THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

146/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

W. S.

Appellant

Judgment of the Court (ex tempore) delivered on the 13th day of October 2015 by Mr. Justice Edwards

1. This is an appeal by the appellant against the severity of six sentences of four years imprisonment for offences of defilement of a child contrary to s. 3(1) of the Criminal Law Sexual Offences Act 2006, and one sentence of nine years imprisonment with the last three years of it conditionally suspended for an offence of sexual assault contrary to s. 2 of the criminal Law Rape Amendment Act 1990, as amended by s. 37 of the Sex Offenders Act 2001 and as provided for by s. 14 of the Criminal Law (Amendment) Act 1935. All sentences were to run concurrently.

2. The facts of the case may be summarised as follows. The appellant, a married man with three children, had become friendly with the injured party's family through attending at the same church. The injured party who was born in 1996 began babysitting for the appellant in 2011 when she was aged fourteen. The appellant was at that point in his early 30's.

3. Following a church meeting in early 2011, the appellant was giving the injured party a lift home when he asked the injured party for a kiss. The injured party did not kiss him on this occasion, but the request was renewed later by text message and subsequently agreed to. Following this the appellant sent further text messages of an explicit nature to the injured party talking about oral sex. Subsequently, on the 11th February, 2011, when the injured party was in the company of the appellant in the appellant's house, they did engage in kissing. Moreover, the appellant also proceeded to touch the injured party's vagina through her clothes on this occasion.

4. On a further occasion, on the 24th February, 2011, the injured party was in the appellant's car when he unzipped her hoodie, pulled down her vest top and bra and kissed her breasts. This incident was the subject matter of the sexual assault charge to which the appellant pleaded guilty and for which he received the nine year sentence with three years of it conditionally suspended.

5. This was the beginning of an escalating course of sexual contact between the appellant and the injured party. This course of sexual conduct progressed from the initial kissing, genital touching through clothes and fondling of the child's breasts as already described, through fellatio involving ejaculating in her mouth on numerous occasions, digital penetration, cunnilingus, repeated vaginal intercourse and finally anal intercourse.

6. It is properly characterised in the respondent's written submissions as involving repeated defilement of the child in every conceivable manner. There was also evidence of a degree of compulsion in some aspects of the sexual activity at issue following expressions of reluctance or unwillingness on the part of the injured party to participate in certain things such as vaginal intercourse without a condom and anal intercourse.

7. The sexual contact continued over a five month period and ceased a number of months after the injured party's fifteenth birthday. There appeared to have been a number of breaks in the contact during the five month period, with the accused recommencing the sexual contact by way of text messages to meet up and have sex. It was only brought to an end by the victim's mother discovering text messages from the accused on the victim's phone on the 22nd July, 2011, and confronting her and bringing the matter to the attention of the gardaí.

8. The appellant faced trial on a sixteen count indictment. He pleaded guilty at an early stage to six counts of defilement, being counts 1, 3, 5, 8, 10 and 13 respectively, and on the basis that a further eight counts of defilement, being counts 2, 4, 6, 7, 9, 11, 12 and 14, respectively, would be taken into consideration. The defilement charges covered the incidents of fellatio, digital penetration, cunnilingus, vaginal intercourse and anal intercourse. The appellant also pleaded guilty to one count of sexual assault, being count 15, which as previously alluded to covered the pulling down of the injured party's vest top and bra, and the kissing of her breasts. Again, this plea was accepted on the understanding that a second count of sexual assault, being count 16, would also be taken into consideration. On the facts presented in evidence count 16 is understood to have covered the incident where the injured party's vagina was touched through her clothes.

9. The court heard evidence that the appellant had previously been in the army; that he had two non relevant previous convictions involving a drunken driving incident and an assault causing harm in the context of a nightclub brawl; that he had been discharged from the army due being convicted of the assault in the nightclub; that he was ashamed and remorseful; that he had had tragedy in his personal life, having lost a child conceived in a previous relationship; that his marriage had broken down and that he had been assessed by the probation service as being at low risk of re-offending.

10. The court was told that the injured party had declined to make a victim impact statement, but that she was known to be in her Leaving Certificate year and to be doing quite well.

