THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

291/16

The People at the Suit of the Director of Public Prosecutions

Respondent

- AND -

A.P.

Appellant

JUDGMENT of the Court delivered on the 12th day of December 2017 by Mr. Justice Mahon

Introduction
1. This is an appeal against severity of sentence. The appellant entered a guilty plea on the 20th January, 2016 to one court of sexual assault contrary to s. 2 of the Criminal Law (Rape) Amendment Act 1990 as amended and one count of exploitation contrary to s. 3 of the Child Trafficking and Pornography Act 1998 as amended. On the 5th October, 2016, in the Circuit Criminal Court, the appellant was sentenced to four years imprisonment on each count to run concurrently.

The circumstances of the offences
2. The sexual assault occurred between September and October, 2011, and the exploitation between April and May, 2012, before and after the victim's, (the appellant's daughter) second birthday. The appellant was watching pornography on a computer and masturbating when his daughter came into the room and he asked her to lick the top of his penis. On the first occasion, she did as instructed and left the room shortly thereafter. On the second occasion, she refused the request but remained in the room and the appellant ejaculated in front of her.

3. In November, 2014 the victim reported the incidences to her mother. She confronted the appellant who did not deny the allegations and he removed himself from the family home.

4. The appellant then contacted crime stoppers and told them that he wished to make a confession. They advised him to present himself at his local Garda station. On the 3rd December, 2014, he made a voluntary cautioned statement to the Gardaii. In February, 2015 he made himself available for arrest and interview. When subsequently charged he made full admissions and fully cooperated. He entered a guilty plea on the first available opportunity.

5. The victim's mother prepared a victim impact statement in which she detailed how the family was devastated and of the very significant and on-going impact on the victim, her sibling and herself.

The appellant's personal circumstances
6. The appellant had a difficult upbringing. He has no previous criminal convictions and did not come to Garda attention after he was charged. He had a good work history and did voluntary work with the community. At the time of sentencing he was unemployed and on disability benefit. There existed personal and financial circumstances at the time of the offending.

7. The appellant presented to mental health services on the 10th December, 2014. He had become depressed and suicidal. There were probation, psychiatric and psychological reports made available to the sentencing Court. He was described as psychologically vulnerable with mood regulation difficulties. He was described in the probation report as being at a low risk of reoffending. He was aware of the impact of his actions. He took full responsibility and deeply regretted his actions. He engaged with the assessment process and recognised the need for ongoing therapeutic input relating to managing his mood, his problematical childhood and issues related to the offence. It was indicated he could benefit from specialist therapeutic intervention in relation to his offending.

8. The appellant volunteered to go into custody the day before sentencing when the matter had been listed but not reached in the Court below. He had by then left his accommodation and would otherwise have been homeless.

Sentencing
9. The sentencing judge placed the offence at the top of the middle range. He noted the aggravating factors to include the fact that the victim was the appellant's own child, her age, the devastating and fundamental breach of trust, the stealing of a child's innocence and the effect on the victim and her family as conveyed in the victim impact report. The mitigating factors were the plea which was considered to be "ultra-important" in light of the victim's age and circumstances, the fact that he had turned himself in and confessed, that he had no previous convictions, that he was at a low risk of reoffending and his acceptance that he needed help and his willingness to continue receiving it, his remorse and regret the fact that he was devastated by what happened. The sentencing judge also referred to the conclusions contained in the psychological report. He also noted that there were no threats, violence or grooming involved.

10. In light of the mitigating factors and that the appellant is now serving, in effect, a self-imposed life sentence in the sense that his children will likely never want to have anything to do with him, the sentencing judge reduced the headline sentence of seven years to four years imprisonment on each count to run concurrently. It was directed that the appellant be placed on the Sex Offenders Register.

