THE COURT OF APPEAL

Record Number: 122CJA/18

The President
Peart J.
Edwards J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- V –

P. R.

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 27th of May 2019 by Mr. Justice Edwards

Introduction
1. This is an application brought by the Director of Public Prosecutions to review the sentences imposed by a judge of the Circuit Court sitting in the Circuit Criminal Court for the County of Offaly on the respondent on 21st March 2018 in respect of 17 counts of indecent assault and two counts of sexual assault, on the grounds that they were unduly lenient.

2. The Circuit Court judge was initially minded to impose headline sentences of four years in respect of the indecent assault counts and three years in respect of the sexual assault counts and to make those four-year and three-year sentences consecutive giving an aggregate headline sentence of seven years. He was further minded to reduce that aggregate headline sentence by two years, in effect to reflect the totality principle, giving a reduced headline sentence of five years. Then, having been impressed with the mitigating circumstances put forward on behalf of the respondent, and with the respondent's willingness to seek rehabilitation, the sentencing judge indicated that he was prepared to suspend all but the last nine months of the reduced five-year headline sentence. For convenience, effect was given to the court's stated intentions by structuring the ultimate sentence in the following way. The court imposed a sentence of five years on Count No 1, being a count of indecent assault to date from the date of sentencing but suspended the final four years and three months of the said sentence. The remaining 18 counts were then simply taken into consideration.

Grounds on which the review is sought
3. The applicant asks this court to review the said sentence and to find it to have been unduly lenient. The applicant contends it was unduly lenient, in the sense of being significantly outside the norm, in several respects.

4. First, it is contended that the sentencing judge under-assessed the gravity of the case, and in particular in doing so failed to have adequate regard to the aggravating circumstances and also failed to attach sufficient importance to the penal objective of general deterrence. In particular, the applicant identifies the sentencing judge's statement that *"[t]he sentence imposed must reflect the type of sentence that would have been imposed at the time the offending occurred"* as representing an error of principle.

5. Secondly, it is contended that the sentencing judge afforded excessive weight to the mitigating factors in the case, and attached undue importance to the penal objective of rehabilitation at the expense of the other widely acknowledged principal objectives of sentencing, namely appropriate retribution and deterrence.

6. The facts of the case were succinctly summarised by the sentencing judge in his ruling and I propose for the purposes of this *ex tempore* judgment to adopt his summary. The background to the offending is that the victim was a son of the accused. The offending started when the victim was nine-years of age and continued until he was twenty-one years of age. The offences took place in different areas of the family home save for the final offence which took place at the accused's place of employment. The victim was the second youngest of five children and lived in the family home until he was twenty years of age. The abuse involved masturbation by the accused of both himself and the victim. In addition to this the accused performed oral sex on the victim. On occasions the accused would rub himself while naked from the waist down against the victim and on one occasion when the victim was in fifth class, this activity was so intensive that it caused injury to the victim's penis which became sore and raw. On another occasion the accused tried to put his penis into the victim's anus and only ceased this activity when the victim complained that it was sore. This incident happened when the victim was in second year. After each incident the accused apologised to his victim for his behaviour and on some occasions told the victim not to disclose the abuse to his mother. The incidences of abuse usually took place when nobody else was in the house and when the accused's mother was outside or at bingo.

7. In 2011 the victim became very depressed and suicidal. He spent three weeks in a psychiatric hospital and subsequent to this he started to make disclosures about the abuse. The victim had previously told his partner of the abuse and on 9th April, 2014 he made a statement of complaint to the Gardai. That statement of complaint triggered the investigation which has now led to these proceedings.

8. The sentencing judge went on in his ruling to deal in some detail with the impact of the offending conduct on the victim. I do not propose for reasons of brevity today to repeat that. It is sufficient to say that the sentencing judge rightly characterised the victim impact statement that he received as very harrowing, powerful, dignified and thought-provoking. It disclosed in graphic terms the devastating effect of the accused's offending on him and also on the entire family. And poignantly the judge noted that the family is now unfortunately divided between those who continue to support the accused and those who support the victim. He commented correctly, we believe, that it is understandable but unfortunate that this has happened.

