THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

149CJA/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

C.G.

Appellant

Judgment of the Court (ex tempore) delivered on the 11th day of April 2016, by

Mr. Justice Sheehan

1. This is an application by the Director of Public Prosecutions for a review of the sentence imposed on the respondent CG pursuant to s. 2 of the Criminal Justice Act 1993, at the Circuit Criminal Court in Dundalk on the 20th May, 2015.

2. In the early hours of the 8th February, 2014, the respondent was at home with his partner when he was disturbed by some matters relating to one of his daughters whose mother was abroad at the time with her partner and two young children.

3. The domestic arrangements that had been put in place were that one daughter CA was to stay in a friend's house and the other younger daughter K was to stay with her father, the respondent. Both girls were allowed to go to their home to watch television.

4. As a result of a telephone call between CA and the respondent, the respondent became aware that his youngest daughter was intoxicated and behaving inappropriately. When he heard this he ordered a taxi and went to her home accompanied by his partner. The respondent met his daughter K there and commenced assaulting her by slapping her, as a result of which she fell to the ground. K's older sister CA, then intervened whereupon the respondent took a handgun from his pocket and held it sideways to her face.

5. CA ran on to the landing at which point the respondent picked his daughter K up off the floor hurting her in the process and took her to a waiting taxi. There is some dispute as to whether or not he put the gun in her mouth during the course of the journey to his own home. When the taxi arrived at his home he took K forcibly from the taxi and brought her into his home. He there produced the gun again and at one point in the course of assaulting her he threw the gun at her, he also pulled her hair, boxed her and at one point forced her legs over her head. During the currency of the assault the respondent threatened to kill his daughter who experienced difficulty breathing. A witness described the respondent as appearing like a madman.

6. The respondent's partner asked a neighbour to call the police. K escaped to her neighbour's home and was subsequently taken to hospital. A consultant paediatrician described a wide range of physical injuries suffered by her, including serious injuries to her face, shoulder, elbows, forearm, wrists, hands, legs and feet. She had no bone injuries and was discharged from hospital a week later.

7. She needed to use crutches for four months and subsequently collapsed in September following a panic attack and had to be taken to Temple Street Hospital in Dublin. There were two victim impact reports prepared by different probation officers on behalf of K and CA. Both reports noted the devastating effect that these assaults had on their lives.

8. In the case of K the probation officers says that she is only now at the outset of a lengthy path to recovery. At the time of the report she was deeply distressed by her father's lack of expressed remorse. Her progress in school has been hampered and her deteriorating physical health had brought an end to her involvement in Gaelic football and other sports. What particularly troubled her was the fact that she had prior to this night a close bond with her father and she was struggling to understand how he could have assaulted her in the way that he did.

9. With regard to CA the probation officer reports that the crime has impacted on her at an emotional, social and psychological level, but the report also states that CA has matured greatly over the fifteen months since the incident occurred and that CA was adamant about completing her education.

10. In the course of his sentencing remarks the learned trial judge deals extensively with the victim impact reports and notes the severity of the offending behaviour. During the course of his sentencing remarks he described that what happened on the date in question at the respective locations as "shocking", "horrific", and "outrageous behaviour". The sentencing judge also noted that the appellant had made threats made to K that he would drown her in the river, knee cap her and kill her. In referring to these threats he said that she must have been petrified. He also went on to note that while the respondent was intoxicated at the time he said that that was not a mitigating or excusing factor.

Personal circumstances of the respondent

11. The respondent CG is a 42 year old father of three children. At the time of sentence he had no contact with his two daughters and only had supervised access to his young son. He described himself as single at the time of sentencing. As a result of his offending behaviour, his relationship with his partner had ended.

12. He was born and raised in Dundalk. His father died of alcohol health related issues when he was twelve years old and his mother had died when he was sixteen. He is the youngest of twelve children. His wife divorced him in 2007 when he was in custody serving a prison sentence.

13. The probation report which was submitted to the court notes that the respondent had a significant addiction history and stated that during the six month period that he spent in custody prior to sentence, he had engaged with counselling services. It was also noted that when he subsequently obtained High Court bail he underwent a residential treatment programme at Cluain Mhuire in Athy. The probation report notes that on his return to prison he continued to work hard on his recovery and that he participates in counselling aftercare meetings and group therapy.

14. The probation report concluded:-

> "During this assessment process there were signs of a growing awareness by the respondent of his need to change his behaviour."

15. The respondent has a number of previous convictions, sixteen in total. The most serious of these previous convictions were those recorded on the 27th August, 2000, when he was convicted and sentenced in respect of four offences at the Special Criminal Court. These offences included the possession of firearms and ammunition in suspicious circumstances. Prior to that he had been convicted on the 30th March, 2000, of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 and had been sentenced to two years imprisonment for that offence. In 2008 he was sentenced to four months imprisonment for an offence under the Public Order Act and later that year he was convicted of drunken driving and driving without insurance. In 2009 he was convicted of producing an article in the course of a dispute or fight contrary to s. 11 of the Firearms and Offensive Weapons Act in respect of which he received a sentence of six months imprisonment that was suspended for two years. On the 8th October, 2010 he had been convicted of unlawful possession of drugs contrary to s. 3 of the Misuse of Drugs Act 1977, as amended and on the same date he was convicted of public order offences.

The indictment
16. On the 5th March, 2015, the respondent pleaded guilty to the following counts on the indictment:-

Count 1 Assault causing harm upon K. The maximum sentence for this offence was five imprisonment and a sentence of four years imprisonment was imposed.

