THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

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The People at the Suit of the Director of Public Prosecutions

Respondent

V

M.F.

Appellant

JUDGMENT of the Court delivered on the 24th day of October 2017 by

Mr. Justice Hedigan

Introduction
1. This is an appeal against severity of sentence. The appellant entered a guilty plea in the Central Criminal Court on the 4th July, 2016, to six counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended. The facts were heard on the 10th October, 2016. On the 17th October, 2016, the appellant was sentenced to six years on counts 4, 6 and 9 to run concurrently. On counts 11, 12 and 13 the appellant was sentenced to two years to run consecutive to each other and the sentences imposed on counts 4, 6 and 9. The sentencing judge also directed that there should be four years post-release supervision. A *nolle prosequi* was entered in relation to a threat to kill charge.

The circumstances of the offences
2. The six counts relate to four victims. They are sisters and were minors at the time of the offences. The appellant was in a relationship with their mother and lived with them from August, 2002 to February, 2004. The first three counts relate to the eldest victim ("A") having occurred between October, 2002 and February, 2004, when she was aged 12 to 13. These are representative counts. The offences occurred in her bedroom when the victims' mother was out of the house and when she was present in the home. A described how the offences occurred on a daily basis. They included the appellant touching her around the vaginal area and digital penetration progressing to the appellant forcing her to touch his penis and masturbate him. He threatened to kill her if she told her mother.

3. Count 11 relates to victim B and occurred when she was 12 years old. She described waking, having fallen asleep on the couch, to find the appellant touching her down her trousers outside her underwear. The appellant told her not to tell her mother and to pretend it never happened.

4. Count 12 relates to victim C and occurred when she was 11 years old. She described waking, having fallen asleep watching television in her mother's bed, to find the appellant naked beside her in bed and being forced to touch his penis. He said sorry and told her not to tell her mother or he would hurt her.

5. Count 13 relates to victim D and occurred when she was 7 years old. She stated that the appellant touched her around her vaginal area, outside her clothes. This occurred on the couch in the sitting room when she as alone with the appellant. He told her not to tell anyone.

6. Approximately 11 months after the appellant moved out of the house victim A confided in a teacher and a complaint was made to the Gardaii in early 2005. Thereafter victims B, C and D made their allegations known. The appellant was arrested and interviewed in relation to the first three victims on the 7th March, 2005, and the fourth victim on the 12th April, 2005. Nothing of probative value emerged from those interviews. Prior to charge he left the jurisdiction. He was arrested in the United Kingdom on the 26th April, 2013, and extradited on the 6th January, 2015.

7. The matter was listed for trial on the 4th July, 2016, and a jury had been empanelled when a guilty plea was entered. Certain disclosure remained outstanding until the 1st July, 2016.

8. Victim impact reports were handed in and detailed the significant impact of the offending on the victims' lives, their relationships, their work and studies and their children. It has led to drug and alcohol abuse and damage to their self-confidence and trust of others.

The appellant's personal circumstances
9. The appellant was 49 years old at the time of sentencing. He experienced physical and verbal abuse in his childhood from his step-father. He is estranged from his biological father. He has limited education and is without formal qualifications.

10. The appellant, according to a psychological report, suffers from depression and self-harm. This included a suicide attempt. He has a history of addiction to both alcohol and drugs. He has made efforts to address and resolve these since the offending behaviour.

11. When the appellant left Ireland he addressed his addiction issues, took up stable employment and entered a long term relationship from which he has two children. He has had little or no contact with his family since entering custody.

12. The appellant had 21 previous convictions. The most significant of which was for s. 4 rape for which he entered a guilty plea in 1995. It involved an adult woman. He received a nine year sentence and was released in 2001. The other convictions were for bringing an article into prison in the UK, road traffic offences, burglary, malicious damage, arson, trespassing, larceny and escape from custody.

Sentence
13. The aggravating factors identified were the nature of the offending, the multiplicity of victims, their tender years, the abuse of a

position of trust, the threats he made, the abuse of all four victims during the same time period, the prolonged offending and his previous convictions.

14. The mitigating factors were his guilty pleas, but they were late, his remorse in court and apology, again at a late stage, his addiction difficulties and efforts to address them and his willingness to engage in programmes to gain insight into his conduct. It was noted that he suffered abuse as a child, was in a stable relationship in the UK and had suffered from depression and self-harm. The self-harm seemed to be linked to his extradition.

