THE COURT OF APPEAL

[CJA23/13]

The President
Sheehan J.
Edwards J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

V.
JAMES MAHER

RESPONDENT

JUDGMENT of the Court delivered by the President on the 10th day of February 2015

1. This is an application by the Director of Public Prosecutions under s. 2 of the Criminal Justice Act 1993, for a review of sentences imposed on the respondent which the applicant contends were unduly lenient.

2. On 14th February 2012, the respondent pleaded guilty to five counts of indecent assault in respect of one injured party. On 10th July 2012, he pleaded guilty to a further fourteen counts of indecent assault committed on another injured party. The first set of offences took place during 1984, in a town in County Clare. In respect of the second injured party, the offences occurred between 1st January 1982 and 17th March 1984 in County Clare. The sentence hearing took place on 19th November 2012, and the learned sentencing judge gave judgment on 14th January 2013, when he imposed sentences of two years imprisonment on each of the five counts in respect of the first injured party, and on each of the fourteen counts in respect of the second. The judge ordered that all of the sentences were to run concurrently.

3. In coming to his decision, the learned judge considered that the maximum sentence he could impose for each offence was imprisonment for two years. He had been informed by Counsel for the Director that this was the maximum sentence applicable at the time when the offences were committed. A critical question in this application is whether that was correct. The Director's Counsel submitted that the relevant maximum sentence was ten years imprisonment. Counsel for the respondent accepted that the prosecution was not bound on this application by the submission made at trial that the Director now contends was incorrect. He did not, however, concede that the appropriate maximum sentence was ten years imprisonment.

4. If the Director's contention is correct, it follows that the learned trial judge proceeded on an incorrect basis in thinking that he was actually imposing the maximum sentence permissible for any one count. If the maximum sentence was two years imprisonment, the question nevertheless arises as to whether the sentences imposed were overall unduly lenient and, specifically, whether at least two of the sentences should have been ordered to run concurrently since there were two separate victims who were subjected by the respondent to repeated indecent assaults.

The Facts of the Cases

5. The respondent was in his early 40s at the time when the offences occurred. He was the manager of an underage hurling team. In that connection, he met one of the victims of the offences. He knew the boy's family and was a visitor to the house and went drinking with his father. He used to drive the boy to hurling training and the abuse began with the respondent fondling him during these journeys. The abuse escalated to masturbation and oral sex. The boy was 11 years old when the abuse began and he was 12 years and 13 years at the time of the offences in the indictment to which the respondent pleaded guilty.

6. The accused met the second boy when he gave him a lift in his car. The respondent gave him a false name and arranged to meet him again. The abuse in this case escalated in similar fashion. The respondent brought the boy to the offices where he worked and abused him in the toilets there. On another occasion, he brought him to Dublin and they stayed overnight in a guesthouse, sleeping in the same bed, with the respondent pretending to be the boy's father.

7. One of the injured parties provided a victim impact statement which was read to the Court and the other gave evidence. In each case, the abuse had a profound and long-lasting impact. They made attempts on their lives. They suffered devastating psychological consequences and have been living with the consequences of the abuse ever since. They descended into drink and drug-dominated lives. One said that his life had been "totally messed" and he blamed his whole situation on what had happened to him. The other said that he sank into a deep depression as a result of trauma, shame, guilt and feelings of hopelessness. He has been diagnosed with depression and will need to remain on mediation permanently: "I suffered enormous pain and will always remain scarred by the actions of this man".

The Judge's Decision

8. The respondent was aged 69 years at the date of sentence. He had unconnected previous convictions which the judge held were irrelevant. The trial judge noted that the respondent had been arrested in the first case, and in the second case, he had come voluntarily to the Garda station. He cooperated with the questioning to some extent. He denied that there had been masturbation but agreed otherwise on the sequence of events and that there had been inappropriate touching between him and the boys. It was also the case that he had made statements in which he gave further accounts of events which the injured parties had not remembered.