11. The trial judge approached the matter in the following way. He said:

> "Yes. All right, well there are a number of ways of approaching this. I have to say I regard it as a very serious case indeed, and I do so because of a number of factors of the aggravating variety. First of all, Mr S. took advantage of a friendship between families and secondly took advantage of the fact that both families attended a particular Christian

church. He took full advantage of those facts in relation to somebody who was less than half his age and, although the victim appeared to be under the impression that she was in some form of mature relationship with this man, of course nothing could be further from the truth because the girl was aged 14 at the time when this commenced and, although she may have been mature in both conduct and appearance, the fact remains that she's not in a position, because of immaturity, to agree to conduct of this kind. It's also aggravated by the fact that the conduct at the heart of this went on for a long period of time and I have very little doubt in my mind, notwithstanding the fact that it had a stop-go element to it, might well have continued were it not for a very vigilant parent intervening and discovering what was going on. It's aggravated also by the fact that over this protracted period of five months or so this girl was being abused in a very progressive way, having, I've no doubt, been identified and, as the saying goes, groomed for that purpose, proceeding from discussions, to touching, ending up with anal sex but visiting in between digital penetration, oral intercourse and vaginal intercourse. So, it's very, very serious indeed when one analyses the conduct at the heart of it and taking place, as it did, on most occasions in public and it's only, I think, fair to observe in relation to the matter that although the young girl in question gave the appearance of what might otherwise be the appearance of consent in relation to this, the evidence seems to me to suggest that she wasn't particularly happy about proceeding on a number of the occasions referred to in the evidence, so I don't think it's a case that can be fairly characterised as being entirely free from a degree of compulsion. She certainly didn't seem to be interested or want anal sex and there appears to have been a minor degree of compulsion in relation to that, also in proceeding to vaginal intercourse without a condom when she clearly didn't want that either. So, there are a number of aggravating aspects of significant concern in relation to it.

It could have been approached, I suppose, in a number of ways. I would not have been content that the maximum penalty in relation to a single count of defilement, being five years in the circumstances, could have, even on a maximum basis, appropriately reflected the gravity of the misconduct here. So, I would have in, perhaps structuring it in one way, considered making at least one of the counts consecutive on a discretionary basis but on the other hand, I have a single count of sexual assault on full facts which allows for a sentence of 14 years and that, in my view, reflects a more appropriate type of range within which one should consider where this entire gamut of misconduct lies.

So, the facts, as given by Garda A.M.C., speak for themselves. I don't propose to go back over them, having just identified that it occupies pretty much the full range of sexual activity, and Mr S. really took what was not his to take. This girl should have been allowed to develop sexually at an appropriate time in an appropriate place with a person of appropriate age and Mr S. has prevented that possibility. Now, she didn't give victim impact evidence. She's declined to be present and, on the evidence, appears to be doing well in her Leaving Cert year so that, at least, is a positive side of all of this.

So, it seems to me that if one identifies a possible scale of zero to 14 years in relation to count No. 15, it certainly seems to me, absent mitigating factors, to lie on the upper side of the middle point of that range, and perhaps I'm being conservative in relation to that but perhaps others will be the judge of that. So, I do take on board what Mr Shortt says, that a plea of guilty is very important in a case like this because it's particularly important that a young girl, and she's still a young girl, should not have to recount these indignities in front of a jury of strangers, so a plea is important and I accept Mr Shortt's submission in that respect. But he rightly recognises that he was faced with a very comprehensive statement of complaint, very properly and professionally taken by the guards, by clearly a very articulate young person and I've no doubt that a successful defence of this would have been very, very difficult in those circumstances, but I think he's entitled to the full credit that arises in respect of a plea of guilty in relation to that and, as Mr Shortt again correctly points out, it's an affirmation to the injured party that she is not at fault in relation to this. I have regard to the fact that there was a particular tragedy in his background and I take that into account as a mitigating factor, although it doesn't explain to me why he engaged in persistent and deliberate abuse of a young person in this way. I accept his previous good character. I also accept that he's at low risk of reoffending, which is one of the assessments that needs to be carried out. He doesn't appear to have a huge insight into the effect of all of this but he does appear to be genuinely remorseful and has been assessed by all relevant parties as being of low risk.

So, it seems to me that I should give him credit in respect of the mitigating factors, but in particular of the plea of guilty, to the extent of one third of the appropriate sentence. Because there is a low risk, as opposed to no risk, of reoffending, I extend that by way of a suspension of that portion of the sentence. I have to also consider post-release supervision, and I think a short period of that is appropriate under the auspices of the Probation Services. So, one-third of the appropriate sentence will be suspended on a bond of €300 to keep the peace and be of good behaviour for the appropriate period, plus 12 months probation supervision on release.