15. The sentencing judge found the appropriate sentences for counts, 4, 6 and 9 were nine years. Considering mitigation this was reduced to eight years to run concurrently. On counts 11, 12 and 13 the appropriate sentence was four years. This was reduced to three considering the mitigating factors. These sentences were to run consecutive to the eight year sentences and each other. It was noted that concurrent sentences were appropriate as it was necessary to punish the appellant in relation to each victim. The judge then went on to consider the cumulative sentence and the principle of totality. She then reduced the eight years sentences to six and the four to two. Finally, a post release supervision period of four years was imposed. The judge noted this was to allow for treatment or in order to address the insight aspect of matters. The sentence was backdated to account for the time the appellant spent in custody in the UK.

Appellant's submissions
16. It is accepted that these are serious offences and that the appellant has been convicted previously for similar offending behaviour and that the judge was entitled to consider this. It is submitted that the sentencing judge failed to give adequate weight to the mitigating factors. The guilty pleas were of significant assistance to the prosecution and spared the victims the ordeal of giving evidence. The Court is referred to *The People (DPP) v. O'Sullivan* an *ex tempore* judgment of the Court of Criminal Appeal delivered on the 22nd March, 2002. It is submitted that in light of the above the sentences were unduly severe and disproportionate in all the circumstances.

17. It is submitted that the consecutive nature of the sentences imposed was disproportionate. A sentence should be proportionate to the circumstances of the offender. As was stated in *The People (AG) v. O'Driscoll* [1972] 1 Frewen 351 at 359. The Court in that case held that sentencing is to induce a criminal to turn away from crime as well as to act as a deterrent. The sentence should be appropriate for the particular crime and criminal.

18. It is submitted that the sentence should reflect the personal circumstances of the criminal and the gravity of the offence. It was stated in *The People (DPP) v. McCormack* [2000] 4 I.R. 356 at 359 that it is not just the personal circumstances of the criminal but the appropriate sentence is one for the crime because it has been committed by the particular criminal.

19. It is submitted that the judged erred in imposing consecutive sentences as between the victims and in the level of sentence imposed as regards the offending behaviour toward each victim, particularly with reference to victim A.

20. It is submitted that it is considerably significant that the behaviour towards the other three victims were once off offences. It is not reasonable to suggest these offences reached the mid level of this offending. In reference to victims B and D the offending can only be viewed at the lowest possible end of the scale. It is submitted that commencing at four years for each was an error of principle.

21. It is submitted that consecutive sentences were disproportionate in all the circumstances and no exceptional circumstances were outlined to ground their imposition. This Court, in its rulings, highlights that it is appropriate to give a particular form of weight to mitigating factors where consecutive sentences are decided upon. In *The People (DPP) v. J.S.* [2015] IECA 254 it was held that the judge did not weigh them correctly and did not afford a sufficient discount for the mitigating factors where he decided to impose a consecutive sentence.

22. It is submitted that the sentence structure means that there was ostensibly no regard for the objective of incentivising rehabilitation.

Respondent's submissions
23. In relation to the appellant's submission that the judge failed to give adequate weight to the mitigating factors, it is submitted that the pleas were entered and remorse expressed after the jury had been empanelled. This timing meant little comfort was given to the victims. The ordeal ended at the latest possible time. It is submitted that s. 29(1) of the Criminal Justice Act 1999 permits a judge to have regard to the point at which a guilty plea is indicated. The sentencing judge in the instant case was entitled to take into account the late stage at which the plea was entered.

24. It is submitted that the sentences imposed reflected the mitigating factors. The headline sentences were reduced in consideration and acceptance of same. There was no error in principle. Appropriate and sufficient consideration and weight were given to the mitigating factors advanced.

25. In relation to the appellant's submission that the sentences were unduly severe and disproportionate it is submitted that they reflected the significant aggravating factors of the victims' ages and the relationship of trust. In relation to victim A it was protracted and serious offending. The others were single offences within the same timeframe as the abuse of victim A.

26. The appellant had a history of previous convictions. This significantly included a conviction for s. 4 rape. Further the victim impact statements reflected how deeply affected the lives of all four victims have been.

