THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 144

The President
Sheehan J.
Edwards J.
146CJA/13

The People at the Suit of the Director of Public Prosecutions

Applicant

and

M.L.

Respondent

Judgment of the Court delivered on the 18th day of June 2015 by Mr. Justice Sheehan

[1.1] This is an application by the Director of Public Prosecutions pursuant to section 2 of the Criminal Justice Act 1993 for a review of the sentence imposed on the respondent in the Dublin Circuit Criminal Court on the 31st May, 2013, on the ground of undue leniency.

[1.2] Following an eighteen day trial which concluded in November 2012, the respondent was found guilty by majority verdict on 60 counts of sexual assault against six sisters over a period in excess of ten years between 1994 and 2005. Apart from one offence which occurred in the respondent's car, all the other offences occurred in the family home.

[1.3] In respect of 37 counts for which the maximum sentence is five years imprisonment pursuant to s.2 of the Criminal Law (Amendment) Act 1990, the respondent was sentenced to four years imprisonment with the final twelve months suspended. In respect of 23 counts for which the maximum sentence is fourteen years imprisonment pursuant to s.2 of the Criminal Law (Amendment) Act 1990 as amended by s.37 of the Sex Offenders Act 2001, the respondent was sentenced to seven years imprisonment with the final two years suspended for a period of five years on condition that he undergo a sex offenders treatment programme while in prison. The sentencing judge also imposed a two-year post release supervision order directing the respondent to comply with all directions of the Probation Service. The Sex Offenders Act of 2001 came into force on the 27th September 2001 by virtue of Statutory Instrument 426/2001 and provides for a sentence of fourteen years imprisonment for a sexual assault on a child after that date.

[1.4] It was submitted by the applicant that the sentence imposed was unduly lenient for a number of reasons. Amongst the reasons advanced by counsel for the Director of Public Prosecutions was that the sentencing judge failed to have any adequate regard to the gravity of the offences herein particularly in respect of the gravity of the conduct in question, the length of the offending period, the frequency of the offences, the number of victims and the breach of trust on the part of the respondent at the time of the commission of the offences. It was also submitted that the sentencing judge failed to have any adequate regard to the effect of the offences on the victims and failed to identify what, if anything, he considered to be a mitigating factor.

[1.5] Both the applicant and the respondent filed detailed written submissions in the course of which both parties referred this Court to previous sentencing judgments as relevant comparators in support of their respective positions.

[1.6] In succinct oral submissions, counsel on behalf of the Director of Public Prosecutions submitted that the respondent had taken advantage of and seriously abused a vulnerable family over a period of ten years. Counsel submitted that while the Director of Public Prosecutions was not advocating consecutive sentences, the sentence imposed by the trial judge amounted to an error in principle in light of the aggravating factors in this case. It was contended that the sentencing judge had manifestly failed to give adequate weight to the aggravating factors in the case including the devastating impact the offender's behaviour had on the victims. This latter point was identified by the sentencing judge in the course of imposing sentence.

[1.7] Counsel for the Director of Public Prosecutions submitted that the sentencing judge failed to consider the principles of general deterrence and retribution and placed reliance upon the case law some of which included: - *The People at the Suit of the Director of Public Prosecutions v M.S.* [2002] 2 I.R. 592; *The People at the Suit of the Director of Public Prosecutions v James O'Reilly* [2008] 3 I.R. 632; *The People at the Suit of the Director of Public Prosecutions v Black* [2009] I.E.C.C.A. 91. Counsel also placed a number of comparators relating to sentencing before this Court including the following cases: - *The People at the Suit of the Director of Public Prosecutions v Lyons* [2014] 7 J.I.C. 3111, *The People at the Suit of the Director of Public Prosecutions v O'Regan* (Unreported, Court of Criminal Appeal, Kearns J., 20th October, 2008), *The People at the Suit of the Director of Public Prosecutions v. Keane* [2008] 3 I.R. 177

[1.8] Counsel for the respondent contended that the sentencing judge had imposed a substantial sentence on the respondent which was proportionate and which also sought to incentivise the rehabilitation of the respondent attaching onerous terms to the suspended part of the sentence. Counsel for the respondent further submitted that in light of the comparators furnished by him the sentence imposed was not unduly lenient and placed reliance upon the following cases: - *The People at the Suit of the Director of Public Prosecutions v McKenna* [2002] 2 I.R. 345; *The People at the Suit of the Director of Public Prosecutions v. McC* [2003] 3 I.R. 609. Counsel for the respondent submitted that the sentencing court was correct in pursuing the penal aim of rehabilitation and in this regard placed reliance upon the decision of *The People at the Suit of the Director of Public Prosecutions v Conroy (No.2)* [1989] 1 I.R. 160, *The People at the Suit of the Director of Public Prosecutions v P.H.* [2007] I.E.H.C. 335.

In order to consider these submissions it is necessary to set out the background to the offence.

