THE COURT OF APPEAL

[126/CJA/19]

The President
McGovern J.
Collins 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

AND

EOIN VICKERS

RESPONDENT

JUDGMENT of the Court delivered on the 11th day of March 2020 by Birmingham P

1. Before the Court is an application brought by the DPP seeking to review sentences on grounds of undue leniency pursuant to s.2 of the Criminal Justice Act 1993. The application is brought in circumstances where, on 20th May 2019 in the Central Criminal Court, the respondent was sentenced to a term of 11 years' imprisonment with the final two years of the sentence suspended. The resulting net sentence was one of nine years' imprisonment. The sentence was imposed against a background of the fact that the respondent had entered pleas of guilty to two counts of defilement of a child under 15 years of age, who shall be referred to as AK, three counts, which were described as sample counts, of defilement of a child under 17 years in respect of the same injured party, AK, an offence of assault causing harm where the complainant and injured party was again AK, and a count of defilement of a child under 17 years which related to a different complainant, referred to as PC.

2. The offending in question took place between June 2011 and August 2013. The respondent, who was aged 24/25 at the time, met the injured party, AK, in April 2011. AK was aged 14 years at the time. The meeting was in the west of Ireland where the complainant lives. The respondent was not from that area, but had travelled there to participate in a protest movement. There was contact between the injured party and the respondent with matters progressing to a stage of very regular sexual intercourse. This was occurring on an almost daily basis during the summer of 2011. After a period, the respondent decided that he would not use a condom. He told the complainant that he was infertile, which was untrue. Later, he urged her to become pregnant. She became pregnant by him and gave birth to a daughter in March 2012. Following the birth of the baby, he was instrumental in devising a strategy involving the creation of a non-existent

once-off sexual partner from Tipperary who was said to be the child's father. Sexual activity between the respondent and AK continued up until October 2013.

3. The respondent actively sought to isolate the complainant from her friends in various ways. By way of example, the school that she attended had organised an overseas school trip, but the respondent removed her passport to try and prevent her participating. He controlled and monitored her access to social media. In particular, he actively sought to restrict her engagement with boys of her own age.

4. On at least one occasion, he assaulted her by punching her to the face. This was one of a number of physical assaults. The principal complainant had a contraceptive implant and the respondent was keen that this would be removed. He equipped himself with a Stanley Knife or blade in order to remove the contraceptive implant by cutting it out of her arm. This incident is the subject matter of the s. 3 assault. There was a separate assault involving a knife and the use of needles to tattoo his nickname onto her genital area.

5. The second injured party in the case is the cousin and best friend of the first complainant. At some point around January 2013, she became aware of the relationship between the principal complainant and the respondent. The respondent suggested that this complainant should take drugs and he supplied her with heroin. He had also supplied heroin to the principal complainant, having introduced her to this drug. With the second complainant, he engaged in suggestive texting and this progressed to sexual intercourse on two occasions. There was also evidence of the respondent engaging in manipulative behaviour towards this complainant which included instructions on how to facilitate a termination in the event that she became pregnant and using her to monitor the activities of AK.

6. The Director's criticism is two-fold, first that the respective headline sentences identified of ten years for the defilement of the principal complainant, three years for the defilement of the second complainant, and two years for the s. 3 assault involving the cutting out of the contraceptive implant were too low. Second, the Director complains that the ultimate sentence imposed was also too low, and in particular, that the judge erred in suspending any part of the sentence of 11 years at which he had arrived. The Director identifies as factors that make this particularly serious offending as follows:

   (a) Premeditation and planning;

   (b) The vulnerability of the injured parties;

   (c) The fact that there were two injured parties;

   (d) The series of criminal acts involved;

   (e) The age gap between the injured parties and the respondent;

   (f) The level of violence involved committed against the principal complainant;

(g) The sustained nature of the abuse in relation to both injured parties;

(h) The fact that compromising photographs of the principal injured party were used as a threat or as a means of enforcement;

(i) The plying of the injured parties with heroin; and

(j) The grooming and manipulative behaviour of the respondent in relation to both injured parties.

