THE COURT OF APPEAL

Record No. 222/2015

Mahon J.
Edwards J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

TV (NO. 2)

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 7th day of December 2017 by Mr. Justice Mahon

1. The appellant was convicted by a jury at the Central Criminal Court of twenty five sexual offences. Eighteen were of rape contrary to common law and as provided for in s. 48 of the Offences Against the Person Act 1981 and s. 2 of the Criminal Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. Seven were of rape contrary to s. 4(1) of the Criminal Law (Rape) (Amendment) Act 1990. Concurrent sentences of fifteen years were imposed in respect of each of the counts, to date from the 18th June 2015. He has now appealed against sentence, his conviction appeal having been dismissed by this Court in June 2017.

2. The appellant is a Lithuanian national aged thirty six years. He and his family have lived in Ireland since mid 2004 including his wife, whom he married in 2001, and his children one of whom, his daughter, VV, is the complainant. She was born on the 31st August 2001, and is now aged approximately fifteen years.

3. In April 2012, when VV was approximately eleven years old, she disclosed to a friend that she was being sexually assaulted by her father. A teacher in the complainant's school was informed, and the HSE was notified within days. An investigation was then undertaken by the HSE and the gardaí. The complainant was immediately removed from the family home. She was medically examined at the sexual assault treatment unit in Galway. The gardaí searched the family home under a search warrant and certain items were seized, including two vibrators. The complainant was interviewed on a number of occasions by appropriately trained specialist interviewers. The appellant was arrested on the 15th May 2012 and was interviewed on three occasions while in custody on the same date. Further statements were taken from the complainant and from her foster mother.

4. The offences occurred between 2008 and 2012 when the complainant was between seven and eleven years old. She alleged that the appellant routinely raped her on a weekly basis with most offences taking place in the family car.

5. The grounds of appeal against sentence are summarised in the appellant's written submissions in the following terms:-

> • It is respectfully submitted that the learned sentencing judge imposed a sentence of excessive duration upon the appellant. The appellant has a number of previous convictions relating to road traffic offences. None of the previous convictions relate to violence or sexual assault. The appellant is a foreign national who differences in language and culture serve to isolate him from the rest of the prison population. This isolation will result in an increased severity of his sentence. During the course of the trial of the appellant there was no allegation of unusual violence or intentional humiliation of the complainant. These issues taken together impart that the learned trial judge deviated from the normal practice of sentencing and imposed a sentence of excessive duration upon the appellant.

6. In the course of his sentencing judgment the learned sentencing judge specifically excluded the existence of previous road traffic convictions to be anything other than a *minimal factor* in this particular case. He also acknowledged that there would be an added difficulty for the appellant as a foreign national in serving a lengthy prison sentence in this country, but he observed that:-

> *"The extent to which a sentence might be less where an non national is concerned is far more limited than was once the case, because we now live in a society where there are people, many people from different cultures and different backgrounds and different nationalities…"*

7. The victim impact statement which was read to the Court below was powerful and very clearly identified the very serious and long lasting effect on the complainant of the offences committed by the appellant, her father. She referred to her *whole childhood* having been taken from her and how that childhood was destroyed by fear and a sense of powerlessness. She described how the severity and frequency of the sexual assaults perpetrated on her caused her to regularly feel sick. She described her life as having been destroyed and how she now feels different to everyone else. In relation to the appellant's decision to contest the test, the complainant stated:-

> *"He made me go through a court case and lied all the way through it. He made me go in front of strangers and tell them all about the horrible things that happened to me, even in the end he had to make me suffer. He ruined my life and then tried to make a liar out of me."*

8. In his sentencing judgment the learned sentencing judge usefully summarised aspects of the dreadful experiences endured by the complainant and its effect on her when he said:-

> *"…she made the point that she would see the accused's car waiting for her after school and knew what was going to happen. She said her whole childhood was taken from her and she wasn't allowed any friends, no one came to her house, she didn't have parties. They didn't speak English at home so speaking to others at school had always been difficult. She wasn't assisted with her homework. She wasn't given the opportunity to take up hobbies and she feels that*

that was because the accused was afraid that she would tell someone that he was raping her persistently…. She said now that she lives in fear that someone is going to find out what is, has happened, that she lives a life of shame and lies. So, whilst the rape is no longer continuing she says it continues to ruin her life. Normal activities in life do not give her pleasure such as buying new clothes or going to discos because she is living, as she sees it, a life of shame."

