THE COURT OF APPEAL

Birmingham J
Mahon J
Hedigan J

[248/2017]

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

The People (at the suit of the Director of Public Prosecutions)

Appellant

And

Peter Hilliard

Respondent

JUDGMENT of the Court (*ex tempore*) delivered on the 17th day of May 2018 by

Mr. Justice Hedigan

1. This is an application brought by the Director of Public Prosecutions pursuant to section 2 of the Criminal Justice Act 1993, seeking review of sentence on grounds of undue leniency. The respondent was sentenced in the Circuit Criminal Court on the 24th October, 2017 having pleaded guilty to two counts of sexual assault upon two women. Concurrent sentences of eighteen months imprisonment were imposed on the respondent, suspended in their entirety on certain conditions.

Background
2. The victims in this case were both patients in the care facility where the respondent worked as a health care assistant. Both women were suffering from profound intellectual disabilities when they were assaulted.

3. The first count concerned an assault on seventy-one year old P.D. between the 24th and 25th of June 2016. Ms D. was a women who suffered from advanced dementia, and was described as someone who "did not live in the present". The assault involved the respondent lifting her nightdress to her shoulders, such that she was wearing only her incontinence wear. The respondent touched and groped her exposed breasts. He recorded the assault using a mobile phone, and can be heard making grunting noises and saying words akin to "look what you're making me do, look what you're doing to me" on the recording. The respondent later mistakenly posted this video on Facebook, which was instantly investigated.

4. The second count concerned an assault on N.C. which took place on an unidentified date between 20th February, 2013 when she moved into the facility and 6th January, 2016 (the date of her death at age sixty-five). The respondent approached Ms C. in the day room of the facility and groped her breast through her t-shirt for approximately five seconds. This was recorded by him electronically. The assault occurred in the presence of a male patient who also suffered from cognitive impairment. Ms C. made no reaction to being sexually assaulted and video recorded. Ms C. was described as someone who "wouldn't know what was going on".

Personal Circumstances of the Respondent

5. The respondent has no previous convictions. He has worked since completing the junior certificate, at first as a tea-boy and later as a groundsman and a yardsman at Dublin Corporation. He was involved in the Red Cross and completed a course in care. Arising from this, he commenced work in the nursing home.

6. In the course of his interviews with the Gardaí, the respondent expressed his remorse for what he had done. He stated that he himself had been raped or sexually assaulted when he was young. He further stated in the course of his interviews that he mistakenly uploaded the video to Facebook. He had worked the night shift and had only had two or three hours sleep when he uploaded the video, he stated that he was half-asleep.

7. Upon psychological assessment carried out by Dr Ríoghnach O'Leary, it was found that the respondent's cognitive abilities were below average. Medical reports before the learned sentencing judge suggested that the respondent was at a low risk of reoffending.

The Sentence
8. The learned sentencing judge delivered his sentence as follows:

> "doing the best that I can and having regard to the reports and testimonials, I propose to impose an 18 month sentence and I'm going to suspend that sentence for 18 months. I'm going to suspend it in full, but on certain very strict terms and conditions. The first of which is that he keeps the peace and is of good behaviour, which means that if he commits any offence during the period of the suspension of the sentence, he may be liable to come back and face the entire sentence. Secondly, he is going to have to follow the recommendations contained in Dr O'Leary and Dr Walsh's report, which has been opened to the Court and is dated the 23rd of October 2016, and in particular he is, as a term of his bond, to continue attend the weekly group therapy group for men who have sexually offended. He is going to have to continue to attend such a group for a period of 18 months […] The monetary amount will be €100 on the bond. He'll have to have his details entered on the sex offenders' register […] "

9. The learned sentencing judge had previously set out that the aggravating factors in the case included: the fact that the assaults had occurred on the women when they were patients in a care facility; their particular vulnerability; the relationship between the respondent and the victims; the particular breach of trust the case involved. The learned sentencing judge further stressed that the accused mistakenly uploaded the video to Facebook, somewhat reducing the mitigating factors in the case, in that this was not a case where the accused 'came clean' of his own accord or made a confession.

10. Mitigating factors that the learned sentencing judge referred to included: the lack of violence in the commission of the offence;

the fact that the victims suffered no psychological harm; the guilty plea; the fact the accused was of previous good character and had no previous convictions; his expression of remorse; the respondent's low risk of reoffending.

11. The learned sentencing judge stressed that the offence was at the lower end of the scale in terms of a sexual assault. He commented that cases like this would often be found in the District Court, however due to the complicating features in the case, the case was before him.

12. The learned sentencing judge emphasised that the accused was particularly psychologically vulnerable at the time of the commission of the offences. The accused had been working excessive hours and was sleep deprived. His relationship with his own wife was at a low ebb physically, something which the learned sentencing judge stated can "sometimes lead people astray".

13. The learned sentencing judge also took into account the letter written by the wife of the respondent, in which she stated that the respondent was a huge support within his family, in particular to his youngest child who is autistic. She stated that if her husband were to go to prison, this would have an enormous effect on her youngest child's physical and emotional wellbeing. She stated that the respondent had the full support of his wife and four children during this difficult time.