Discussion and decision

9. Although it was argued on behalf of the applicant that the sentencing judge had failed to take account of the aggravating circumstances in the case, it was not suggested that the sentencing judge had failed to identify any particular aggravating circumstance. The complaint was simply that he had failed to attach sufficient weight to the aggravating circumstances in the case.

10. The jurisprudence concerning how an application to review a sentence on the grounds of undue leniency is to be approached is by this stage well known and it is unnecessary to set it out in this short judgment. One of the principles established by that jurisprudence is that great weight should be afforded to the reasons for the sentence given by the sentencing judge at first instance. In this case the sentencing judge took great care in dealing with this matter. He reserved his judgment and he delivered a written judgment, a step which is somewhat unusual in the Circuit Criminal Court. The care which he took is evident from the detail of his judgment and the rigour of his analysis. The relevant aggravating factors are comprehensively listed in his judgment and we are in no doubt that he carefully weighed them as part of his assessment of the gravity of the case. It is clear that he was fully in command of the facts of the case and that he had proper regard to the culpability of the offender and to the harm done. Moreover, his recourse to consecutive sentencing to reflect the period of time over which these offences had occurred, which straddled the 12-year period from when the complainant was nine years of age until he was twenty-one years of age, was in our view appropriate.

11. No comparators were produced by counsel for the appellant to suggest that the headline sentences imposed in respect of the group of indecent assault offences and the sexual assault offences respectively were outside of the norm. While we do not agree with counsel for the respondent that the application should be dismissed solely on that account, it is of some significance that the applicant's position with respect to the assessment of gravity is based on mere assertion. In the absence of any comparators put forward by the applicant, or for that matter the respondent, we consider that this Court is entitled to take judicial notice of what in its extensive experience of dealing with cases involving indecent assault and sexual assault is considered to be the norm in terms of a headline sentence for a case of the present type.

12. Although there was potentially a penalty of imprisonment for up to 10 years available for the indecent assault offences, that was intended to cover both what would now be categorised as sexual assault offences and aggravated sexual assault offences which up until the enactment of the Criminal Law (Rape) (Amendment) Act 1990 were undifferentiated. The type of offending in this case would not qualify as aggravated sexual assault. At the time of the commission of the sexual assaults charged in this case, *i.e.*, in 1991 and 1992, sexual assault attracted a penalty of imprisonment for up to five years (in 2001 that was increased to 14 years where the victim is a child under seventeen, and to 10 years in all other cases), whereas aggravated sexual assault has at all stages since the creation of that differentiated offence in 1990 attracted a potential penalty of up to life imprisonment. We consider that, for practical purposes, and whatever about any theoretical maximum penalty, the indecent assault offences charged in this case would not have been capable, considered individually and on a stand-alone basis, of being justifiably treated as attracting an effective potential penalty that was any greater than the potential penalty initially applying in the case of the more modern offence of sexual assault.

13. The sentencing judge determined upon an initial headline sentence of four years for the indecent assaults. The four years arrived at would have represented 80% of the effective range for a stand-alone indecent assault that was not within the category of what would now be considered to be an aggravated sexual assault, where the effective range is treated as being from zero to five years on the basis that five years was initially the maximum available for sexual assault. Similarly, he determined upon a headline sentence of three years for the sexual assaults, representing 60% of the range then available. The differentiation was justifiable in circumstances where included amongst the incidents of offending conduct charged as indecent assaults was an attempt at anal penetration.

