offence. He attended school locally in the area where he resided with his parents and his younger brother. At the date of the offence he was in third year of secondary school. B had a diagnosis of Asperger's syndrome and Attention Deficit Hyperactivity Disorder, and had a special needs assistant assigned to him at school.

3. The sentencing court heard evidence that on the 23rd October 2011, a person identifying himself as B called Childline to make a complaint about an incident that had occurred the previous December. B was given advice in relation to contacting either a social worker or member of An Garda Siochana. He subsequently rang 999, and was put through to a Garda station, and spoke to a female Garda enquiring how he could make a complaint. Arising out of this B subsequently made a complaint to a teacher, and subsequently to the deputy headmaster, at his school and this complaint was brought to the attention of the Gardaí in his locality.

4. In the course of the ensuing Garda investigation two specialist interviewers took a detailed statement from B in the presence of his father. B informed Gardaí that he came into contact with a male on an adult dating website in or around October of 2010. B had been required to enter his name and date of birth in order to access this website. He also provided a mobile phone number in response to a request on this website and, following this, B received a text message from a male calling himself *'D'*. It was later accepted by the appellant that he was this male.

5. B and the appellant communicated by phone calls and text messages. The messages were sexualised in nature. B was aware from early on that the appellant was around 40 years of age. The messages became more explicit and included photographs and a video. Before long B and the appellant were texting each other on a daily basis. There were in the region of 100 to 120 text messages, and the investigating garda described this as a 'grooming operation'. After a short time it was agreed between B and the appellant that they would meet up. Before they met, the appellant asked B if he was thinking of telling anyone about their contact and B took this to mean that the appellant did not want him telling the Gardaí or anyone else.

6. B told the Gardaí that the plan in meeting up was *'intentionally to have sex. I guess that is what he wanted'*. B and the appellant made an arrangement to meet on the 23rd December 2010, during B's lunchtime during school. When the assignation was being planned the appellant suggested to B that the scheduled lunch period was too short. Accordingly, in order to get off early and take a longer break B informed his parents that he was due to sit a history exam when this was not the case.

7. B and the appellant met beside a Spar shop in a town in the locality where B lived. The appellant was driving a Hyundai motor car and B got into the appellant's car. The appellant then drove out of the town in question for some distance before pulling in to the side of the road on the hard shoulder. When the appellant then attempted to kiss B, B sought to avoid being kissed by pretending that he was receiving a phone call. At this the appellant told B to *"turn off the fucking phone, just let me fuck you and I'll bring you straight back to school".*

8. B told the appellant that he did not want to do this and told Gardaí that he was scared of the appellant. The appellant then proceeded to drive off and asked B if he could touch his penis a number of times. B said "No" three times before eventually agreeing. The appellant opened the zip of B's trousers while driving at speed and rubbed B's penis. B said that while this was going on, he was touching the appellant's penis though this was over his trousers and the appellant didn't open his trousers. B told Gardaí then that he was feeling paranoid because he thought every car passing might be his parents, and that he felt sick after it when he got back to school. He described returning to school in his statement:-

> *"He took his hand away from my penis and I stopped touching him. I did up my own zip. D drove straight into the school grounds, there was nobody walking around. They were all in school and nobody saw me coming back into school."*

9. As B was being returned to school, the appellant told him not to tell anyone *'because you'll be in just as much trouble as I will.'* The appellant sent B a further text that evening. There was evidence that B and the appellant planned to meet on a second occasion but that B had failed to turn up as he was afraid. The evidence was that B received some further text messages from the appellant and that the last contact was on the same date that B contacted Childline.

10. In the course of the Garda investigation the appellant was identified as a suspect. Having been contacted he attended a Garda station by appointment, where he was formally arrested and interviewed. He made full admissions in the course of being interviewed.

11. Following the offence the injured party became worried, upset and withdrawn. He had suicidal ideation and wrote a suicide note that was later found under his bed by his father. He took an overdose of tablets in January 2011 following which he developed kidney failure and nearly died. He had further suicidal ideation in the summer of 2011 and claims to have gone up on to the school roof with the intention of hurting himself. He himself seeks to attribute his attempts at self harm to the appellant's exploitation of him. However, the court has had no medical or psychological evidence placed before it to assist it in assessing the validity of that attribution. Be that as it may, it is clear that B, a young man who was particularly vulnerable, was profoundly affected by being the victim of the appellant's crime.