Count 4 Assault causing harm to CA. A sentence of three years imprisonment was imposed on the respondent in respect of this offence. The maximum sentence was five years imprisonment.

Count 5 Making a threat to K. A sentence of five years imprisonment was imposed in respect of this offence where the maximum sentence was ten years imprisonment.

Count 7 Possession of a firearm without a firearm certificate contrary to s. 2 of the Firearms Act 1925, as amended. A sentence of four years imprisonment was imposed on the respondent in respect of this offence. At the time the judge believed that the maximum sentence for this offence was five years imprisonment.

17. The respondent was indicted on seven counts, but the Director of Public Prosecutions accepted a plea of guilty on counts 1, 4, 5, and 7 and entered a nolle prosequi on counts 2, 3, and 6. The plea was accepted on the basis of the full facts being disclosed to the sentencing judge.

Submissions
18. The Director of Public Prosecutions initially sought a review of two of the sentences imposed, namely those imposed on counts 5 and 7 on grounds of undue leniency pursuant to s. 2 of the Criminal Justice Act 1993. But at the oral hearing in this Court the appeal in respect of count No. 7 was withdrawn and counsel indicated to the court that he was proceeding only on count No. 5 which was the count in which the sentence of five years imprisonment had been imposed in respect of making a threat to K.

19. In the course of his submissions on behalf of the Director of Public Prosecutions counsel argues that the learned trial judge erred in the imposition of the penalty imposed on count 5 having regard to the available penalty and further having regard to all the penalties that were imposed in relation to the balance of the counts. Counsel for the appellant submitted that by failing to impose a higher penalty in respect of this offence or in the alternative to impose a consecutive element in the sentencing such as would result in the appellant being incarcerated for a lengthier period, the sentencing judge had imposed a sentence that was unduly lenient. Counsel submitted that the learned trial judge in imposing an overall sentence of five years imprisonment had therefore committed an error of principle. In support of this application counsel submitted that the sequence of events, the tender age of the victims, the fact that both were his children and in his sole care within the jurisdiction at the time of the offending, as well as the sustained nature of the period of the violence giving rise to the offences, established that this offending in respect of each count was at the very highest given the accumulation of circumstances attaching to each offence.

20. Counsel for the respondent on the other hand contends that the case was summarised comprehensively by the learned sentencing judge prior to the imposition of sentence and concludes that the learned sentencing judge correctly identified the appropriate sentences in this case. Counsel for the respondent submits that there were substantial points of mitigation that supported the sentences that were imposed and further submitted that when all the circumstances of the offences as committed by this offender are considered then the sentences imposed are within the appropriate range of sentences and accordingly are not a substantial departure from what would be regarded as an appropriate sentence. Counsel for the respondent also submitted that this was not a case for a consecutive sentence.

21. Section 2 of the Criminal Justice Act 1993, provides the legislative framework within which to consider a review of a sentence for undue leniency and it states the following:-

> "(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.
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> . . .
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> (3) On such an application, the Court may either –
>
> > (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

22. The principles governing the law in relation to undue leniency appeals pursuant to s. 2 of the Criminal Justice Act 1993, were summarised in a judgment of the Court of Criminal Appeal in *The People at the Suit of the Director of Public Prosecutions v. Derrick Stronge* [2011] 5 JIC 2301, where it was stated that:-

> "From the cases cited at the end of this paragraph, the following principles can be said to apply in an application for review under s. 2 of the 1993 Act. These are:-
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> (i) The onus of proving undue leniency is on the D.P.P..
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> (ii) To establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former.
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> (iii) In the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate.
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> (iv) This task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal.
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> (v) The fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise.
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> (vi) It is necessary for the divergence between the sentence imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified: and finally
>
> (vii) Due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made.

The relevant cases are The *People (D.P.P.) v. Byrne* [1995] 1 ILRM 279, *The People (D.P.P.) v. McCormack* [2000] 4 I.R. 356 and *The People (D.P.P.) v. Redmond* [2001] 3 I.R. 390."

23. In applying these principles to the present case we first of all have to consider the applicant's submission that this was a proper case for a consecutive sentence. We noted that the sentencing judge considered that possibility. Counsel for the Director has relied on the Court of Criminal Appeal judgment in *DPP v McKenna (No. 2)* [2002] 2 I.R. 345, and has also sought to argue that the violence used in the present case was such that it could properly be described as depraved. We have not been persuaded by the argument that the McKenna judgment is an authority on foot of which we ought to hold that this is a proper case for a consecutive sentence. This, as we have said, was an issue considered by the sentencing judge at the time and it was open to him to conclude as he did, that this was not an appropriate case for a consecutive sentence.

24. Counsel submitted that the circumstances of the threat to kill ought to have attracted a higher sentence than one of five years imprisonment. We agree with the sentencing judge that the offending in respect of this particular count falls at the highest range calling for a substantial sentence. Indeed if this Court had been called on to sentence the respondent in this case, we might well have imposed a more severe sentence than one of five years imprisonment. But that is not the test.

25. There were factors in favour of the appellant, including his engagement with counselling services, his attendance at Cluain Mhuire and the plea of guilty in circumstances where the trial could not have proceeded the day on which the plea was entered. In those circumstances the sentence imposed while undoubtedly lenient is within the margin of appreciation that we are required to afford a sentencing judge and accordingly we dismiss the application for a review of the sentence.