27. The sentencing judge was entitled to exercise her discretion and impose consecutive sentences to reflect the offending against each victim. She then properly considered the principle of totality and further reduced the sentences. Two years for each of the more minor offences is not an error in principle in light of the particular considerations of the case.

28. The respondent refers to the decision of the Court of Criminal Appeal in *The People (DPP) v. F.* [2010] IECCA 68 where the appellant was convicted after a lengthy trial of 31 counts of child sexual abuse involving the rape and indecent assault of three sisters. The trial judge determined consecutive sentences to be appropriate. He stated that to do otherwise would suggest to the second and third victims that the offences against them were of less, or no, importance and the convicted person would not really be serving a sentence for the offences against them. The Court noted that while consecutive sentences should be used sparingly this did not mean that there was a prohibition on such sentences or that they should be exceptional. They held that sparingly means there will be times when consecutive sentences are appropriate.

29. It is submitted that the factors for the imposition of consecutive sentences are present in this case. There was sexual abuse of different children in the appellant's care over an extended period.

30. The sentence imposed did not reflect an error in principle.

31. The respondent noted that the post release supervision period specifically catered for rehabilitation.

Decision

32. In *The People (DPP) v. Byrne* [2017] IECA 97 at paras. 26 and 27 Edwards J. helpfully set out the process which should be undertaken by a court when sentencing:-

> "...the exercise of sentencing generally involves a two stage process. The first stage involves assessing the gravity of the offence, with reference to culpability (including aggravating factors tending to increase culpability and mitigating factors tending to reduce culpability), and the harm done, and determining where on the scale of available penalties the offence should be located before account is taken of any mitigating factors not already taken into account as bearing on culpability. In this way the sentencing judge determines on a headline sentence in the first instance.
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> The second stage involves discounting from the headline sentence arrived at in the first stage for any mitigating factors not already taken into account, such as a plea, previous good character, age, remorse, co-operation, restitution, a good work record, adversities in the accused's person's life and life history, public service or positive contributions to society, good works, efforts at rehabilitation and any other relevant circumstances capable of going to mitigation. In this way the Court endeavours to arrive at a just and proportionate ultimate sentence."

33. The learned sentencing judge clearly approached the task of sentencing in this matter in a careful, methodical and meticulous manner. The sentence of six years imposed in respect of counts 4, 6 and 9 is not questioned by the appellant and correctly so in the view of the Court. In arriving at that sentence appropriate account was taken of the gravity of the offences, their nature being sexual assaults on very young girls, in his charge, *in loco parentis*, the multiplicity of victims who were sisters, their abuse during the same time period and the threats he made to each. Mitigating factors were also considered including his guilty plea albeit a very late one, his remorse and apology also albeit somewhat late.

34. In relation to counts 11 and 13, they are also very serious offences warranting custodial sentencing. They are relatively similar. Count 12 is however somewhat graver, involving the victim child finding the appellant naked beside her in bed and forced to touch his penis. These three counts were very different in nature to the offences reflected in counts 4, 6 and 9. In sentencing for those counts, account was correctly taken of their being repeated over a period of 16 months and involving assault on a daily basis. This child victim aged 12 to 13 years at the time was subjected to a terrifying regime of assault in her own home over a prolonged period. Counts 11, 12 and 13 however, albeit very serious assaults, were one-off events. It appears that many of the egregious aggravating factors were brought into account in fixing the sentences for counts 4, 6 and 9. It appears that the same egregious factors were also taken into account in relation to counts 11, 12 and 13. There seems therefore to be an element of double counting of the aggravating factors. The Court is mindful that the offences involved in counts 11, 12 and 13 would not normally attract a headline sentence of four years. Thus we conclude there has been an error in principle with regard to these sentences and the Court will proceed to quash them and to resentence in relation to thereto.

35. Taking account of the aggravating and mitigating factors already outlined above as found by the learned sentencing judge, we consider that counts 11 and 13, being of a similar nature, should attract sentences of one year each. Count 12, because of its more serious nature as outlined above, should attract a sentence of one year and six months. We agree with the learned sentencing judge that these three sentences should be consecutive. Thus the cumulative sentence in this case should be nine years and six months. We affirm the four-year post-release supervision on the terms set out by the learned sentencing judge. As provided also the sentences' commencement will be backdated to 1st July, 2013. Like the learned sentencing judge in the Central Criminal Court we do not propose to suspend any part of the sentences.