[2] Background

[2.1] The victims in this case were six sisters whom the respondent had sexually abused over a period of 10 years when he lived in their family home as their mother's partner from in or about 1994 when the youngest complainant was then six months old until in or about May 2005. When the respondent originally moved into the family home seven sisters were living there. According to their

mother's evidence, the sexual relationship between herself and the respondent had ended after the first couple of years of the relationship in or about 1996.

[2.2] At the trial the victims all gave evidence describing the nature of the abuse and the circumstances in which it took place. Each of them gave evidence that the abuse had occurred a couple of times a week and over a prolonged number of years. Each described the abuse as comprising of frequent and sometimes daily touching of their breasts and vagina in addition to forced mutual masturbation and oral rape in respect of most of the victims.

[2.3] Each of the victims stated that the abuse mainly occurred in the respondent's bedroom but also in the sitting room and bathroom of the house apart from one incident that occurred in the respondent's car. Five of the six victims gave evidence that upon their return from school each day, the respondent would knock on the floor of his upstairs bedroom demanding a cup of coffee. The abuse would commence when one of the complainant's went to his room with his cup of coffee. Five of the victims gave evidence that the respondent was either naked or, if wearing underpants or a towel, that he would expose himself. Other evidence was also given by five of the complainants that the respondent forced them to watch pornographic films in his company. Four of the complainants stated that the respondent wore a studded ring and attached chains on his penis. The mother of the complainants confirmed that the respondent had such items and the studded ring and chains were exhibited at the trial.

[2.4] Four of the complainants gave evidence of being forced to perform oral sex on the respondent and another complainant also gave evidence that she had been requested to perform oral sex but had refused. Evidence was also given by four of the complainants that the respondent had given yoghurts, sweets or money to them after the abuse had occurred. Three of the victims gave specific evidence of the respondent using baby oil as a lubricant during the incidences of sexual assault.

[2.5] Three of the victims gave evidence of another sister being present while they were being sexually assaulted or having seen the respondent sexually assault one of her sisters. A fourth victim, who did not confirm her sister's evidence of sexual assault when she was present, gave evidence that they both watched pornographic videos together with the respondent.

[2.6] The first victim gave evidence that she and her other sister AF withdrew their previous complaints made in 2003 under threat of being thrown out of the family home and that they had nowhere else to go. AF subsequently reiterated that reason to the trial court.

[2.7] In 2005, AS made a disclosure to her sister AF who took her to a Dublin hospital and also to the gardaí. The other complainants then made statements over a period between May and September 2005. The eldest sister left the family home when she was approximately 17 years of age and did not make any complaint against the respondent.

[2.8] Following his arrest the respondent was interviewed by the gardaí. He denied all the offences and said that the complaints against him were complete lies.

[3] Personal circumstances of the respondent
[3.1] At the time of sentencing the respondent was 52 years of age and he had five children from a previous marriage that had since irretrievably broken down. He has had no contact with his children since 2005. The sentencing court was told that he had a consistent work record from his late teens until the break up of his marriage. However he had not worked following the commencement of his relationship with the complainants' mother. Alcohol abuse had been a significant feature in his life. He had no previous convictions.

[4] Discussion
[4.1] Section 2 of the Criminal Justice Act 1993 provides as follows: -

> *"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.*
>
> *….*
>
> *(3) On such an application, the Court may either –*
>
> > *(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*
> >
> > *(b) refuse the application."*

[4.2] The jurisprudence in this jurisdiction in relation to appeals pursuant to s.2 (1) of the Criminal Justice Act 1993 has established that nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of an appeal court upon review of sentence as upheld in *The People at the Suit of the Director of Public Prosecutions v Byrne* [1995] 1 I.L.R.M. 279, and *The People at the Suit of the Director of Public Prosecutions v Derrick Stronge* [2011] 5 J.I.C. 2301.

[4.3] While it is a truism to say that each case depends on its particular circumstances, it is nevertheless particularly so in cases of sexual abuse. This is undoubtedly part of the explanation for the apparent disparity in sentencing in cases of sexual assault which have been brought to the Court's attention by both parties to these proceedings. Before considering this particular application however, it is worthwhile repeating some general principles of sentencing.

[4.4] One of the dominant principles of sentencing law in Ireland is the judicially developed doctrine of the principle of proportionality. It requires that a sentence be proportionate to both the gravity of the offence and the personal circumstances of the offender. In The People at the Suit of the *Director of Public Prosecutions v. M* [1994] 3 I.R. 306. Denham J. (as she then was) stated at p. 316 that: -

> "[S]entences should be proportionate. Firstly they should be proportionate to the crime. Thus a grave offence is reflected by a severe sentence. However sentences must also be proportionate to the personal circumstances of the appellant…. The nature of the crime and the personal circumstances of the appellant are the kernel issues to be considered and applied in accordance with the principles of sentencing."

