



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

Appeal No.: 105/2015

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Michael Farrelly

Appellant

Judgment (ex tempore) of the Court delivered by Mr. Justice Mahon on the 3rd day of December 2015

1. The appellant was convicted on 4th June 2014 of two counts of defilement of a child under seventeen years of age contrary to s. 3 of the Criminal Law (Sexual Offences) Act 2006, following his plea of guilty. He was sentenced at Dublin Circuit Criminal Court on 27th March 2015 to a term of imprisonment of three years on each of the counts, such sentences to run concurrently, and to commence on 27th March 2015, with the final twelve months of the sentences to be suspended on the accused's own bond to be entered into before the Prison Governor in the sum of €500, subject to a number of conditions.

2. At the time of the offences, the complainant was sixteen years and nine months old, while the appellant was twenty seven years old. The parties met having made contact (initiated by the appellant) on Facebook and following exchange of telephone text messages. The complainant disclosed her age to the appellant in one of these text messages. The parties ultimately met in person on 22nd January 2013 at 10.30 a.m. in Lucan village and went to the appellant's father's home in Lucan. There, they engaged in sexual intercourse. They met again on 25th January 2013, and again on 4th February 2013. On the 4th February 2013 they went to the appellant's home in Clondalkin where they again engaged in sexual intercourse. The relationship ended on 22nd February 2013. The complainant told her parents shortly thereafter whereupon a statement was made to the gardaí. The appellant was arrested on 27th February 2013, and when interviewed, he admitted having had sexual intercourse with the complainant. Initially, he denied knowing her age, but later conceded that he in fact had been told of her age in a text message.

3. The appellant had a previous conviction for drink driving in 2011, and also had other road traffic convictions in 2007, but no previous convictions for anything remotely associated with unlawful sexual activity.

The grounds of appeal

4. The appellant's grounds of appeal are as follows:-

- (i) The sentence imposed by the learned trial judge was excessive and oppressive in all the circumstances;
- (ii) the learned trial judge erred in law and in fact in placing excessive weight on the aggravating factors as outlined during the course of the appellant's sentencing hearing;
- (iii) the learned trial judge erred in law and in fact in placing excessive weight as to the seriousness of the offence;
- (iv) the learned trial judge erred in law and in fact in placing excessive weight on the appellant's lack of insight into the impact on the victim in circumstances where there was no victim impact report prepared in relation to the proceedings;
- (v) the learned trial judge erred in law and in fact in determining that the appellant was at medium risk of sexually re-offending on the basis of the risk assessment expressed to be rudimentary by the Probation Service, while the Forensic Psychological Services report concluded that the appellant evidenced a low risk of sexual re-offending;
- (vi) the learned trial judge failed to have regard sufficiently or at all to the extensive efforts made by the appellant in respect of his rehabilitation and further failed to have sufficient regard to the objective of rehabilitation insofar as same is a component part of any sentence.

5. In his submissions to the Court, counsel for the appellant essentially relies on the simple contention that having regard to all the circumstances the sentence imposed was disproportionate. In particular it is contended that the appropriate sentence in this case, having regard to a number of mitigating factors, and the absence of any significant aggravating factor, was a non custodial sentence. The mitigating factors emphasised include:-

- The plea of guilty generally, and especially also, in circumstances where the gardaí had apparently lost contact with the complainant just weeks prior to the sentencing date, and furthermore the fact that at that time the complainant may have become estranged from her immediate family. The implication is that the successful prosecution of the case in the absence of a plea of guilty may not have been a foregone conclusion.
- The fact that the complainant was just three months short of her seventeenth birthday and the fact that the appellant was himself relatively young.
- The fact that there was an absence of accompanying threats or violence. Furthermore no pregnancy resulted, and there was no evidence of any STD's occurring.
- The existence of strong testimonials from, amongst others, the Defence Forces, relating to the appellant's three years service with Reserve Defence Forces.

6. No aggravating factors were identified by the learned sentencing judge, nor are any apparent to this Court.

7. It is quite clear that the learned sentencing judge approached the sentence on the basis that a non custodial sentence was an option for consideration. To this end he had been requested by counsel for the appellant to delay sentence until a more comprehensive probation report had been completed, some eight weeks later, but he decided instead to proceed to sentence the appellant to three years imprisonment, albeit it with the final twelve months of that term suspended.

8. The Court is satisfied that there was an error in principle in the learned sentence judge's decision to impose a three year sentence, and in reality a two year custodial sentence, in circumstances where having regard to his remarks in the course of his sentencing judgment, he clearly contemplated a non custodial sentence as a real option in this case, but does not appear to have fully evaluated that option.

9. In the Court's view the commission of this offence by this offender, having regard to all the circumstances, does not warrant a custodial sentence of the length directed by the learned sentencing judge if indeed a custodial sentence was appropriate at all. The Court will therefore allow the appeal and set aside the three year sentence.

10. The Court has considered a number of testimonials submitted on behalf of the appellant, including a very positive Prison Governor's report. It has also been provided with an impressive letter from the mother of the appellant's two young children, and her anxiety, that for their sake, the appellant should return as soon as possible to an active fathering role, a role which she emphasised he had always taken seriously.

11. The Court will therefore impose a sentence of twelve months and will suspend the un-served portion of that twelve month sentence for a period of two years, on the appellant entering into a bond in the sum of €100 to keep the peace and be of good behaviour.