THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

287/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Gerry Broughan

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 26th day of May, 2017 by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentences under appeal are sentences of eight years, seven years and seven years on three counts of defilement of a child under 15 years of age contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act 2006 and a sentence of six years imprisonment in respect of the offence of sexual assault of a child contrary to s. 2(2)(a)(i) of the Criminal Law (Rape) (Amendment) Act 1990. All sentences are concurrent so the effective sentence appealed is one of eight years imprisonment. The sentences were imposed in the Circuit Court in Naas on 4th December, 2015. Details of the offences were as follows:

> i. **Count 1**: An offence of defilement that occurred between 21st and 23rd January, 2014 in relation to sexual intercourse with L.M., a sentence of eight years was imposed on this count.
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> ii. **Count 2**: Defilement of a child under 15 years that occurred between 21st and 23rd January, 2014 which involved a sexual act with L.M., by penetrating her mouth with his penis, a sentence of seven years was imposed on this count.
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> iii. **Count 4**: Defilement of a child on a date between 21st January, 2014 and 1st February, 2014 which involved engaging in a sexual act with L.M. by penetrating her mouth with his penis, a sentence of seven years was imposed on this count.
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> iv. **Count 5**: Sexual assault of a child on a date between 31st January, 2014 and 1st February, 2014 by placing his tongue in her vagina, a sentence of six years was imposed on this count.

2. The background to the offences is that the complainant's date of birth is 14th April, 1999 while the accused man's date of birth was 19th November, 1975. The offences occurred at the appellant's home in Monasterevin. The appellant was in a relationship with a woman whose daughter was a school friend of the injured party. The circumstances of the offending were that the complainant went to the home of the accused for a sleepover with her friend, the daughter of the appellant's partner. Initially, there was contact between the parties through Facebook and, as the trial judge pointed out, some of these involved suggestive messaging from the appellant. The complainant indicates that matters progressed to a stage when he would touch or "grab" her bottom. Then there was an occasion when he kissed her on the lips and placed his hands on her hips. Then, between 21st and 23rd January, 2014, the complainant was sleeping over with her school friend. The appellant's partner was out working and the complainant's school friend was downstairs with her little sister. The complainant went upstairs to charge her phone and she explains that the appellant came into the bedroom. There was kissing and he touched her "all over". Initially, the appellant was fully dressed but then he pulled down his tracksuit and boxers. In the room of the complainant's friend he told the complainant that he did not have a condom but that he "knew when to get out". He pulled down her tracksuit. He guided her head towards his penis and put his penis in her mouth. Later he entered her vagina with his penis. The complainant described a second incident which occurred shortly after. After the complainant's parents contacted the Gardaí, the appellant was arrested and when interviewed he made admissions.

3. In terms of the appellant's background and circumstances, he was 38 years of age at the time of the offence. At that stage he was in a relationship although that relationship has ended and he has entered another. The appellant had a number of previous convictions but these were quite limited and did not involve anything of a sexual nature.

4. The complainant read a victim impact statement to the court and it was clear from that statement that these events had affected her to a very significant extent. The judge indeed described the impact on the complainant as "catastrophic". The sentencing court also learnt that the complainant had Asperger's Syndrome.

5. A number of grounds of appeal have been formulated. It is said that the judge's approach to sentencing was not an appropriate one in that he identified the offences as being in the higher range and then set out the mitigating and aggravating circumstances. The appellant submits that this was not the correct approach and that what should have happened was for the trial judge to identify the appropriate sentence taking into account aggravating factors and then applying mitigation. The judge is criticised for putting the offences in the higher range, though initially the complaint was made, incorrectly, that the judge had placed the offences in the highest range. Attention is drawn to his comments that the sexual abuse could be described as disgusting, denigrating, repulsive, horrific, shocking and humiliating, and it is said that those remarks indicate that he was not approaching his task of sentencing in the dispassionate way that he ought to. Overall, it is said that the judge placed too much weight on the aggravating factors and he is criticised for his reference to the impact of the offences on the injured party as being "catastrophic". It is said that insufficient regard was had to the mitigating factors present, including the fact of an early plea. It is pointed out that arrangements were being made to have the case transferred to Dublin where video link facilities would be available but that this was unnecessary because the appellant indicated at an early stage that he would be pleading guilty.