12. The sentencing court heard that the appellant is a gay man who is single and was at the time living with his mother, who has dementia, in a rural town in the midlands. He had a good employment record and at the time of the offence was working in a filling station. He had no previous convictions. He is one of a number of siblings. His brothers and sister were unaware of the issues with his sexuality that had led to his offending. They have been supportive of him since his offending has come to light, and have arranged for him to obtain counselling and therapy. His sister gave evidence on his behalf at the sentencing hearing. She described how the appellant had a difficult childhood due to a speech impediment, and how he had suffered bullying at various schools on account of it. The sentencing court heard that the appellant had recently returned to adult education, and that he was benefitting greatly from counselling and group therapy which he was attending regularly. His sister stated that the appellant now has a more appropriate social life living as an openly gay man which allows him to make friendships with people of appropriate ages.

13. In the course of sentencing the appellant, the sentencing judge, having rehearsed the facts of the case, stated *(inter alia):*

> *"D C is now 50 years; he would have been approximately 46 going on 47 approximately at the date of the offence. His sister describes him growing up that the family weren't aware of his sexual orientation, they weren't aware that he was gay and that he may have difficulties in respect of this condition. However, it appears that when he was operating the website, which was a gay website - that's a matter for himself, of other minded people - but in this instance it was a young person that he got involved with, which was B. He was in a dominant position, being an adult person, having regard to B, who was 15 years at the date of the offence, second year in school and indeed would have been naive in respect of the ways of the world. I'm satisfied, having regard to the nature of the contact, the texts being sexual, sensual in nature, explicit texts which became more sexualised, more explicit, that he was in the course of grooming B in respect of the offence that was carried out on the 23rd of December 2010. It was carefully organised, the meeting was to be secret, the manner of driving out of [a named town] then pulling into the hard shoulder in [a specified location]. The sexual exploitation that he engaged in and required B to engage in can only be described as disgusting, disgraceful, horrific, embarrassing and humiliating. I'm also satisfied that Mr C, having regard to his age, was in a dominant position having regard to B's age. He was in a position to influence, he was in a position to dominate and in a position to exploit B by reason of his age and indeed by reason of his naivety and innocence. The effect of the offence on B has been catastrophic. The offence had such an effect and to such a degree that, subsequent to the offence being committed, that he wrote a suicide note. He went up onto the roof of the school, which is a four storey building, intending to kill himself because of what happened to him. This can only be described as shocking in the extreme and consequential and catastrophic in the extreme.*
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> *Mr D C, after the formal statement of complaint had been made by B, he was subsequently arrested, detained and interviewed and the Sergeant confirmed that he cooperated with the investigation, had made admissions. He initially said that B was 17 years -- or B said he was 17 years but however he did say later on in the interview that he was 15 or 16 years. In any event, when he was picking up a schoolboy and he knew precisely what he was doing when arranging to picking B up and when driving him out of [a named town] in the direction of [another named town] where he subsequently pulled in the car.*
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> *In respect of count number one, the maximum custodial sentence is life imprisonment, then I must decide where does this count lie in respect of the maximum sentence. I'm satisfied would be in the middle to slightly higher range. Then I must have regard to his personal circumstances. He left school at 17 years, he subsequently as a mature student he completed his Leaving Cert. He has a history of work, but I think I said he was aged 50 years, unmarried, living with his mother who is now 85 years and who has been diagnosed with dementia for the past two years. Officially her carer for the last six months but unofficially her carer for the past two years. In mitigation, there was a plea of guilty, he fully cooperated with the investigation and made admissions. I am satisfied that the plea of guilty and the cooperation and admissions was of substantial benefit to the prosecution but in particular to B in that he did not have to give evidence in a trial and did not have to recall the events in respect of the offence. He has expressed remorse. His sister has outlined that he is attending regular counselling - is it with One in Four - in respect of his difficulties and he appears to be -- this appears to be beneficial to him. He has no previous convictions."*