It seems to me that the upper end of the middle point of the scale indicated would indicate a sentence on count 15 of nine years imprisonment so I'm imposing that, backdating it to the date upon which he went into custody. I'm suspending the last three years on the bond indicated. It can be entered here or before the governor at the selection of the prosecution."

He then goes on to deal with post release supervision and finally he says:-

"In relation to the balance of the counts and defilement counts it seems to me that concurrent sentences of four years should be imposed to run from the same date on counts 1, 3, 5, 8, 10 and 13"

12. The appellant contends that the trial judge was in error in the manner in which he structured the sentence, and in particular complains that he was unjustified in imposing a sentence of nine years with three years suspended for the offence that was the most minor of all of the offences in terms of its circumstances, namely, the offence of sexual assault being count 15.

13. In addition, the appellant contends that the overall sentence was too severe having regard to the totality principle.

14. The appellant further contends that the sentences of four years on each of the defilement charges were also too severe in that insufficient credit was afforded for the mitigating circumstances of the case, and there was ostensibly no regard had to the desirable objective of incentivising rehabilitation.

15. The court has carefully considered the submissions that have been made by counsel on both sides in this case. The court is satisfied that there was a clear error of principle with respect to the manner in which the trial judge structured the sentence in question. The trial judge was required to sentence the appellant appropriately on each count having regard to the seriousness of the offence in the particular circumstances in which it was committed by the particular offender. It was not open to him to impose a sentence in respect of a particular offence that was greater than that actually warranted by the offence in question in order to

compensate for the fact that, in his view, the range of sentences available to him for another offence or offences in respect of which he was also required to impose a sentence or sentences was or were inadequate to reflect the gravity of that offence or those offences. There was another option validly open to him by means of which he could have overcome that difficulty, i.e., recourse to consecutive sentencing.

16. In those circumstances it is unnecessary for this Court to express any view on the other complaints made by the appellant, namely, that the overall sentence of nine years with three suspended was excessive having regard to the totality principle, and that the concurrent sentences of four years on the defilement charges were too severe in and of themselves because, it is contended, insufficient credit was afforded for mitigating circumstances and no regard was had to the objective of rehabilitation. The Court having found an error of principle in the manner in which the entire sentencing was structured can proceed to quash the existing sentences and re-sentence the appellant afresh.

17. The court has considered the gravity of the offences in question. It has considered the aggravating factors, very comprehensively rehearsed in the ruling of the trial judge which I have recited above in full. The court has also considered the mitigating factors again fully rehearsed in the ruling of the trial judge which the court has read in full.

18. In terms of re-sentencing Mr. S., the court proposes to have recourse to a mix of concurrent and consecutive sentencing.

19. First of all, the court will impose a sentence of two years imprisonment in respect of the sexual assault charge which is count No. 15 on the indictment. The Court is satisfied that such a sentence properly reflects the actual gravity of the offending conduct the subject matter of the sexual assault charge, with due allowance for the mitigating factors in the case.

20. With respect to the remaining charges, which are all defilement charges, the court proposes to group counts 1, 3 and 5 together and counts 8, 10 and 13 together. In respect of each group the Court assesses the gravity of the individual offences comprising them as meriting a sentence of four years imprisonment on each count before any discount is applied to take account of mitigating factors.

21. Turning then to the question of the appropriate discount for mitigation, the court will allow a discount of eighteen months in respect of each four year sentence, giving a sentence on each defilement count after application of mitigation of two years and six months.

22. The sentences imposed on counts 1, 3, and 5 are to run concurrently with each other, and the Court also makes them concurrent with the sentence on count 15. The sentences in respect of counts 8, 10 and 13, respectively, are also to run concurrently with each other, but they are to run consecutively to the sentences imposed on counts 1, 3 and 5, respectively.

23. When the consecutive sentencing dimension is applied, that results in a net overall sentence of five years imprisonment which this Court is satisfied is proportionate and respects the totality principle. However to incentivise rehabilitation in this case, which it is acknowledged was not overtly alluded to by the sentencing judge at first instance, this Court has decided to go further and conditionally suspend the final year of the net overall sentence of five years. To give practical effect to this the last twelve months of the individual defilement sentences on counts 8, 10 and 13, respectively, will be suspended upon such conditions as are specified in the bond to be entered into by the appellant at the conclusion of the Court's ruling.

24. The court will not interfere with the post release supervision order made at first instance and we re-impose that. Finally, all counts previously taken into consideration are again taken into consideration in the same way as before.