9. The Court has been referred to a number of previous decisions involving sentences for rape and other sexual offences. The Court was referred to the case of *DPP v. Drought* [2007] IEHC 310 wherein Charleton J. conducted an analysis of sentences for sexual assault. In the course of his judgment in that case Charleton J. said that:-

"A sentence of ten or eleven years imprisonment appears to be unusual, even after a plea of not guilty to rape, unless there are circumstances of unusual violence or pre-meditation… The degree to which the perpetrator chooses to violate and humiliate the victim can bring the appropriate sentence into the upper end of the band of nine to fourteen years."

10. Comparing sentences in different cases concerned with the rape or sexual abuse of young children is fraught with difficulty because of the very different circumstances that will often exist in each case. That problem was referred to in a judgment of this Court in *DPP v. R.K.* [2016] IECA 208 when the following observation was made:-

"Cases vary significantly, and even in those cases of offending behaviour which at first sight appear very similar in character, on closer examination, significant differences will often emerge. For that reason, a degree of caution is required when comparing sentences in one case with sentences in another.."

11. The offending in this case was particularly serious. Particular facts place the offending as severe and on a high scale. The rape and sexual abuse of a young child involves the most serious breach of trust where the abuser is the child's parent as it risks the almost complete destruction of childhood, as, to a very great extent, occurred in this case. This case involved repeated acts of rape perpetrated on a child between the ages of seven and eleven years on an almost weekly basis. The prolonged and routine nature of the rapes placed the offences at a very high point in the scale of gravity. The consequence has to be a lengthy custodial sentence.

12. A sentence of fifteen years is undoubtedly a lengthy sentence and one reserved for very serious offending. Sentences of such length (and indeed longer) are not uncommon for offences as grievous as those of which the appellant has been convicted and which he contested fully. Sentences of a similar nature were imposed or upheld in a number of cases in relatively recent times including *DPP v. FG* [2014] IECA42, *DPP v. LD* [2014] IECA 53, *DPP v. Griffin* [2011] 1 IECCA 62 and *DPP v. SP* [2009] IECCA, to mention but a few.

13. Mr. Bowman S.C. (for the appellant) is critical of the failure of the learned sentencing judge to follow best practice by following a two stage process in formulating the appropriate sentence. In the Supreme Court case of DPP v. M. [1994] 3 IR 306, Egan J. observed that *"..one should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating should then be looked at and an appropriate reduction made"*. While this criticism may be justified in this case the failure to approach sentence in this manner cannot of itself warrant interference by this Court. The sentencing judgment was by any standard comprehensive and measured.

14. Insofar as rehabilitation is concerned it is, of course, very much in the public interest that an offending and especially one involved in the commission of serious sexual crime involving a young child should, where appropriate, have built into his sentence some incentive to rehabilitate. Such was very much the view expressed by this Court in *DPP v. ML* [2015] IECA 144. In the instant case, the issue of rehabilitation was specifically considered by the learned sentencing judge but he decided against making provision for it on the basis that whether there was any hope for rehabilitation, in the circumstances of this case was speculative. He was entitled to take this view on the facts in this case.

15. Although not particularly relevant to that issue insofar as it featured in the sentencing in the Court below, it is noteworthy that in the course of the hearing of this appeal the issue of rehabilitation and remorse was addressed in some detail by a member of the Court, but it did not prompt any expression of remorse or acceptance of guilt from the appellant despite having spent two and a half years to date in prison.

16. In this case the stand out features are the fact that the offences concerned the repeated and frequent raping of the appellant's young daughter over a prolonged period. While there had been worse cases, and unfortunately even worse cases will come before the courts in the future, this case must rank in the higher bracket of the gravity scale.

17. Bearing in mind that the offences carry a maximum sentence of life imprisonment, a fifteen year term represents, in the Court's view, a reasonable outcome for the appellant. It was certainly within the discretion available to the learned sentencing judge. No error of principle has been established.

18. For these reasons the Court will dismiss the appeal.