14. Instead of moving directly at that point to imposing a sentence, the trial judge, who was speaking *ex tempore*, then proceeded to recap and reiterate much of what he had already said in relation to the aggravating and mitigating factors in the case. The fact that he did so assumes significance in the context of one of the appellant's grounds of appeal, which is to the effect that there was double counting of aggravating factors. While it would not otherwise be necessary to do so, the Court considers it appropriate in those circumstances to set out the trial judge's further remarks:

> *"The aggravating factors in the case is that this is a serious offence, the manner of the sexual exploitation by D C of B and the type of sexual exploitation carried out by D C on B. Initial contact made through a website he got B's mobile number, phoned him, text him continuously or for a considerable number of times between 100 to 120 -- 120 texts. Texts became more sexualised, more explicit, including photos. This indicates Mr C involved in grooming B, also acted as a predator in respect of B. A secret meeting arranged. Mr C picked B up from outside [a business premises in a named town] on the 23rd of December 2010. B got into Mr C's car, the car drove off in the direction of [another named town], pulled in in the hard shoulder in the townland of [named townland]. Mr C about to kiss B, B got a phone call. Mr C said going to fuck him. B said no. B was afraid he was going to attack him. He described that he was in a leather jacket and described him like a gangster. Mr C drove off. He asked B to touch his penis. He opened B's trousers. Touched his penis; it was painful. Said to B, "sexy body". Wished he could have sex with B. He asked B to touch his penis. B touched it from the outside -- outside Mr C's clothing. The type of sexual exploitation, the sexual indecency by D C engaged in and got B to participate in. The sexual exploitation and the sexual indecency engaged in by D C and what he got B to participate in was disgusting, disgraceful, horrific, embarrassing and humiliating. Mr C was in a dominant position having regard to his age and B's age. He abused his dominant position, he exploited B's age and he also exploited B's age by reason of his*

inexperience of life. I'm satisfied that he also did it so in a cold, calculating manner in respect of the meeting place, in respect of the picking up and then in respect of the sexual exploitation and sexual indecency that he carried out on B. The effect of the offence on B has been catastrophic. He left a suicide note, he went up to the roof of the school, the intention to commit suicide which was a consequence of the offence carried out by Mr C on him. They are very substantial, aggravating factors in the case. Then I must have regard to the seriousness of the offence and to the very substantial aggravating factors and balance them against the mitigating and the personal circumstances. I will have regard to the mitigating and the personal circumstances, but the seriousness of the offence and the very substantial aggravating factors in this case are a serious matter for concern, though I will have regard to the mitigating and the personal circumstances. My understanding in respect of the mitigating circumstances, I referred to no previous convictions, but my understanding also that he has not come to the attention of the guards since the date of this offence; if that's incorrect I can be corrected."

Counsel: "That's correct, Judge."

"In respect of count number one I'm imposing a six-years custodial prison sentence, the six years to run from today's date. However, I will give him some light. I will suspend the last two years of the six years on the following terms: that he enters into a bond of €200 before this Court, to be of good behaviour for a period of two years from the date of his release from his custodial prison sentence."

15. The appellant appeals against the severity of his sentence on seven grounds in all as set forth in his Notice of Appeal but these may be distilled down to the following substantive complaints:

(a) the trial judge, in attaching too much weight to the aggravating factors in the case, and in ostensibly double counting such aggravating factors as he had identified, over rated the seriousness of the offending behaviour and located the offence at too high a point on the scale of potential penalties;

(b) the trial judge was mistaken in his understanding of certain of the facts;

(c) the trial judge failed to attach sufficient weight to the mitigating factors in the case, and had failed to adequately incentivise continued rehabilitation.

16. In relation to the first of these complaints, the Court wishes to state immediately that it is satisfied that all of the matters identified by the trial judge as aggravating features of the case were properly identified as such. In fairness to the appellant, he does not in fact complain that inappropriate matters were taken into account as aggravation, but rather that such aggravation as was identified was inappropriately weighed and was double counted.