14. Of course, the fact that there had been numerous offences committed over a protracted period, and their frequency, required to be acknowledged in the sentencing exercise and appropriately reflected. The judge's recourse to consecutive sentencing was an appropriate means of doing so. While the sentencing judge did remark that the sentence imposed must reflect the type of sentence that would have been imposed at the time the offending occurred, we are not persuaded that the headline sentences that were nominated by the sentencing judge, which related to offending that took place between 1982 and 1995, were sentences that would not be imposed today for such offending. While we agree that the respondent was required to be sentenced according to sentencing policy considerations, whether legislatively or judicially determined, applicable to the circumstances of the case at the date of sentencing, whether in terms of how the courts see the gravity of particular types of offending behaviour, or otherwise, we see no evidence that there was any *de facto* departure from that on the part of the sentencing judge. We find no error of principle in the setting of an initial aggregate headline sentence of seven years in the circumstances of this case.

15. Whenever recourse is had to consecutive sentencing regard has to be had to the totality principle and the proportionality of the aggregate sentence requires to be examined. The sentencing judge in this case decided that where he was sentencing a man in his mid-70s amongst other circumstances it was appropriate to reduce the initial aggregate headline sentence from seven years to five years. Again, we consider that that was appropriate in the circumstances of the case and within the judge's legitimate range of discretion and accordingly find no error of principle.

16. Moving then to the applicant's second principal complaint, which is that too much weight was afforded to mitigating factors, we are inclined to agree and to uphold this complaint. In our assessment the circumstances of this case were such that an immediate custodial sentence was called for and it was one that required to be measured in years rather than in months. It is certainly the case that there were substantial mitigating factors in the case to which the respondent was entitled to due credit. He had pleaded guilty at the earliest opportunity, he had no previous convictions, he had a good work record, he was a man in his mid-70s, his wife was seriously unwell and would be dependent on him to a large extent for care and support which he was anxious to provide. Moreover, the respondent had publicly apologised for his conduct, and he had made a substantial offer by way of financial restitution. While the probation report casts some doubt on the extent of his insight, it did confirm that he was at low risk of re-offending and that, moreover, there was a willingness on his part to engage in a program of rehabilitation. While not gainsaying any of that we do not consider that cumulatively these factors would have entitled the respondent to a discount of more than 40% to 50% on the reduced headline sentence. The sentencing court would have had discretion within that range in terms of its discount. The discount actually afforded by the sentencing judge was one of 85% and we consider that to have been excessive and outside of the margin of appreciation available to him. That was an error of principle.

17. We find the sentencing judge to have been in error in that respect notwithstanding his stated reasons to which we have afforded

due deference, and his conscientiousness of approach which we have already acknowledged. However, we simply cannot agree that the degree to which he discounted for mitigation and to incentivise rehabilitation was appropriate. To have discounted to the extent that he did has resulted in our view in a sentence which is substantially outside the norm.

18. In circumstances where we have identified an error of principle leading to a sentence that was outside of the norm we must quash the sentence imposed by the court below on the basis that it was unduly lenient and proceed to re-sentence the respondent.

19. Approaching matters in exactly the same way as the sentencing judge, we consider that a five-year headline sentence is the appropriate one. However, in our view, an appropriate discount from this for mitigation and to incentivise rehabilitation would be one of 40% and we would have discounted by that amount by suspending the final two years of the five-year headline sentence, if we were sentencing at first instance. However, we are not sentencing at first instance. In this case the applicant did not move with the expedition that this Court might have expected in a case such as this. The respondent has long since served the full sentence imposed on him at first instance and he was in fact released in October 2018. Moreover, he has paid in full the amount that had been offered by way of restitution and he has engaged in the rehabilitation programme that he had undertaken to do when he was being sentenced in the court below.

20. The matter now comes before this Court in May 2019 and it is undoubtedly going to be harder for the respondent to have to go back to prison after a delay such as that which has taken place. In circumstances where there has been prosecutorial delay, and in circumstances where there will be an understandable disappointment factor on the part of the respondent at having to go back to prison at this point having had his liberty restored many months ago, we are prepared to suspend a greater portion of the sentence that we are now imposing than we might otherwise have done. To reflect the circumstances of this somewhat exceptional case we will suspend three years of the headline sentence of five years leaving a sentence of twenty-four months to be served, but in respect of which the respondent will be entitled to credit for such time as he has already served.