9. The judge found that there were significant mitigating factors. The respondent had indicated at an early stage that he would plead guilty and then did so which was a significant element in the case and a premium had to be put on the pleas of guilty. The respondent had insight into what he did and the impact on his victims. The offences were committed in the early 1980s, and if they had been disposed of at that time, they would have been dealt with under a different sentencing regime. The time lapse was also significant because the respondent had not reoffended since. He had no other relevant convictions. The judge felt that he had been "otherwise severely punished, suffering shame and humiliation in the small community where he lives".

10. The judge acknowledged that there were also aggravating features, in that, first, there were two victims. Secondly, the abuse occurred over a long period and it happened on frequent and regular occasions. There was a breach of trust, at least in the case of the boy who was on the hurling team in the GAA club. The respondent had abused his position as manager of the team and had ingratiated himself with the family. There were also some similar features in the case of the other boy because, again, the respondent groomed him and exploited his position as the owner of the car who could give the boy lifts and he engaged in deceit in pretending to be his father.

The Sentence
11. The learned trial judge imposed sentence on 14th January 2013, having given the matter consideration in the period from 19th November 2012, when the evidence was heard. He found it a difficult case. The judge imposed a prison sentence of two years on all counts to run concurrently. He said that this was "the maximum sentence but, recognising the mitigating factors, in particular his plea of guilty, I am not making any sentence consecutive to any other, which I would be entitled to do".

12. The Director submits that the sentence imposed was clearly inadequate and unjustifiable, and in those circumstances, the learned trial judge should have exercised his discretion to impose consecutive sentences.

Indecent Assault – Applicable Maximum Penalty
13. The principal legislative measures are as follows:

> (1) The Offences Against the Person Act 1861, provided at s. 62 that a person who was guilty of "any indecent assault upon a male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable. . . to be kept in penal servitude for any term not exceeding 10 years. . ."
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> (2) The Criminal Law Amendment Act 1935, provided at s. 6 that a person convicted of any indecent assault on a female should be liable to imprisonment for any term not exceeding two years. That was the punishment for a first offence; the maximum was five years imprisonment for a second or subsequent offence but we are not concerned with that part of the provision.
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> (3) The Criminal Law (Rape) Act 1981, s. 10 repealed s. 6 of the 1935 Act, and raised the maximum penalty on conviction of an indecent assault upon a female to ten years imprisonment. This provision had the effect at the time of equalising the penalties for indecent assault on females with the offence of the same name committed on a male.
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> (4) The next development was s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, which replaced the offence of indecent assault with one of sexual assault, whether committed upon a male or a female person, and fixed the penalty at five years imprisonment in each case.
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> (5) Finally, s. 37 of the Sex Offenders Act 2001, amended the act of 1990 by providing a maximum penalty of 14 years for sexual assault on a child, that is, a person under 17 years of age, and a maximum sentence of ten years for any other sexual assault.

14. In the period between the enactments of 1935 and 1981, there was a gross disparity in the maximum punishment for indecent assault, depending on the gender of the victim. This disparity of penalty gave rise to a challenge to the validity of the ten year maximum in the case of *DPP v. S (M) (No. 2*) [2007] 4 I.R. 369, and the decision in that case is crucial to the issue that has to be decided now. The High Court held that the provision as to punishment in the 1861 Act was inconsistent with the Constitution and thus was not carried over into the law of the State on the enactment of the Constitution. The plaintiff in that case faced charges of indecent assault allegedly committed between 1966 and 1976. The Court declared that the statutory maximum penalty provided for in s. 62 was inoperative. Laffoy J held that "the common law offence is not affected, nor is the punishment appropriate to the common law offence at common law".

15. The successful plaintiff in S (M) sought to prevent his trial going ahead on the basis that with the statutory penalty removed he could not be tried for the offence. The Court did not agree. Laffoy J. said that the effect of the declaration of invalidity was that there was no statutory penalty, which followed necessarily from the inconsistency of the provision with the Constitution, but the common law offence of indecent assault remained in place and the judge envisaged that there could be a common law penalty but she did not determine what that was. The ramifications as to the venue and mode of trial and the penalty, the learned judge held, were matters to be considered by the Director of Public Prosecutions and the Court of trial.

