THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

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

Record No.: 79CJA/16

Between/

The Director of Public Prosecutions

Appellant

- and–

C. McC

Respondent

Judgment of the Court (ex tempore) delivered on the 22nd day of November 2016 by Mr. Justice Mahon

1. The respondent pleaded guilty at the Circuit Criminal Court in Dublin on 29th February 2016 to twelve counts of sexual assault against his niece over a period of approximately six years between 1979 and 1985. The respondent also pleaded not guilty to a number of other counts, but on the second day of the trial, a *nolle prosequi* was entered in respect of them.

2. The learned sentencing judge imposed sentences of eighteen months imprisonment in respect of each of the offences but suspended the entirety of the said terms on conditions, for a period of eighteen months. This is the appellant's application pursuant to s. 2 of the Criminal Justice Act 1993 for a review of the sentences on the grounds that they were unduly lenient.

3. In September 2013 Ms. O made a complaint to the gardaí that she had been the subject of sexual abuse by her uncle, the respondent, following which the respondent was interviewed by the gardaí in early 2014. The incidences of sexual abuse took place on twelve occasions, between 1979 and 1985, when the complainant was between approximately six or seven years old and thirteen years old, and the respondent was in his twenties. The assaults took place on occasions when the respondent was visiting or staying in the complainant's family home, while he was studying for the priesthood. They involved the respondent putting his hand underneath the complainant's underwear, sometimes removing the underwear, and on occasions touching her vagina but without penetration.

4. The respondent was first confronted with the allegations of sexual abuse in the mid to late 1980s by the complainant's parents. He acknowledged that he had indeed abused his niece, and duly informed his bishop in 1989. The bishop contacted the gardaí and they interviewed the complainant's parents at the time. The bishop also informed the social services. Nothing further appears to have been done at that time because of the reluctance of the appellant's parents to pursue the mater, and that remained the position until the complainant herself approached the gardaí in early 2013, following the death of her mother in 2012.

5. It is important at this juncture to emphasise that while the respondent acknowledged in the late 1980s to having abused his niece he minimised the extent and seriousness of that abuse, admitting only to touching her outside her clothing, maintaining at the time that his only attraction was to female underwear.

6. In the aftermath of his disclosure to his bishop, the respondent attended counselling in Dublin for a number of years arranged by the church authorities. In 1994 he was sent to America and stayed there in residential care receiving treatment for approximately nine months, again arranged by the church authorities. While in America, he applied for laicisation. This was granted by the church authorities and he left the priesthood in 1995. Following laicisation he returned to Ireland briefly, but then moved to London as a form of self exile and lived there from that point in time. He was then aged in his late thirties. He married and worked for about twenty years. His work did not involve any contact with children. He complied with the request from the complainant to stay away from her mother's (and his sister's) funeral in 2012, and also from the funeral of his own mother. He also, apparently, relinquished any succession claim he had to a family owned property in Co. Donegal. He also contributed to the cost of counselling for the complainant, at her request.

7. In the course of his sentencing judgment, the learned sentencing judge complimented the complainant on her determination to deal with this historical sex abuse, her courage, her frankness and her honesty in giving her evidence to the court. He went on to state:-

> *"I don't intend sending Mr. McC to prison, and I am doing so simply because of the very unique circumstances in this case where, when confronted so many years ago, the accused man admitted, though not to the extent even today that you allege he had done wrong to you, but nonetheless he had made his admissions, had presented himself to his sister, your mother, to the authorities within his own order, and An Garda Síochána were involved. And he was prepared it would seem to me at that juncture to have these matters resolved and dealt with. Then, I have no doubt that he would have gone to prison. Now, so many years later, I believe it would be wrong on balance and it is simply a balancing procedure, to put a man of his age and circumstances in prison."*

8. The learned sentencing judge also noted the fact that the respondent had avoided living in Ireland following his return from America in the 1990s, and had not re-offended in the lengthy period since these events. He also referred to the fact that the respondent had contributed to the cost of the complainant's counselling, describing it as *"some small gesture"*.

9. In assessing the gravity of the offending, the learned sentencing judge described it as *"a serious breach of trust"* and considered it to be *"less than the most grievous and it is at the upper end of the scale … of wrong doing"*. .

10. In support of the application to review the sentences imposed on the respondent on the basis that they were unduly lenient, it is contended that the learned sentencing judge:

(i) erred in law and in fact in failing when sentencing the respondent to take account of the serious nature of the offences committed, and

(ii) erred in law and in fact in failing to reflect in the sentence an appropriate balance between the fact that the offences were noted by the learned sentencing judge to be at the upper end of the scale and the mitigating circumstances of the case, and

(iii) erred in law and in fact in placing undue weight on the time which had elapsed between the respondent's admission of his involvement in criminal behaviour and the matter coming before the court, and

(iv) erred in fact and in law in indicating that he was treating the maximum sentence for the offending behaviour as been two years notwithstanding the fact that the offence was one for which the maximum sentence was increased to ten years in June of 1991 and for the majority of the period during which the offences were committed, the maximum sentence was one of ten years, and

(v) erred in fact and in law in placing excessive weight on the respondent's admission and plea of guilty as mitigating factors, in circumstances where the respondent at the time of his admission of wrongdoing and in his interviews, had significantly minimised any involvement until a period of time shortly before the time the trial was due to commence.

