



THE COURT OF APPEAL

**Finlay Geoghegan J.
Irvine J.
Hogan J.**

Record No. 108/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Muhammad Hussain

Appellant

Judgment of the Court (ex tempore) delivered on the 18th day of May 2015, by

Ms. Justice Finlay Geoghegan

1. On the 28th March, 2014, following a ten day jury trial, the appellant Mr. Hussain was convicted before the Circuit Court of an offence of which he had been charged namely within the state intentionally meeting or travelling with the intention of meeting a child having met or communicated with that child on two or more previous occasions and doing so for the purpose of doing anything that would constitute sexual exploitation of the child contrary to s. 3(2A) of the Child Trafficking and Pornography Act 1998, as inserted by s. 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007.
2. The offence of which the appellant was convicted took place on the 22nd of July, 2011, and the sentencing hearing took place on the 7th April and on the 11th April. The trial judge imposed a four year custodial sentence, taking into account thirteen weeks which had been served in custody.
3. The appellant appealed against the severity of that sentence and for the reasons set out in a written judgment delivered by the court on the 16th February, 2015, the court allowed the appeal, vacated the sentence imposed by the trial judge on the appellant and remanded the appellant in custody pending a sentencing hearing and decision on sentence. The court also directed at that time, that a probation report be obtained and a Governor's report and an education report from the authorities in the Midland Prison, in which the appellant was in custody.
4. The court also gave an opportunity for any additional information to be handed in which counsel and solicitor for the appellant wanted us to consider in relation to mitigation. The Court has received a report from the Assistant Governor on the 12th March, 2015, which indicates that the appellant since the date of his original sentence and whilst in custody and I perhaps should indicate at this stage that the reason the court is taking these into account is that in accordance with well established principles and practice the court is sentencing now the appellant as of today and therefore takes into account matters which have occurred since the date of conviction and original sentence. The Governor's report indicates that he is on an advance privilege level and that he has received no disciplinary reports and that he is attending classes and the education report sets out certain classes that he is following in the prison.
5. A probation report was then received by the court dated the 23rd April, 2015, and regrettably the court must observe that the probation report is not helpful and is not satisfactory in a number of respects. Firstly, it misstates the offence and I think it important to state that the appellant was not convicted of trafficking a child for the purposes of sexual exploitation as is recorded in the probation report. That would be an inherently more serious offence than the offence of which he was convicted. Secondly, he did not plead guilty as is recorded in the probation report. Thirdly, and what is perhaps the most disturbing and important to this court for sentencing purposes the probation report under the heading of risk assessment is in some respects contradictory and it also again appears to be based on something which was not relevant to this offence. It refers to certain types of assessment and firstly states, that the RM 2000 assessment places the appellant in the medium category for violent recidivism and the court wishes to make clear that there was no violence involved in the offence of which the appellant was convicted and there was no evidence of any prior conviction in this jurisdiction of violence and it appears that there is no information in relation to any offence in any other jurisdiction.
6. In relation to sexual recidivism which is relevant, the same assessment placed him in the high category for sexual recidivism, but then some other instrument referred to as "the Stable and Acute 2007 Instrument was used to assess the dynamic risk factors and the probation officer reports that he represents a low risk of reconviction, but unfortunately the probation officer does not assist the court in any way in how it should view these conflicting results.
7. The only other relevant matter perhaps, to the view which the court is now taking on sentence is that the probation officer reports that appellant is not engaged in any offence focused work during his sentence. The court made inquiry of counsel for the Director and Mr. Hussain as to whether they are aware if there is any such course available within the Midland Prison and the counsel for Director is unaware and counsel for Mr. Hussain believes it is unlikely and I will come back to that.
8. This court has already in some detail in the judgment delivered set out the matters which are relevant to considering where on the spectrum of gravity this offence should be placed. That is dealt with in paras. 52 to 60 of the judgment already delivered and I do not propose repeating. It also has made clear in that section of its judgment that the sentence to be imposed by this court, as it believes was done by the trial judge, is on the basis of the facts at the sentencing hearing as distinct from what was proved beyond reasonable doubt during the trial. Nevertheless it obviously must be based on facts which relate to the offence which were proved beyond reasonable doubt or accepted at the sentencing hearing and on that basis this Court for the reasons set out in that judgment is of the view that it should now sentence upon the basis that the appellant travelled to meet with an intention of inviting as distinct from either inducing or coercing the child to commit a sexual act.

9. The court has had regard to the nature of the sexual act intended as set out in the judgment and taking into account those matters, the court is of the view that the gravity of this offence as committed by this offender is at the lower end of the spectrum. In doing so the court wishes to draw attention simply again to what is stated in its judgment that the offence, no matter where it is placed on the spectrum of gravity is an offence which is inherently a serious offence.

10. Considering all the relevant facts in relation to the offence committed by this offender, the court considers that before mitigation the appropriate sentence would have been a sentence of four years.

11. In relation to mitigation, the relevant factors are that the appellant has no previous relevant convictions. He had a good work ethic record in this jurisdiction and was supporting his family in Pakistan. When arrested, he made certain admissions of fact to the gardaí and whilst lacking some insight into the nature of the offence, he did cooperate. Post conviction he did express remorse and did not appeal. He had originally, when told of the age of this child, ceased contact and it was not he who reactivated the contact and the arrangements to meet the child were in fact made not in a phone call with the child as he believed, but with a third party.

12. He is a foreign national, one who is far from home and is serving his sentence in this jurisdiction without family support, though the court has noted that he does have support from members of the Muslim community and in particular, I think, from a Mosque which he had attended.

13. In taking into account those mitigating factors, the court is of the view that the appropriate sentence as of now is a sentence of three years with the final nine months suspended on the following conditions: first, that henceforth he keep the peace and be of good behaviour and second, that if the prison authorities offer him any course or counselling relevant to the offence committed that he will participate in such course or attend such counselling. By reason of the uncertainty as to the existence of such services within the Midland Prison, it is conditional on the prison offering same.

14. The sentence will be backdated to the date of imposition of the sentence in the Circuit Court and take into account the thirteen weeks in custody prior to that date as did the sentence in the court below. The final matter is that it follows from the nature of the offence that the court must declare that the relevant provisions in the Sex Offenders Act, 2001, apply to the appellant and the certificate will issue from this court in relation to that matter.

15. The court has also taken into account in imposing sentence that the immigration authorities have notified Mr. Hussain that on his release he will be deported and that Mr. Hussain has indicated that he will not be appealing or contesting in any way that deportation.