16. On the day following delivery of the judgment in the case, after hearing further submissions, Laffoy J granted: –

> "A declaration that if the plaintiff were to be convicted and sentenced for the common law offence of indecent assault in respect of a male person, for the sentencing judge to apply a maximum sentence of more than the equivalent sentence than would have been available at the time of the offence for an indecent assault upon a female would be to breach the plaintiff's constitutional right to equality."

17. The result of this judgment was to reduce the punishment for indecent assault committed upon a male person from ten years imprisonment to two years. It is clear that the case leaves open some potential areas of debate as to just how this result came about and as to the possible penalties that might have been imposed at common law when they had previously been supplanted by the enactment of section 62. However, those questions do not arise in this case because they have not been raised by the parties in this Court and they were not considered or debated in the Court of sentence. This Court accordingly takes the position that the outcome of the S (M) litigation was to acknowledge that the maximum sentence for indecent assault on a male that was committed during the period in question in that case was imprisonment for two years.

18. The offences that are charged in this case were committed at the time when the 1981 Act was in force. That Act provided for a maximum penalty of ten years for indecent assault on a female, but it said nothing about indecent assault on a male. The reason is clear. The legislature was under the impression at the time that the maximum punishment for indecent assault on a male was ten years imprisonment because of s. 62 of the 1861 Act. However, unbeknownst to the legislators, that provision had not been carried over into our law by reason of inconsistency with the Constitution in view of the discriminatory punishment as between male and female.

19. The Director's case on this appeal is that the effect of the 1981 Act was to remove the invidious distinction in the punishments and that is correct, as far as it goes. That is what the legislature thought it was doing. Since the legal position, as decided by the High Court in S. (M) (No. 2) is that the punishment provided for in s. 62 of the 1861 Act did not become part of our law, what actually happened was that the punishment for indecent assault on a female was increased from two years maximum to ten years maximum, but it did nothing for similar offences on males. Whatever was the position as to maximum punishment for indecent assault on a male person at the time when the 1981 Act came into force remained the position.

20. It cannot be the case that a legislative provision that expressly provides for indecent assault on a female person in a legislative context of differentiation could have an indirect or implied effect on the punishment for indecent assault on a male. But that is necessarily the Director's position.

"The penalty for the offence of indecent assault on a male has never been increased as a result of legislation applying to female victims, retrospectively or otherwise. Rather, the penalty has unevenly are selectively been reduced as a consequence of the decision in DPP v S.M. (No.2). Looking back, from a position after 12 July 2007 (when Ms Justice Laffoy gave her judgement), the penalty has been decreased for some periods, but not for others. So, if one follows a timeline from 1935 right up to current date, the penalties for offences on males may appear to go up and down (by reference to the ex post facto requirement to respect parity), but they do so because of a notional exercise in equality being carried out at the present time, not because of a deemed statutory amendment or a parallel effect between unrelated statutes. Most importantly, the penalty being applied now for historic abuse can never and does never exceed the penalty which ostensibly applied at the relevant date from the point of view of someone looking at the law of the land as it then stood, though they may, for some periods of time be less than those penalties were at the time."

21. The possible further implications of the decision in S.M. (No.2) could be pursued into interesting byways of constitutional theory, but such explorations and speculations are unnecessary for the purpose of this appeal. The enactment of the 1981 legislation did not revive the ten year maximum that the judgment in S. M. held had fallen in 1937, leaving in its place the common law offence of indecent assault on a male person carrying a common law penalty that the Court did not find it necessary to specify in that case. There could be no implicit imposition of a maximum penalty for a criminal offence by way of indirect effect or that is to be inferred as having been re-imposed by a provision dealing expressly with a different situation.