11. The learned sentencing judge described the circumstances of the case to be unique, as indeed they are in many respects. The level and the extent of the respondent's acknowledgement of his abuse of his niece within a few years of such abuse occurring, and at a point in time when there was only emerging the full horror of child sex abuse, including the sexual abuse of children by members of the clergy, is remarkable. It is nonetheless noteworthy that the acknowledgement on the part of the respondent approximately thirty years ago was to a degree tempered or diluted in that the incidents admitted to by him were somewhat less serious than what in fact had occurred.

12. Furthermore, the fact that, having been confronted by the complainant's parents, the respondent informed his bishop of the allegations, and then, by all accounts, engaged in rehabilitation both here and in the U.S., and then within six years or so sought laicisation, suggests a degree of acknowledgment on his part of guilt and remorse and an anxiety to deal with the abuse, not often witnessed in these types of cases. All of these facts, in addition to the speedy reporting of the allegations to the gardaí by the church authorities, might also be considered by many as unusual features of a case of historical clerical sex abuse from thirty years ago.

13. The other side of the coin, as it were, is the fact that an innocent young girl was abused by her uncle, a person in whom she had placed great trust, in a manner which can only be described as serious and over a prolonged period, albeit on an infrequent basis. The incidences did not, fortunately, involve more serious types of sexual abuse, involving for example, penetration and which frequently come before the courts. More appropriately, the acts complained of in this case might be categorised on the gravity scale on mid range rather than, as described in the court below, as been at the upper end.

14. The complainant's Victim Impact Statement presents a picture of how a now adult victim of sexual abuse suffered by her as a child, had resulted in life long anguish, torment and lack of confidence. One particular sentence in her statement powerfully emphasises the extent of the respondent's breach of trust, "This man was my uncle and I should have been able to trust him". Thankfully, and very much to her credit, the complainant has largely succeeded in turning her life around.

15. Had the complaints of abuse in the late 1980s being the subject of a prosecution at that time, it is almost certainly the case that the appellant would have been sentenced to a custodial prison sentence. However, no prosecution took place at that time, and the matter only came before the courts earlier this year. The matter now comes before this Court by way of an application by the DPP for a review of the sentences imposed earlier this year on the basis that they were unduly lenient.

16. In DPP v. McCormack [2000] 4 I.R. 36, Barron J. stated:-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

17. The *jurisprudence* of this Court dictates that in order for there to be a finding that a sentence was unduly lenient, it is necessary that it be established that the sentence was not merely lenient, but was unreasonably so.

18. A sentencing judge has a wide discretion as to sentence that is imposed in any particular matter. In *DPP v. Byrne* [1995] 1 ILRM 279, it was stated "*...the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand…"*

19. As has already been pointed out, this case has many unique and unusual features, many of which have to be viewed as strong mitigating factors, as indeed they were viewed in the court below.

20. It is only in rare or exceptional circumstances that acts of sexual abuse committed on young children by mature adults, and especially as in this case, adults in a position of trust, will not result in a sentence which involves a custodial element. In the Court's view, at this remove in time, this is one of those cases. It almost certainly would not have been such a case in the late 1980s or 1990s had a prosecution then taken place. However, the learned sentencing judge acted properly within his discretion in deciding to suspend the entire of the sentences imposed for the reasons stated and also because as of now, in 2016, the respondent has undertaken very definite and positive steps throughout the last thirty years to indicate genuine remorse. These include his decision to seek laicisation from the priesthood, to avoid contact with his niece including staying away from family funerals, living in the U.K. rather than in Ireland, giving up his succession rights to a family property, disclosing the sordid detail of his abuse to his wife prior to marriage and responding positively to requests from his niece to assist financially towards the cost of counselling.

21. The Court has however identified an error of principle on the part of the learned sentencing judge to the extent that he imposed

sentences on the basis that all the offences each carried a maximum sentence of two years imprisonment. This was incorrect in that the Criminal Law (Rape) Act 1982 increased the maximum sentence for such offences from two years imprisonment to ten years imprisonment from 5th June 1981.

22. The correct maximum sentences for counts 21, 23, 29, 31, 33, 35 and 37 is therefore ten years, and not two years imprisonment.

23. It is necessary therefore for this Court to quash the sentences imposed by the learned sentencing judge in respect of those counts, and to re-sentence the respondent as of today. In so doing it has had regard to the testimonials and correspondence available to the court in addition to those considered in the court below. Also very much taken into consideration is the fact that the respondent is the sole carer for his wife who has significant and debilitating health problems requiring his constant assistance for ordinary living on a day to day basis.

24. The sentences now imposed in respect of these counts will be four years imprisonment. The Court will suspend the entire of these terms on the same conditions as were directed in the Circuit Criminal Court.

25. In summary, the sentences in respect of counts 13, 15, 16, 17 and 19 remain at eighteen months imprisonment each, suspended in their entirety on the conditions stipulated in the Circuit Criminal Court, and the sentences in respect of counts 21, 23, 29, 33, 35 and 37 will be four years imprisonment each, likewise suspended in their entirety subject to similar conditions.