The grounds on which the Director has sought to review the sentences is sought are as follows:

(i) In setting the individual headline sentences of ten years, two years and three years, respectively, being a cumulative 15 years, the sentencing judge failed to fully appreciate the gravity of the offences as committed by the respondent;

(ii) In setting the individual headlines sentences of ten years, two years and three years, respectively, being a cumulative 15 years, the sentencing judge failed to afford sufficient weight to the aggravating circumstances present;

(iii) The sentencing judge erred in applying the principles of totality and proportionality to the effect of setting down an unduly lenient total sentence;

(iv) The sentencing judge attached too much weight to the limited mitigating factors present;

(v) The sentencing judge failed to adequately reflect both the personal and general deterrence aspect and the retributive element of the sentence;

(vi) The sentencing judge departed in a significant way from the norm that would be reasonably expected in a case of this nature; and

(vii) The sentencing judge was unduly lenient in suspending two years and/or any part of the sentence of 11 years imprisonment.

7. In terms of the background and personal circumstances of the respondent, he was born in June 1983, so he was roughly 28 years of age when the untoward activity commenced. He was approximately twice the age of the first complainant, AK, and twice the age of the second complainant, PC, when the respective activity began.

8. Victim impact reports were presented to the Court in respect of both complainants. It is very clear that each of the injured parties has been affected very significantly by their interaction with the respondent. It is also evident that the impact is severe, long-term, and continues to this day. It is, however, encouraging that both young women, as they now are, have gone on to third-level education.

9. The judge's approach to sentencing was to, first of all, identify headline or pre-mitigation sentences for different aspects of the offending. At an early stage of his sentencing remarks, he commented that the transcript of the sentence hearing made for grim reading. The judge went on to describe the behaviour of the respondent as manipulative, controlling, violent, narcissistic, and pure evil activity. The judge identified ten years as the headline sentence for the defilement of the principal complainant, AK, three years for the defilement of the other complainant and two years for the s. 3 assault, the removal of the contraceptive device implanted in AK's arm. Then, having regard to the mitigating factors, he reduced the ten years to eight years, the sentence of three years to two, and the sentence of two years to one year so that the total of 15 years was reduced to 11 years and then proceeded to suspend the final two years. The final outcome being an effective sentence of nine years' imprisonment. The decision to suspend the final two years is the subject of particular criticism by the Director.

10. In respect of the respondent's background and circumstances, the sentencing court was told that after being questioned by Gardaí in relation to these matters, he went, initially, to Portugal and then to England. He is the father of two sons aged 14 and 12 years from a past relationship, but appears to have limited contact with them and with their mother. He met his wife when he went to Portugal in 2014. They have a two-year old son. In terms of previous convictions, the respondent has a previous conviction under s. 3 of the Misuse of Drugs Act 1977 in relation to heroin that he was in possession of in December 2011. There were some public order matters linked to his involvement in a protest movement. He received a suspended sentence in 2010 in relation to offences of handling stolen property and entering a building with intent to steal. He links these offences to a heroin addiction.

Discussion

11. This is in some ways quite an unusual case. The factors which make it unusual include the duration of the offending, two and a half years in the case of the first complainant, and the very fact that there were two complainants. As defilement cases go, this has to be regarded as exceptionally serious. There was the significant age gap to consider; the respondent was twice the age of each of the complaints. When he first met the principal complainant, she was in her school uniform, in her second year in secondary school, and there can be no question about uncertainty or confusion about the girls' ages. Initially, the first complainant was plied with alcohol, and subsequently, both young complainants were introduced to heroin. This is an aspect of the case that is particularly disturbing and puts the case right at the upper-end of such cases. At an early stage of the relationship with the first complainant, he had her supply compromising photographs and he used these as a form of control, threatening to distribute them locally or to put them on the Internet. A still further dimension of seriousness is provided by the fact that the "relationship" was a violent and abusive one. His efforts to control the first complainant, in particular, and to isolate her from her friends, while monitoring and controlling her access to her mobile phone and to social media, was reprehensible. The trial judge's description of the respondent's behaviour as manipulative, controlling, violent, narcissistic, and involving pure evil activity was a very apt one indeed.

12. There has been no real dispute between the parties about the legal principles applicable to reviews such as this. Indeed, those principles have not really been in dispute since the first such case, that of DPP v. Byrne [1995] 1 ILRM 279. Nonetheless, we take the opportunity of reminding ourselves what was said on that occasion:

    (i) The DPP bears the onus of proof in showing that the sentence was unduly lenient.