22. In the result, it must be taken that the maximum penalty for indecent assault on a male person at the time in question in this case, namely, the years 1982 to 1984 was two years imprisonment. That had been the maximum sentence for indecent assault on a female, in the case of a first offence, as provided by the 1935 Act. The equality provision in the Constitution rendered ineffective or non-operative the ten year maximum under the 1861 Act, so that anything greater than two years would have breached Constitutional rights. The fact that the female equivalent offence was visited with a new punishment in 1981 did not change the male equivalent back to ten years because it had never actually been ten years since 1937.

Consecutive Sentences

23. The second question that arises in the case is whether the sentences should have been consecutive rather than concurrent. The offences were perpetrated on young innocent victims over a protracted period in each case. They involved breach of trust by the respondent and abuse of his position as an adult with access to the boys and in authority. The evidence that the victims gave to the Court described the severe and lasting impact that the abuse has had on them throughout their lives. The pattern of grooming and repetition of the abuse, the exploitation and deceit involved and the lasting harm done are characteristic of the offences of abuse of children with which the courts have become familiar in recent years.

24. There were mitigating features of the cases, notably the fact that the accused pleaded guilty and spared the victims the anxiety and the embarrassment and even the ordeal that they would have had to endure in a contested trial.

25. The judge was entitled to impose concurrent sentences for the crimes that were committed against each victim. The director cites the case of *DPP v G McC* [2003] 3 I.R. 609 in which it discusses *People (Director of Public Prosecutions) v McKenna* [2002] 1 I.R. 347. The court noted in the former case that the undoubted discretion to make sentences consecutive is exercised sparingly. However, referencing the McKenna decision, the court said that in that case, the defendant had committed repeated abuse and then resumed abusing the victim after a period when he was out of the jurisdiction. In the circumstances, the sentencing court decided that "unless there was some element of consecutive sentencing, the overall sentence was going to be clearly inadequate and unjustifiable. "The court decided not to interfere with the Circuit Court sentences, but to make them consecutive. On this principle, the Director argues that the sentences in this case are clearly inadequate and unjustifiable.

26. The Director submits that irrespective of whether the maximum sentence was imprisonment for ten years or two years, the sentence imposed was unduly lenient and constituted an error in principle by reason of the multiplicity of offences, the protracted abuse that was perpetrated by the respondent and the separate complaints. More specifically, the respondent abused his position as a hurling coach and trusted family friend; he targeted young men who were separated from their parents and living with relatives whose supervision was less than it might have been otherwise; he groomed his victims with gifts, money and alcohol; he involved the boys in active participation in sexual activity; and finally, the severe life-long damage that was done to the victims.

27. The respondent submits that the Director has not discharged the onus of proof in respect of undue leniency. The judge gave the case careful consideration, adjourning sentence for a period of weeks during which he reflected on his decision. His approach was careful and methodical, balancing mitigating and aggravating features. He imposed the presumed maximum sentence applicable, thus reflecting the gravity of the offences. The accused had his name placed on the Register of Sex Offenders and there is a long-lasting element of public opprobrium. In respect of the question of consecutive sentences, the learned judge expressly considered whether such an approach was required.

28. The parties are in agreement that nothing but a substantial departure from the appropriate sentence will justify the intervention of this Court. It is obviously not sufficient that the Court of Appeal would have imposed a different sentence. The law in relation to s. 2 of the Criminal Justice Act 1993 is helpfully summarised in *People* (Director of Public Prosecutions) v. Redmond [2001] 3 I.R 390.

29. In all the circumstances, this Court is satisfied that the application by the Director must succeed. The sentences of imprisonment for two years to run concurrently were unduly lenient. Although there were significant mitigating features in the case, the overall gravity of the crimes committed, the circumstances as above described, the serious aggravating elements as described, including the calculated exploitation of vulnerable boys over a long period, the grooming and deception, the nature of the acts and the psychological damage are of such a nature that the sentences were clearly inadequate and unjustifiable. In those circumstances, they must be set aside.

30. In accordance with the jurisprudence of the Court of Criminal Appeal in cases of undue leniency so found, the Court will afford the respondent an opportunity of putting forward any relevant up to date material for the purpose of sentence.

Approved: Ryan P.