



THE COURT OF APPEAL

Record No. 72/2017

Birmingham P.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

J.S. (No. 2)

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 26th day of June 2018 by Mr. Justice Mahon

1. On the 12th October 2016, following a trial in the Central Criminal Court, the appellant was convicted on three counts of rape. The offences occurred between the 1st September 2009 and the 31st March 2009, the 1st October 2010 and the 31st December 2010, and the 1st January 2011 and the 31st March 2011, respectively, at a location in County Cork. Subsequently, the appellant was sentenced to a term of seven years imprisonment with the final six months suspended on conditions. His appeal against conviction was dismissed by this court earlier today and this judgment now deals with his sentence appeal.

2. By way of background, the complainant was just short of his fourteenth birthday at the time of trial. His is the second eldest of four boys. The appellant is the complainant's uncle, the complainant's mother being the appellant's sister. The offences consisted of a number of incidents of anal penetration. When the complainant was eleven years old, he was interviewed by specialist garda interviewers and the video recording of that interview was presented in court as his direct evidence. He was then cross examined by defence counsel. This court has already expressed its view that the complainant's account of the events complained of in the course of his video interviews was clear and impressive.

3. The appellant's grounds of appeal are seven in number, and are as follows:-

(i) the learned sentencing judge did not give sufficient weight and balance to the evidence adduced in mitigation of sentence;

(ii) the learned sentencing judge did not give sufficient weight and balance to the appellant's young age;

(iii) the learned sentencing judge did not give sufficient weight and balance to the appellant's lack of any relevant previous convictions;

(iv) the learned sentencing judge did not give sufficient weight and evidence to the appellant's extremely low intellectual capacity, and in particular, to the report of Dr. Breda C. McLeavey, consultant clinical neuro psychologist and clinical psychologist adduced into evidence on behalf of the appellant.;

(v) the learned sentencing judge erred in law by placing the offences at too high a starting point in terms of penalty prior to taking the mitigating factors into account;

(vi) further to the above ground of appeal, the learned sentencing judge erred in law having placed the offences at a particular point in terms of the scale of offending, by failing to thereafter to give the appellant the appropriate level of reduction therefrom having considered the mitigating factors present, and

(vii) the learned sentencing judge erred by failing to suspend a greater amount of the sentences imposed in view of the appellant's personal circumstances, and in particular the fact that he would likely need ongoing assistance into the future in terms of his life.

4. It is evident from the oral submissions made to this court by the appellant's counsel, Ms. O'Connell SC, that the focus of the appeal is directed at the appellant's general psychological condition and the contention that the learned sentencing judge failed to adequately account for that in both arriving at the headline sentence and the net custodial term ultimately imposed.

5. It is quite apparent, however, that the learned sentencing judge did approach sentencing very much in the context of the appellant's psychological state. In particular, he stated:-

"In assessing his moral culpability for the offences which he has committed, I must also have regard to the fact that Mr [S.] has been found by objective testing to be a person who has a significant intellectual disability. Dr McLeavey, consultant clinical neuro psychologist, has advised the Court that Mr [S] is a person of extremely low intelligence, functioning at or below the poorest second percentile of the population across all domains tested. This finding does not of course deprive Mr [S.] of all moral culpability for his actions. On the contrary, the furtive manner in which the crimes were committed clearly demonstrate that Mr [S] knew that what he was doing was wrong. However, his intellectual deficits must nonetheless be relevant to any objective assessment of his moral responsibility for his actions, because his underlying intellectual disability must to some degree compromise his capacity for reasoning, judgment and control of his impulse - impulse and to that extent is relevant to assessing and measuring his moral culpability for the offences involved."

6. He then carefully addressed the sentence to be imposed in the following terms before finally arriving at a net custodial term of six and a half years, having expressly taken account of a number of mitigating factors:-

"The offences before the Court are undoubtedly very serious. It seems to me that if this case was a case that involved an adult without intellectual disability, the appropriate starting sentence for each offence would be a sentence of 12 years. However, to take account of Mr [S.]’s significant intellectual disability, it seems to me that the headline sentence in this case should be a sentence of nine years to reflect the nature of the offences, their effect on the child victim and the intellectual deficits of Mr [S.]. This is the starting point against which such mitigation as there is in the case must be measured."

7. Submissions on behalf of offenders are frequently made to sentencing courts in relation to dysfunctional backgrounds and psychological. It is, of course, appropriate that this be done where such factors exist and for a sentencing court to adjust or structure sentencing accordingly. An often quoted extract from the Court of Criminal Appeal judgment in *DPP v. McCormack* [2000] 4 I.R. 356, at 359, succinctly emphasised the appropriate approach to be taken in arriving at an appropriate sentence:-

"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 the accused. The range of possible penalties is dependent upon those factors."

8. The sentencing court was provided with extensive evidence which confirmed that the appellant had a dysfunctional childhood and had laboured for almost all of his life under significant psychological restraints. Evidence on this issue was given by Garda Patricia Grimes, and also in the form of a detailed report dated the 23rd November 2016 prepared by Dr. Breda McLeavey, a consultant clinical neuropsychologist and clinical psychologist. In her report Dr. McLeavey stated under the section headed "Conclusions", the following:-

"Mr. S. functioned at a very poor level on all formal tests tasks."

1. On general intelligence testing he obtained a full scale IQ in the extremely low range, below the poorest 1% of the general population."

2. His Verbal Comprehension is extremely poor, at the poorest 1% of the general population."

3. His auditory memory is in the extremely low range with particularly poor recall of passages of information, a function that resembles everyday memory demands for the meaningful discourse found in conversation, radio and television, and written material. His visual memory is borderline impaired for immediate recall, and very poor for delayed recall."

4. Literary skills were assessed for word reading, spelling and reading comprehension. Results indicate extremely poor literacy skills across the domains tested, inadequate for basic every day demands."

5. Results of neuro psychological assessment indicate that Mr. S. has a significant intellectual disability, and"

6. His adaptive / social functioning with regard to life skills is very poor, with work / career planning severely curtailed by his feeling of shame related to his inability to read and write. His motivation to improve his literacy skills with education, but this would require a training programme suited to his intellectual disability."

9. These findings by Dr. McLeavy placed this case in a category of cases where there is overwhelming evidence of severe physiological dysfunction of a nature which necessarily requires a marked reflection in what is deemed to be the appropriate sentence. As Ms. O’Connell suggested the appellant was functioning at a psychological level little more than that of a child. That said, there was insight on the appellant’s part into the very wrong nature of the offences committed by him at the time they were committed, and it is undoubtedly a fact that the offences were very serious and involved the significant sexual abuse of a young child by an adult uncle, albeit one who was still a teenager.

10. The Victim Impact Statement prepared very courageously by the complainant illustrates the extent of the very troubling consequences for him from that sexual abuse. Very much to the complainant’s credit is the sense of determination portrayed by him to positively move on with his life.

11. The court is satisfied that while the headline sentence of nine years identified by the learned sentencing judge was appropriate, it is concerned that greater weight was not attached to the current and historical psychological factors referred to above in arriving at a net custodial term, and that the issue of rehabilitation was insufficiently provided for. These are errors of principle that require intervention by this court in what was a very difficult case by any measure.

12. The court will re-sentence the appellant as of today. That sentence will be one of seven years imprisonment with the final eighteen months suspended for a period of five years subject to certain conditions.