Appellant's submissions
11. The appellant submitted nine grounds of appeal, namely, the sentencing judge erred in law in:

> (1) failing properly or at all to locate the offences committed on the scale of gravity for the offences concerned,
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> (2) treating the offences as being "top of the middle range" category, notwithstanding the absence of evidence of duress or the use or threat of force and the absence of evidence of persistent behaviour,

(3) failing to have sufficient regard to the manner in which the appellant met the offence. In particular, due regard was not given to: the fact that the appellant's confession not only brought about the investigation, it formed virtually the entire basis of the prosecution's case; the significant difficulties that would have been faced in prosecuting the case had the confession not been made or had the case been subsequently contested,

(4) failing to give due credit for the mitigating factors present and the sentence was accordingly disproportionate,

(5) failing to consider the evidence in support of the submission that the appellant was at low-risk of reoffending,

(6) failing to give sufficient credit to the remorse on the part of the appellant, his insight into the nature of his offending and his previous good character,

(7) failing to have adequate regard to the principle of rehabilitation in sentencing,

(8) failing to have adequate regard to the personal circumstances of the appellant and the devastating impact the matter had on the appellant to date and will have in the future, and

(9) imposing a sentence that was disproportionate in all the circumstances.

12. The grounds of appeal were addressed under two main categories. The assessment of the gravity of the offences and the assessment of the mitigating factors encompassing the manner in which the appellant met the offences, his low risk of reoffending and rehabilitation, his previous good character and remorse and the devastating effect on him.

13. In relation to the gravity of the offences it was submitted that the headline sentence of seven years was consistent with the judge's view that the offences were at the top of the mid-range and were shocking in light of the victim's age, relationship to the appellant and the impact on the entire family. However, the judge went on to note that there was no violence or threat of violence, or grooming. The offences happened in the moment and were not premeditated. They occurred over a limited period of time. Having regard to these factors, it was however inevitable that the appellant faced a severe sentence even when adequate credit was given to the mitigating factors.

14. It was submitted that there was a departure from the proper approach to sentence structuring outlined in *The People (DPP) v. Kelly* [2005] 2 I.R. 321, in which Hardiman J. held that the range of penalties should first be considered, then the court should locate where in that range the case lies, and then the mitigating factors are to be applied. In *The People (DPP) v. M* [1994] 3 I.R. 306 at 315 it was held that "a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable". The court should look at the range of penalties and then decide where in the range the offence falls and then consider the mitigating factors and make appropriate reductions. It was held in *The People (DPP) v. Tiernan* [1988] I.R. 250 at 255 that lack of premeditation was more appropriately the absence of an aggravating factor rather than mitigation.

15. The appellant submits that there were significant reasons why this case ought not to have been placed so high on the scale of offending. The sentencing judge stated that but for the manner in which the appellant met the case he would have placed it in the highest bracket of offending. This, it was submitted, was indicative of how the Court failed to conduct a proper consideration of where on the scale of gravity the offences properly lay.

16. In relation to the mitigating factors it was submitted that it was difficult to assess the extent to which proper credit was given for these factors as the Court failed to fully outline its reasons for the location of the offences on the scale of gravity. As such it was not possible to measure the extent the sentences represented the gravity of the offences and the reduction for mitigation.

17. It was submitted that a four year sentence for offending of this nature was unduly harsh. It was submitted that it was difficult to see how it was consistent with the many and significant mitigating factors. These included the early guilty plea, complete cooperation, the admissions which brought the investigation into being and which made up the vast bulk of the prosecution evidence, the significant difficulties which would have arisen had the case been contested, the appellant's shame and remorse, the stress the appellant was under at the time of the offending, his previous good character, his low risk of reoffending, the absence of a diagnosis of paedophilia, the real prospect of complete rehabilitation, and the fact that he will remain on the sex offenders registry and the attendant social ostracism and family separation.