Thus, it is clear that a sentencing judge is obliged to impose the appropriate sentence for the offence because it has been committed

by this particular offender. In *The People at the Suit of the Director of Public Prosecutions v. McCormack* [2000] 4 I.R. 356 the Court of Criminal Appeal emphasised this precise point and stated at p. 359 that: - *"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"*.

[4.5] In a case such as this, where an offender has been convicted of multiple offences, a sentencing court must apply the principle of totality. The principle of totality ensures that the overall sentence is appropriate having regard to an offender's overall criminal behaviour. A sentencing court can order that sentences imposed for separate offences run consecutively or concurrently and it can also adjust the sentences for one or more offences to ensure that the principle of totality has been observed overall. Therefore, the principle of totality cannot be applied until a proportionate sentence has been determined in respect of each offence. Only then should the total sentence be reviewed to decide if it is cumulatively proportionate in respect of the overall offending behaviour, the harm caused and the individual offender.

[4.6] In structuring a sentence in respect of an offender who has perpetrated particularly serious crimes which have caused devastating effects to a victim or victims, it is essential that a sentencing court maintain a commitment to the pursuit of a recognised penal aim. In this regard it is especially important to remember that the aim of imposing a sentence upon an offender is never to achieve revenge. In this regard, it is worthwhile reiterating the comments of Denham J (as she then was) in *The People at the Suit of the Director of Public Prosecutions v. M* [1994] 3 I.R. 306 at p.317 who stated that: - *"Sentencing is neither an exercise in vengeance, nor the retaliation by victims on a defendant. However, the general impact on victims is a factor to be considered by the court in sentencing."*

[4.7] There are of course a number of recognised penal aims. The courts, however, have consistently endorsed the view that a key objective in sentencing offenders convicted of sexual offences is one of rehabilitation. Rehabilitation is of course not the only aim of sentencing and there are instances where other purposes of sentencing operate ought to operate.

[4.8] With these principles and recognised penal aims in mind, when it comes to reviewing sentences for sexual assault this Court is faced with the difficult but necessary task of seeking to place the offending behaviour on a scale of seriousness in line with the range of sentencing options provided by the legislature. The correct manner in which a sentencing court should approach sentencing is well-settled in this jurisdiction and is best described by Egan J. in the Supreme Court in *The People at the Suit of the Director of Public Prosecutions v. M* [1994] 3 I.R. 306 where he stated at p. 315 that *"one should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made".*

[4.9] In the present case some of the offending behaviour constitutes offences contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 which carries a maximum penalty of life imprisonment. That offence was not charged and counsel for the respondent rightly reminds the Court that it can only proceed to sentence on the basis of the counts charged, namely sexual assault. That said, this Court must place that behaviour at the higher end of the scale for sentences of sexual assault.

[4.10] In considering the sentencing judge's approach in this case, the Court notes his clear attempt to apply the principle of proportionality and to reconcile that with the penal aim of rehabilitation. The sentencing judge would have been aware that sex offenders sometimes have great difficulty in acknowledging the enormity of their wrongdoing and occasionally only begin to do so when their appeal has concluded. Accordingly it was appropriate for the sentencing judge to seek to incentivise the respondent's rehabilitation. In the event the respondent refuses to undergo the Sex Offenders' Treatment Programme then he is subject to an additional two years imprisonment.

[4.11] The fundamental question for this Court to determine is the one outlined to it by counsel for the Director of Public Prosecutions namely is the overall sentence of seven years imprisonment for those offences which carry a maximum sentence of fourteen years imprisonment unduly lenient given the aggravating factors? The Court notes that the Director of Public Prosecutions does not seek consecutive sentencing in this case.

[4.12] The comment made by the UK Court of Appeal Criminal Division in *R v. Turner* [2011] EWCA Crim. 3201 is an apt starting point where the following was stated at para. 8 of that judgment: - *"When a woman invites a man into her home to live with her and he assumes the role of stepfather to her young child, that imports a high degree of trust and responsibility. In our judgment, a sexual assault on that child manifests a breach of trust to a very high degree."*

That degree of trust and responsibility was breached in a fundamental way by this respondent when he continuously sexually abused six daughters of his partner over a ten-year period. This abuse happened when these sisters were young girls between the ages of nine and fourteen. The respondent caused them such suffering that the sentencing judge properly described his behaviour as having had a devastating affect on this family and caused individual harm and suffering to each of the victims. The sentencing judge placed the offending behaviour at seven years on the range of sentencing options.

[4.13] It is this Court's view that that starting point constitutes an error in principle. The sentence imposed clearly failed to allocate sufficient weight to the aggravating factors resulting in a significant departure from the appropriate overall sentence. Accordingly, the Court holds that the sentence imposed was unduly lenient. The Court will now proceed to a fresh sentencing hearing and having received whatever additional material either of the parties wishes to put before it will then proceed to substitute a new sentence in place of the original one.