



THE COURT OF APPEAL

Record No. 163CJA/2017

Mahon J.
Edwards J.
Hedigan J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

A.S.

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 14th day of June 2018 by Mr. Justice Mahon

1. The respondent pleaded guilty to four counts of indecent assault contrary to Common Law and as provided for by s. 61 of the Offences Against The Person Act 1961 on the 30th November 2016 at Galway Circuit Criminal Court. On the 31st May 2017 the respondent was sentenced to consecutive prison terms of fourteen months each, making a total term of fifty six months. The entire sentence was suspended for a period of five years.

2. The applicant seeks a review of the sentences on the grounds that they were unduly lenient pursuant to s. 2 of the Criminal Justice Act 1993.

3. The background facts can be briefly stated as follows. The indecent assaults occurred in the period 1985/1986 over thirty years ago. At the time the complainant who was then seven years old and the respondent who was then nineteen years old lived in the same vicinity. The complainant was a friend of a younger brother of the respondent. The indecent assaults occurred on a regular basis, three to four times per week, over a period of approximately twelve months at which point the respondent and his family moved from the area and emigrated to England. The sexual abuse occurred at three locations; an upstairs bedroom at the respondent's home, a shed which was used as a gym situated at the back of the respondent's home and at a gym where the respondent worked and the complainant attended on Saturday mornings. The sexual assaults involved, for the most part, the respondent using the complainant's hand to masturbate himself and indeed acts of oral rape.

4. The respondent is a member of a large family. He moved to the U.K. when he was nineteen years old and has resided there for approximately thirty years. He was about fifty years old at the date of sentence. He was married for eighteen years and had two step children. That marriage ended and the respondent is now in another relationship. He has a good record and had been employed as a warehouse operative in a food distribution company over the past twelve years but was dismissed directly as a result of his conviction. He then secured another position but subsequently lost that job also when his new employer became aware of his conviction from the internet. The court has also been informed that the respondent may now have to move his address in the U.K. because of his conviction. The respondent received a ROSHA from South Cheshire Magistrates Court in England in 2008, which expired in 2014 in relation to sending explicit text messages to a fifteen year old boy but this was not a conviction. It would have become a conviction had he not complied with the terms of the order made. This was not treated as a previous conviction either in the court below or in this court.

5. The grounds on which this application is brought are as follows:-

- (i) the sentence imposed was unduly lenient. A fully suspended sentence did not meet the justice of the case;
- (ii) failure to have any or any adequate regard to the gravity of the offences herein. The persistence of the offending period. The frequency of the offences and the age disparity between the respondent and the victim at the time of the offending;
- (iii) failure to have any or any adequate regard to the affect on the victim, and
- (iv) failure to consider the principles of general deterrents and retributions.

6. Section 2 of the Criminal Justice Act 1993 provides as follows:-

"2(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.

(2) An application under this section shall be made on notice given to the convicted person, within 28 days from the date on which the sentence was imposed or such longer period not exceeding 56 days as the Court may on application to it in that behalf, determine.

(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 that would have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

7. The Victim Impact Statement read to the court very comprehensively illustrates the extent of the suffering caused by the respondent's behaviour. It is useful to quote the following short extracts from it:-

"..Having to do this statement is the most sickening and stomach churning, full of hatred, disgust, anger and one of the hardest things I had to do in my life, except for coming forward after a life losing all faith in myself for not coming out and saying or telling my parents or anyone else what you did to me. The reason I did not say it to anyone back then is because I was only a child, between or around the age of seven years old, and he told me that if I told anyone that he would cut my mother and father's throat, so you can just imagine the fear and insecurity he instilled in me...I so badly wanted to tell my dad but I couldn't come up with a way to somehow tell him. My dad died in front of me on Christmas morning of a heart attack when I was eighteen years old. I didn't know what to think and I lost all faith altogether in myself and went off the rails on drink, drugs and all the things I shouldn't have done. But it did help me to sink my feelings of anger and hatred I was feeling within my body and mind that no one can see, that I had because of him and what he had done to me and the guilt I had and was carrying within because of him, and that is some burden to carry.."

8. The focus of the Director's application is not the sentence of fifty six months which she accepts was an appropriate one but, rather, the decision to suspend the entire term.

9. The principles to be applied by this court when considering an undue leniency application were usefully summarised by McKechnie J. in *DPP v. Stronge* [2011] IECCA 79, when he said:-

"(i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose; sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of such court is quite different on a s. 2 application, it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between the sentence imposed and that which ought to have been imposed to amount to an error of principle, before the intervention is justified and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.

10. The court is satisfied that the sentences imposed would, even if they had included a significant element of custody, have been lenient, but the decision to suspend the entire term was undoubtedly unduly lenient. The offences were serious. They were perpetrated on a vulnerable child over a prolonged period of approximately thirteen months and were coupled with frightening threats made to ensure the child's silence. Such offending warranted a significant period in custody in the absence of the most extenuating circumstances. No such circumstances exist in this case.

11. The learned sentencing judge sought and obtained an undertaking from the respondent that he would not return to this jurisdiction, presumably indefinitely. He addressed Mr. Madden SC, the respondent's counsel, thus *"..if he is prepared to undertake it, I will deal with the case in a particular way"*.

12. Such an undertaking would likely not have amounted to any great hardship for the respondent given the fact that he had for many years lived and worked in the U.K. and presumably had not intention of returning to live in this country. The other side of the coin, as it were, however, is the fact that the type of conditions that are often imposed on a sex offender who is receiving a very lenient sentence and, especially an entirely suspended sentence, such as supervision or a requirement to undergo treatment or that they be registered as a sex offender could not have been incorporated into the sentence with any practical effect.

13. The court is satisfied that the overall sentence imposed in the court below, and in particular the decision to suspend it in its entirety was unduly lenient, and accordingly the court will re-sentence the respondent as of today. In so doing, and because the new sentence will involve custody, the court has taken account of the fact that the respondent has had his original sentence being one not involving custody altered to a sentence involving custody and has enjoy unfettered liberty during the intervening period with the result that his incarceration at this point will be a severe disappointment to him. Accordingly, the court has prolonged the period of suspension to a greater extent than it would have done if sentencing at first instance.

14. The sentence now imposed is again one of fifty six months imprisonment, but with the final thirty two months suspended for a period of three years on condition that the respondent enter into a bond in the sum of €100 to keep the peace and be of good behaviour. The net custodial sentence is therefore two years.

15. (On the respondent's application the court delayed the commencement of the prison sentence until the 18th June 2018 on strict conditions, to enable the respondent arrange his personal affairs).