18. In relation to the manner in which the appellant met the offences it was submitted that the sentencing judge erred in failing to allow an appropriate discount for the appellant's guilty plea. The victim and her family were spared the trauma and ordeal of a trial. The prosecution and the courts were spared time and expense. There is a public interest in avoiding costly and lengthy proceedings. It was contended that the appellant was entitled to substantial credit for avoiding such. In Tiernan it was noted that the Director of Public Prosecutions accepted that a guilty plea, even in an open and shut case, is of value. Despite the admissions in the instant case it was far from open and shut. The victim had difficulty with recollection and there was never a prospect of a trial had the prosecution proceeded solely on the appellant's admissions. The early guilty plea was consistent with the appellant's attitude from the outset. He made detailed admissions revealing the nature and extent of the offending. Unless significant credit was given for such helpful admissions others might be deterred from cooperation in similar cases.

19. In *The People (DPP) v. Meyer Hustveit* [2016] IECA 271 this Court determined that a wholly suspended sentence was unduly lenient for multiple counts of rape, it proceeded to impose a custodial sentence of fifteen months. Significant credit was given to the fact that but for the accused's admissions, a prosecution would never have been brought. It was submitted that the appellant was in a similar situation and also entitled to substantial credit. The offences in the present case are however different to those in Hustveit both in nature and number.

20. In Prof. O'Malley's book, *"Sentencing Law and Practice"*, 2nd Ed., (Dublin, 2006) it is observed that *R v. Claydon* [1994] 15 Cr. App. R. (S.) 526 is authority for the proposition that those who admit guilt in circumstances where they would have otherwise remained undetected are entitled to a substantial sentence discount.

21. It was submitted that the appellant cooperated to a remarkable degree thus saving the victim and her family further trauma and distress. While the significance of the plea was acknowledged it was argued that it was not reflected in the final sentence imposed in the Court below.

22. The appellant's engagement with professionals to address the reasons for his behaviour went some way to explain why he was considered to be at the lowest risk of reoffending.

23. It was further submitted that the appellant had made efforts to understand his behaviour and that the offences were just two isolated incidents. It was also submitted that the offences were out of character. These were said to be relevant factors which supported the contention that the appellant was unlikely to come before the courts again or pose a threat to anyone.

24. As was held in *The People (DPP) v. McCormack* [2000] 4 I.R. 356 and *The People (DPP) v. O'Driscoll* [1972] 1 Frewen 351 sentences are not just imposed to deter offenders from committing particular crimes but to encourage them to turn away from a criminal life. This is clearly in the public interest. Sentences should be appropriate for the particular crime committed by the particular offender. In *The People (DPP) v. McGinty* [2007] 1 I.R. 633 it was observed that there could be circumstances where, having regard to the interests of society, the particular facts and the accused's circumstances, a wholly suspended sentence would be appropriate for a s. 15A Misuse of Drugs Act offence. It was held that it was necessary to consider whether it was in the interests of society that substantial progress in rehabilitation and likely full rehabilitation would be put at risk by the imposition of a custodial sentence. It was submitted that this aspect of the case was not given due weight or consideration by imposing a lengthy custodial sentence.

25. In relation to the appellant's previous good character and deep remorse the Court was referred to *The People (DPP) v. Kelly* [2005] 2 I.R. 321 where it was held that the lack of previous convictions was one of the most important factors to be considered in arriving at the appropriate sentence. The Court also approved of Prof. O'Malley's comments that a first time offender should receive a lighter sentence.

26. The appellant was deeply remorseful and guilt-ridden. This was displayed in the manner in which he met the case and the anguish he showed during garda interviews and in court. Prof. O'Malley notes that remorse may indicate a reduction in the likelihood of future offending and may help the victim. In *R v. Thomson* [2000] NSWCCA 309 the New South Wales Court of Criminal Appeal held that remorse may have implications for the sentencing objectives. It was submitted that the judge failed to have due regard to these significant mitigating factors.

27. In relation to the devastating impact on the appellant it was submitted that the sentencing judge recognised that the appellant was profoundly affected by what occurred. In *The People (DPP) v. G.D.* (Unreported, Court of Criminal Appeal, 13th July, 2004) the Court described placing a person on the sex offenders register as a punishment in itself. Failure to abide by obligations imposed by being so placed can result in prosecution and imprisonment. The appellant's placement on the Register was particularly punitive, it was argued, because he was deemed unlikely to reoffend.

