THE COURT OF APPEAL

[134/2018]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

DAVID HOBAN

APPELLANT

JUDGMENT of the Court delivered on the 7th day of March 2019 by Mr. Justice McCarthy

1. This is an appeal against severity of sentence. The appellant pleaded guilty on the 13th April, 2018 to two counts of defilement of a child under the age of seventeen. The appellant entered the plea on the date of arraignment. On 26th April, 2018 the appellant was sentenced in the Circuit Criminal Court by his Honour Judge Nolan to three years' imprisonment on Count One on the indictment, with Counts Two, Three and Four taken into consideration. The events occurred in the month of June 2015 - two on an unidentified date and the last on the 29th. The accused pleaded guilty on a "full facts" basis, by definition accepting the prosecution version of events as to the last of them. The first and second events were not the subject of complaint by the injured party but were brought to light by the accused's admissions and his version was accepted - it might be summarised as indicating activity in which the complainant participated.

2. The complainant was a schoolchild who had been in contact with the appellant through a social media website called Skout. She was fourteen years old at the time of the offence. Her age was displayed as twenty years old on her social media profile but the accused, having thereby made contact with her after which messages were exchanged, followed by further exchanges. Apart from any view he could or did form as to age when they met - which is inferred to be early May or April, he came to the realisation that she must be under eighteen years old.

3. The Gardaí received a complaint from the family of the complainant to say that she was missing - she had not returned from school on a given day. She was eventually located and she then made a complaint that she had been raped. An investigation ensued and the appellant was later located in an apartment nearby. Following arrest and detention, in interview, he stated his belief that the complainant was between fifteen and seventeen years old.

4. In respect of the incident on 29th June, 2015, the complainant stated in her complaint that she and the appellant were sitting on a couch, that they were kissing, and that the appellant put his hands into her trousers. She told him to stop but he did not. He then stood up and told her to go into his bedroom. She said she felt scared; she went into the bedroom where the appellant started to undress. She explained how the appellant was trying to open her jeans and remove her top. He was touching her bottom area and said "I want you now". The appellant removed his and the complainant's underwear and started to have vaginal intercourse with her. This went on for 10-15 minutes; the complainant said that she felt disgusted by what was happening.

5. As part of the investigation, a number of messages via WhatsApp between the complainant and the appellant were recovered. The messages commenced on 28th April, 2015 and continued up to the date of the appellant's arrest on the 29th June, 2015. The appellant makes reference in some of the messages to the complainant's young age, he stated in one of the messages: "I am sorry; you are a lovely girl. I wish you were older and allowed do what you want". Further, there was the following exchange between the parties on the 6th May, 2015:-

The appellant: "Relax…I like you a lot but things will never work out between us and you know that."

The complainant: "Why? I'm too young?"

The appellant: "Yup."

6. The appellant had ten previous convictions for public order matters. He had no previous convictions in relation to sexual offences nor any Circuit Court convictions.

<u>Grounds of Appeal</u>

7. The appellant submits that the sentencing judge erred:

(1) in measuring a total sentence of three years in all the circumstances of the case;

(2) in measuring three years in each case as an appropriate period for defilement under s.3 of the Criminal Law (Rape) (Amendment) Act, 2011, in which there had been a plea of guilty;

(3) in failing to identify a headline sentence from which to mitigate;

(4) in failing to afford adequate mitigation to the appellant for his genuine remorse and familial circumstances;

(5) in failing to give sufficient weight to the pleas of guilty entered in relation to the offences;

(6) in failing to have sufficient regard to the objective of rehabilitation insofar as same is a component part of any sentence.

8. The substantive ground of appeal has rightly been refined by Ms. Gearty SC for the appellant to the proposition that an error of principle has been made in imposing an excessive sentence. She does not resile from her acceptance of the prosecution version of events in respect of the incident of the 29th June and emphasises that there could have been no prosecution in respect of the two earlier unspecified dates without the admissions of the accused thus adding to the weight to be given to his pleas. She submits that the sentence was "out of kilter" with sentences for like offences imposed previously. Of course, howsoever one might characterise it, the imposition of an excessive sentence can, *per se*, constitute an error in principle. Counsel not only relied upon general principles pertaining to sentence as established by the authorities but also refers to a number of them by way of comparator. We do not wish to downgrade the assistance which can be derived by the Court from the use of comparators but we think it right that we should emphasise again that each case must be decided on its own facts – one is sentencing the offender before the Court for the crime committed by him. We have considered the decisions relied upon with the caveat aforesaid. We can say at the outset that the fact the sentencing judge did not set a headline sentence and thereafter apply the relevant mitigating factors is not in and of itself a good ground of appeal. There is a considerable overlap in the grounds of appeal but it seems to us that the contention that the sentence is excessive is grounded upon the propositions that in arriving at the sentence, the judge did not afford adequate mitigation for the appellant's plea of guilty, his remorse, his family circumstances, and did not have sufficient regard to the objective of rehabilitation. In practical terms we think they are best dealt with together.

9. The judge gave his judgment as follows:-

> *"Judge: Five years. Thank you very much. Now, the mitigation is clear: He has pleaded guilty. I think he has expressed true remorse for what he did. It seems he is well capable of reform. He has a work history. He seems to be an intelligent man. It seems his young life was troubled by great tragedy; it seems he lost a lot of people who were close to him to death in one way or the other but, nonetheless, everybody is the master of their own ship. People must make decisions and basically around this particular time this man didn't make the right decisions. For his own reasons, he had sexual relations with a child on six occasions. That is reprehensible. The age difference is substantial; he was 25, 26. We are not talking about an 18-year-old boy here or a 19-year-old boy; we are talking about a grown man who should have been mature enough to stop himself. He didn't. So a custodial sentence will be given in this case."*

…

> "*In relation to suspending part of it, it seems to me I will not. It will be a sentence. I think this man is well capable of reforming himself. He will be well capable -- I think he knows the difference between right and wrong and he knows he did wrong on the particular dates…"* [Transcript, 25th April 2018, Page 19].

10. It seems to us that the sentencing judge had regard to all relevant factors, summarised as they were in his judgment. It seems to us the sentence was within the margin of discretion available to every trial judge. Of course, a judge may ostensibly direct his mind to relevant evidence and principles of sentencing yet fall into error. Ultimately, as in the present case, the issue is whether or not the sentence is excessive to the point that an error in principle has occurred. The offences were serious offences involving sexual intercourse and oral intercourse on three separate occasions. Whilst the principal mitigating factors must be the plea of guilty and the expression of remorse, the aggravating factors are significant, in particular, the disparity of age and the element of aggression on what appears to be the last occasion. We cannot see any error of principle and we therefore dismiss this appeal.