17. To deal with the latter aspect first, this Court is fully satisfied that despite the way in which the sentencing judge structured his *ex tempore* judgment, and the undoubted repetition contained therein, and recapping of ground already covered, there was no double counting of aggravating factors. It is sometimes necessary for judges engaged in sentencing to have recourse to *ex tempore* rulings. A judge managing a busy sentencing list, and who is clear in his or her mind concerning the appropriate sentence to be handed down in a particular case, will frequently not have the luxury of the time to retire to chambers to plan his or her sentencing remarks in advance and to map out a detailed structure for what it is that he or she wishes to say in the course of passing that sentence. It is entirely understandable that a judge speaking *ex tempore* may seek to recap or to revisit some of what he or she has said already, out of a desire to ensure that all important points that he or she had wished to cover are fully treated, and that nothing has been inadvertently overlooked. We are completely satisfied that such repetition as was engaged in by the sentencing judge in this case was the result of nothing more than conscientiousness on his part and that there was no double counting of aggravating factors.

18. That having been said, this Court is satisfied that the trial judge attached too much weight to the aggravating factors in the case and in doing so over assessed the seriousness of it. It is well established in the jurisprudence of this Court, and in that of the former Court of Criminal Appeal, that seriousness is to be weighed with reference to both culpability and harm done, and with due regard to the range of available penalties. Moreover, in assessing culpability the court must be concerned with the conduct in question as committed by the particular offender. See *The People (Director of Public Prosecutions) v. M* [1994] 3 I.R. 306 and *The People (Director of Public Prosecutions) v. Kelly* [2005] 2 I.R. 321.

19. The potential penalties in this case ranged from non-custodial options up to life imprisonment. That such a wide range of potential penalties was available to the sentencing judge is itself reflective of the fact that sexual exploitation of a child can take a myriad of forms, and cover a wide range of seriousness.

20. The term sexual exploitation is defined in the Child Trafficking and Pornography Act 1998 (as amended) in the following way:

'sexual exploitation ' means, in relation to a child:-

(a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,

(b) the prostitution of the child or the use of the child for the production of child pornography,

(c) the commission of an offence specified in the Schedule to the Sex Offenders Act 2001 against the child; causing another person to commit such an offence against the child; or inviting, inducing or coercing the child to commit such an offence against another person,

(d) inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act, or

(e) inviting, inducing or coercing the child to observe any sexual, indecent or obscene act, for the purpose of corrupting or depraving the child,

21. Accordingly, the potential life sentence available covers cases that could range from non contact voyeuristic conduct such as the opportunistic photographing of a child in a state of undress, engaged in for the purposes of producing a single child pornographic image, not for commercial use or dissemination, taken for the offender's personal sexual gratification only, and involving a single victim who might not even be aware that he or she was being so exploited; to forms of exploitation involving grossly depraved and humiliating physical sexual conduct, associated with gratuitous physical or mental violence, torture, or degradation and causing profound suffering to the child or children concerned, involving outrages repeated many times, involving widespread dissemination,

involving major commercial gain, and perhaps involving many concurrent victims.

22. The form of sexual exploitation charged in the present case was inviting, inducing or coercing the child concerned to engage or participate in a sexual, indecent or obscene act. The sentencing judge assessed it as falling *"in the middle to slightly higher range"* and determined upon a sentence of six years imprisonment before application of mitigating factors. While it cannot be gainsaid that there were some serious aspects to the present case, the Court considers that this was not a case that fell on the higher side of the notional mid line in terms of the range available. One of the difficulties that always arises in any case where a potential maximum sentence is life imprisonment is determining where in fact any notional mid line, or for that matter any other relative bench mark, is to be located. Be that as it may, it is sufficient for the purposes of the present case for the Court to express the view that on the facts of the present case the trial judge's starting point of six years was simply too high in our judgment.

23. The offending conduct, though significantly culpable in terms of the age disparity involved, the grooming involved, the vulnerability of the victim and the nature of acts planned or envisaged though not all realised, at the same time involved only one victim, involved only one actual meeting and such sexual contact as was actually engaged in did not involve physical violence, or gross humiliation or degradation, or anything penetrative. In addition, what was engaged in was engaged in for personal sexual gratification, and not for any form of commercial gain.