    (ii) The appeal Court should always accord great weight to the trial judge's reasons for imposing the challenged sentence.

    (iii) It is unlikely to be of help to the appeal Court to ask if, in the event that a more severe sentence had been imposed, it would have been upheld in a defence appeal based on error of principle. Different criterial apply to prosecution appeals.

    (iv) It is clear from the wording of s. 2 of the 1993 Act that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the appeal Court's intervention.

13. The Court can say at the outset that it agrees that the sentence that was imposed was a lenient one. In saying that, it is quite clear that the trial judge approached his task with particular care. He is to be commended for the way in which he identified headline sentences for each individual offence and explained clearly what mitigation he was allowing in each case. In the Court's view, an aggregate pre-mitigation headline sentence of 15 years was not inappropriate. In that regard, we agree with the trial judge that this was a case where it was appropriate that the sentence in respect of the second complainant should be made consecutive to the sentence or sentences involving the first complainant. The sentence in respect of the first complainant could not be less than 12 years, whether structured, as the trial judge did, on the basis of a sentence for the defilement of a child under 15 charges, with a consecutive element in respect of the assault causing harm, or whether, on the basis of a higher defilement sentence with other sentences in respect of that complainant being made concurrent. The sentence in respect of the second complainant does not seem significantly out of line with those imposed in other cases involving the defilement of a child under 17 but over 15 years.

14. So far as this Court is concerned, the chief difficulty presented in this case is the extent of the reduction afforded by way of mitigation i.e. the reduction of 15 years to 11 years. Really, the only significant mitigation present here was the entry of the plea of guilty. While certainly not without value, it is the case that the plea was not an early one, and that certainly as far as the complainant, AK, is concerned, was entered against a background of overwhelming evidence. The Court can say that, had it, as a Court, or its individual members been called on to sentence at first instance, we would have imposed a sentence higher than that ultimately arrived at by the trial judge, and would not have been minded to allow the same discount as the sentencing judge did. In our view, a reduction of two years in respect of the plea could not be regarded as inadequate. Such a reduction from the headline would have resulted in net aggregate sentence of 13 years

and the question would then arise whether it would be appropriate to suspend any element of that sentence.

15. The very experienced judge who dealt with this at first instance, influenced by the contents of a probation report, felt it very important that there should be a role for that service, and in order to incentivise cooperation on the part of the respondent, was prepared to suspend the final two years on terms. We can see the merit in that approach and would have been prepared to consider doing likewise. Had it been the situation that an aggregate headline or pre-mitigation sentence of 15 years been identified, had that been reduced to 13 years, having regard to the mitigating factors present, in particular, the plea, and then two years of the sentence been suspended, there could be no expectation an appeal against severity would had succeeded. However, as DPP v. Byrne expressly makes clear, that is not the point. Neither is it the point that the Court, individually, and indeed, collectively, would have been disposed to impose a greater sentence than the one actually imposed. Rather, the question is whether the sentence imposed in the Central Criminal Court was not only lenient, but unduly lenient so as to require the intervention of this Court. That it was lenient is, in our view, not open to doubt. However, the sentence imposed, while lenient in the particular circumstances of the case, could not be seen as insignificant. It is higher than sentences that one is accustomed to see in the case of defilement, but that is to be expected as this was an unusual, indeed, it might be said, singular case.

16. Notwithstanding that the sentence was lenient, we have not been persuaded that it was so unduly lenient as to fall outside the judge's margin of appreciation. The very fact that the judge was being called on to deal with such singular facts, where comparator cases are not readily available, means that a considerable margin of appreciation has to be afforded to the trial judge. In this case, the judge approached his task with conspicuous care and deliberation. The fact that some other judges might have arrived at a higher ultimate sentence to be imposed does not mean that the sentence actually imposed was necessarily unduly lenient. Not without some hesitation, we have come to the view that while the Director has undoubtedly established that the sentence was lenient, indeed, very lenient, that she has not established that it was so lenient as to warrant an intervention by this Court.

17. Accordingly, we will refuse the Director's application.