28. It was submitted that the sentencing judge failed to take a sufficiently individualised approach to sentencing and that the sentence was disproportionate. This remains a serious offence with aggravating features. However, in light of the decision in *The People (DPP) v. Drought* [2007] IEHC 310 and the analysis of mitigating and aggravating factors in rape and serious sexual assault cases it was submitted that a headline sentence of seven years reduced to four is excessive in all the circumstances.

29. It was submitted that the sentencing judge was unduly influenced by the seriousness of the case as occurred in *The People (DPP) v. McNamee* [2015] IECA 134 with the result that the sentence imposed was disproportionate in all the circumstances.

Respondent's submissions

30. The respondent rejects the submission that the sentencing judge erred in placing the offences at the top of the middle range. In arriving at the headline sentence the judge described the offences as "shocking". He correctly identified the aggravating factors. The judge explained that he was not placing it in the highest of the high ranges due to the manner in which the appellant met the case. The sentencing judge made no error of law and acted entirely within his discretion.

31. It was submitted that the sentencing judge gave proper and thorough consideration to all of the mitigating factors. Further, he correctly identified those factors as the plea and its benefits, the lack of previous convictions and the positive reports which outlined the appellant's low risk of reoffending. There was no merit to the argument that adequate weight was not given to the mitigating factors. Having applied the mitigating factors a discount of three years was correct in law and entirely appropriate in all the circumstances.

32. There was no error of law or principle. The sentence was properly constructed and proportionate to the crime committed by the appellant.

Decision

33. As the sentencing judge stated, this is indeed a sad case which has had tragic consequences for all concerned. The victim impact statement is a particularly heart-rending and it is to be hoped that the victim, her mother and her brother will, over time, recover from the damaging effect of the appellant's offending behaviour. As the victim impact statement makes clear, that will not be easy to achieve.

34. The Court has reviewed the sentencing judge's sentence carefully. He summarised accurately the sad facts of the offending and the appellant's actions in taking early responsibility for that offending. As a result of his careful analysis, he arrived at a headline sentence of seven years. He then considered the mitigating factors which he identified as including the manner in which the appellant took responsibility for his actions, the fact that there was absent duress or violence and that the offending behaviour was not persistent or systematic. He also took account of the early plea in circumstances where it would have been very difficult, if not impossible, for the respondent to prove the case in the absence of the appellant's confession. The sentencing judge also noted the obvious distress and remorse of the appellant which was very apparent in the course of the sentence hearing. He then went on to consider in detail the reports prepared by the probation and psychological services. Based upon these mitigating factors, the judge allowed a discount of three years off the headline sentence leaving a net total of four years imprisonment.

35. The Court takes the view that the judge's approach to the sentencing process to have been appropriate. However it considers that bearing in mind the content of the foregoing reports, the judge ought to have given consideration to incentivising rehabilitation. There was every reason to believe that the appellant had faced up to his offending and has taken every opportunity to address the problems which contributed to that offending. To this limited but important extent we find an error of principle and will therefore proceed to resentence the appellant as of today.

36. The Court considers the headline sentence and the allowance for mitigation found by the sentencing judge to have been entirely correct. It has the benefit of the prison governor's report and a booklet of references provided at the conclusion of the oral hearing. The governor reports that the appellant is conducting himself in exemplary fashion. The references are most supportive of the appellant, notably those of his loyal friends in Ireland. His distraught family in Latvia and Crimea have also written references for the Court. It is the view of the Court that the appellant should be incentivised to continue his rehabilitation during his remaining time in prison and post release. To that end the Court will impose a sentence of four years in prison but will suspend the final eighteen

months for a period of two years subject to conditions including compliance with the requirements of Forensic Psychological Services as recommended in Dr De Volder's report of the 13th June, 2016.