24. In terms of the harm caused, there was happily no physical harm done to B. However, there is no doubt that B was significantly affected by what occurred and that some psychological harm was done to him. Having said that the Court has to be careful in the interests of justice to only attribute consequences that directly flow from the offending conduct, and in this case the sentencing judge did not have the benefit of any professional assessment of the psychological fallout. The sole assistance available to the sentencing judge in terms of the harm caused was the victim's own impact statement. As mentioned earlier the sentencing judge was left in no doubt but that B was attributing his suicidal ideation and attempts at self harm to the appellant's offending conduct. However, the judge would also have had to take cognizance of the possibility that other factors, such as his confused sexuality, feelings of guilt in relation to his own role in what occurred, and possible issues connected to his ADHD, Asperger's Syndrome and other personal adversities, might also have contributed to, or have fed into, his overall state of distress. That having been said, and notwithstanding the limited information available, it seems reasonable to infer that the appellant's conduct must at the very least have contributed to the undermining of B's self esteem.

25. Taking into account both culpability and harm caused, this Court is of the view that the trial judge fell into error in locating the offence at too high a point on the scale of potential penalties, before application of mitigation. The Court therefore upholds the first of the appellant's three main complaints.

26. The Court is not disposed to uphold the second of the appellant's main complaints. It is true that the sentencing judge did arrive at a mistaken understanding of the evidence in so far as he determined that the injured party had supplied a date of birth to the appellant at the appellant's request, when in fact the evidence he had received was that the injured party had inputted a date of birth himself, and of his own initiative, when accessing the relevant dating website, and that indeed he could not recall what date of birth he had submitted. There is, however, no basis for believing that the sentencing judge's misappreciation and misunderstanding on this point of detail had any impact on the sentence imposed.

27. The Court is also not disposed to uphold the appellant's third main ground of complaint. It is clear that whatever sentence is ultimately arrived by a sentencing judge must be a proportionate one that takes into account the mitigating personal circumstances of the offender. We consider that the sentencing judge gave an appropriate discount by suspending one third of the headline sentence to take account of mitigation. The Court is satisfied that this was sufficient discount to adequately reflect the principal mitigating factors namely the plea of guilty, the appellant's previous good character, his co-operation, his difficult childhood, his sense of personal inadequacy and his commitment to, and progress towards, rehabilitation including coming to terms with his own sexuality.

28. In circumstances where the Court has determined that the six year sentence with two years suspended imposed in the Circuit Court was excessive and unduly severe, the Court will quash that sentence. Having done so, the Court will proceed at this point to re-sentence Mr C. The Court has invited the parties to put before it any materials that either or both of them might wish to place before it to update it in terms of what has happened on either side since the matter was before the Circuit Court on 2nd December 2014. The Court was informed by counsel for the appellant that, although a Governor's Report was not available, his instructions are that his client is getting on well in prison. The Court was told that he has applied for counselling but that this service is not available to him at the moment. He is attending school for the purposes of adult education and is studying five subjects. He has also applied to be a trustee within the prison, and is hopeful of being appointed, but there has been no decision as of yet on his application.

29. This Court considers that, when properly assessed on the scale of seriousness, this case would attract a sentence of four years imprisonment before taking into account mitigating circumstances.

30. The court has already stated that it accepts that the sentencing judge applied an appropriate level of discount, being one third of the headline sentence that he had determined upon. A discount of one third on the new headline sentence of four years would result in a pro-rata discount of sixteen months. A suspension of sixteen months would leave a balance to be served of two years and eight months.

31. However, with a view to incentivising the appellant's continued rehabilitation, the Court is prepared to go further and suspend a further eight months of the said balance to be served.

32. Accordingly this Court sentences the appellant to four years imprisonment but will suspend the final two years of that sentence, leaving an ultimate net sentence of two years imprisonment. The suspension will be on the same conditions as attached to the original suspended sentence.