Comparators

6. Both sides have referred to cases that they regard as helpful comparators. The appellant has referred to the case of *DPP v. Farrelly* [2015] IECA 302 where the sentence appealed was one of three years imprisonment with 12 months suspended. The Court does not regard that as a particularly helpful comparator. The complainant in that case was 16 years and nine months old and the judge had given consideration to a non-custodial disposal before proceeding to impose the sentence that he did. That was a very different case indeed. However, the case which the appellant says is most in point is the case of *DPP v. W.S.* [2015] IECA 220. That

case does have certain similarities in that there were counts of defilement and also a count of sexual assault. There the point of contact between the complainant and injured party was through a church group. The contact was at a time when the complainant was 14 years of age. However, the case is noteworthy for the fact that the judge in the Circuit Court had felt that the maximum sentence available on the defilement charges was inadequate and had imposed the effective sentence on the sexual assault where he imposed a sentence of nine years imprisonment with three suspended, notwithstanding that it was clearly the least serious of all the offences before the Court in that it involved kissing the complainant's breast. The Court of Appeal dealt with the matter by grouping the defilement charges into two groups and in respect of each group assessed the gravity of the individual offences as meriting a sentence of four years imprisonment before discounting for mitigation. A discount of 18 months was afforded in respect of each four year sentence but the two groups were made consecutive to each other so that the effective sentence was one of five years imprisonment but with the final year of that five years suspended. In the Court's view there are factors present which mean that the W.S. case is of limited value.

7. In particular, the impact of the offending in the present case was particularly grave as emerged so starkly from the victim impact report read by the complainant. The fact that the complainant suffered from Asperger's Syndrome meant that she was a vulnerable and fragile person. The fact that the offending occurred at a time when she was sleeping over in the appellant's house as the guest of her school friend adds an extra dimension. The DPP has drawn attention to, and placed a particular emphasis on, the case of *DPP v. Martin Stokes* [2017] IECA 69. However, again there are a number of facts present which limits its value as a comparator. First of all, there was an 18 day trial and the charges included, as well as a charge of defilement, a charge of rape. The sentence imposed in the Central Criminal Court was one of 12 years imprisonment with the final two years suspended in relation to the rape charge and a similar sentence was imposed on the defilement charge. This Court reduced the sentence to one of ten years but with the final three years suspended. However, in that case, while the complainant was 14 years of age at the time of the offence the appellant was 20 years old. The Court was also influenced by the fact that it took four years for the case to come to court which obviously in the context of a very young man, as the appellant was, was a significant consideration. It seems to the Court that none of the comparators to which we have been referred are really in point.

8. What is clear is that these were very serious offences. The age gap was very considerable, the complainant was a school friend of the daughter of the appellant's partner, the injured party was visiting the house for the purpose of a sleepover with a school friend, there was an element of grooming, the element of the gradual progression of sexual activity, despite the fact that the appellant specifically adverted to the risk of pregnancy he proceeded to have intercourse without using a condom. In the Court's view this was a case that had to be met with a significant sentence. Time and again this Court has made it clear that merely because it might have been minded to impose a somewhat different sentence or that individual members of it might have been so disposed does not provide a basis for intervention. There is no doubt that the sentence imposed here was a significant one, indeed a severe one, indeed it seems to be at the higher end of the spectrum in terms of the sentences that have been passed for this type of offence. The question though is whether it was unduly severe and whether it falls outside the available range for such offending.

9. This court finds itself in agreement with the general approach to the case taken by the sentencing judge. The one matter that causes some concern is as to the extent to which mitigating factors were taken into account and reflected in the sentence imposed. There is no doubt that the judge in sentencing did refer to the fact that the appellant had been in a relationship which came to a end when these matters emerged, and that he was now in a new relationship. The judge referred also to the appellant's strong work record and to the absence of addiction issues. Specifically the judge said that in mitigation there was the plea of guilty, the very early plea of guilty, and he referred to the co-operation that was forthcoming, to the acceptance of responsibility and the making of admissions. The judge added that he was satisfied that the plea of guilty was of substantial benefit to L.M. and to her family but in particular to L.M., in that she was saved the trauma, stress and anxiety of having to give evidence if the case proceeded to trial.

10. It is therefore clear that the judge was alert to the significance of the plea of guilty, what is not clear, given how the sentence was structured is how the mitigating factors and in particular the early plea impacted on the sentence that was actually imposed. This Court has commented on a number of occasions that the fact that what is generally regarded as best practice of identifying a headline sentence before mitigation and then applying mitigation is not followed will not necessarily lead to a sentence being quashed.

11. In the Court's view the early plea here was a significant factor, that was so both for all the reasons referred to by the sentencing judge but also because it was offered at a sufficiently early stage so as to obviate the necessity for transferring the case off circuit. The Court feels that it would have been appropriate to have this addressed specifically in the sentence. Accordingly, for this reason the Court is prepared to suspend the final twelve months of the longest sentence that was imposed, the eight year sentence. The sentence will be suspended for a period of three years post release from custody. It will be a condition of the suspended sentence that he enter a bond to keep the peace and be of good behaviour and also that he will be subject to the directions of the Probation Service during that period of three years post release. So providing will strengthen the provision that was made by the Circuit Court judge for three years post release supervision, which of course remains in place.