The Grounds of Appeal

14. It is submitted that the sentences imposed on both counts are unduly lenient within the meaning of section 2 of the Criminal Justice Act 1993. It is submitted that the learned sentencing judge gravely underestimated the seriousness of the offending behaviour and misinterpreted the implications of the absence of evidence of any psychological harm done to both victims. Further it is submitted that the learned sentencing judge placed excessive reliance on the psychological report of Dr O'Leary.

The Submissions of the Appellant

15. The learned sentencing judge noted the absence of any evidence of psychological harm done to either of the victims in handing down sentence. It is submitted that the absence of such evidence does not diminish the gravity of these offences. To the contrary, the absence of evidence of psychological harm ought have refocused the attention of the learned sentencing judge to the particular vulnerability of these women, who could not at the time of offending, or indeed ever, speak or complain. It is submitted that it is a stark and substantial error of principle to allow even a slight reduction in sentence due to an absence of psychological harm in this particular case.

16. The report of Dr O'Leary was relied upon by the learned sentencing judge in sentencing the respondent. Whilst it is submitted that the learned sentencing judge correctly took account of the fact that the respondent was at a low risk of reoffending, the learned sentencing judge incorrectly interpreted the psychologist's report. The learned sentencing judge concluded that the respondent was a particularly psychologically vulnerable person at the time of the commission of the offence, by virtue of his working long hours, being at a low physical ebb and his being sleep deprived. It is submitted that the words "particularly psychologically vulnerable" were never used by Dr O'Leary in her report and her findings were incorrectly interpreted by the learned sentencing judge. It is submitted that difficulties such as insomnia or working long hours do not provide any substantially forgiving context for the commission of these offences.

17. The learned sentencing judge also commented that the respondent had taken to accessing pornography online, which he characterised as "addictive behaviour". It is submitted that Dr O'Leary made no finding that the respondent suffered from any addiction or serious psychological disorder.

18. Whilst Dr O'Leary noted the respondent's cognitive abilities were below average, his abilities were found to be "adequately intact" and there was no evidence of "any deficits in [his] cognitive functioning that could directly contribute to sexually abusive behaviour".

The Submissions of the Respondent

19. It is submitted that the appellant's arguments do not meet the appropriate threshold to substantiate a claim of undue leniency and justify interference with sentence.

20. It is submitted that the learned sentencing judge correctly observed that the circumstances of the case were "rather minor." He was correct to note that ordinarily, offences of groping would be disposed of in the District Court. However, having noted the vulnerability of the injured parties, the learned sentencing judge emphasised that this "complicated" the case to the extent that it was sent forward to the Circuit Court. It is submitted that this was a fair observation.

21. It is submitted that the learned sentencing judge was explicitly clear in his determination and rationale. Having noted the factors that elevated the case to a Circuit Court matter, he concluded the offences were nonetheless at the lower end of the scale of offences:

> "One comes across a vast array of cases, often involving violence, often involving much more serious interference with the person or the victim. So you have to forgive me, when the Court of Appeal wish me to put it on a scale, and I'd have to say, even taking into account the more aggravating features of the case, it still seems to me to be at the lower end of the scale, in terms of a sexual assault, given what comes in front of the Circuit Court."

Having considered the circumstances of the offending in issue, the learned sentencing judge proceeded to consider the circumstances of the offender. It is submitted that this is textbook sentencing procedure and accords fully with the principles enunciated in D.P.P. v. M [1994] 3 I.R. 306. Having regard to what he regarded as the particular psychological vulnerability of the respondent, his low risk of reoffending, and the testimonials from his family, the learned sentencing judge imposed an eighteen month sentence, suspended in full but on strict terms and conditions.

22. It is submitted that no error of principle arises in this case. Reliance is placed in written submissions on the case of *D.P.P. v. Bale and Fowler* [2016] I.E.C.A. 209, wherein it was stated:

> "in applying these principles, we note from the sentencing remarks of the trial judge that he was fully aware of the seriousness of the offences he was dealing with, and equally aware of the jurisprudence in this area."

Further, in *D.P. P. v. McAuley* [2016] I.E.C.A. 173, it was stated that even an "undoubtedly lenient" sentence would not amount to an error of principle if it is clear that the sentencing judge recognised and took into account all of the aggravating factors in the case:-

> "The sentence was undoubtedly lenient. However, the transcript makes it clear that the sentencing judge did recognise and take account of the aggravating factors in the case. While the sentence imposed was lenient, it was not so lenient as to be outside of the norm, particularly having regard to the fact that this was a first offender who was offering to try to make full restitution. A sentencing judge must be afforded a significant margin of appreciation in the selection of what is the appropriate penalty in any particular case and we are satisfied that the sentencing, judge in this case acted within the margin of appreciation properly to be afforded to him."

23. In *D.P.P. v. Byrne* [1995] 1 ILRM 279, it was stated that in order for a sentence to be shown to be "unduly lenient", the following criteria must be established:

> "In the first place, since the Director of Public Prosecutions brings the appeal, the onus of proof clearly rests on him to show that the sentence called into question was "unduly lenient."

24. Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case … he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person concerned, what Flood, J. has termed the 'constitutional principle of proportionality' (see *People (D.P.P.) v. W.C.* [1994] 1 ILRM 321) his decision should not be disturbed.

25. Thirdly, it is in the view of the court unlikely to be of help to ask whether, had a more severe sentence been imposed, it would have been upheld on appeal as being right in principle… …, the test to be applied under the section is not the converse of the inquiry which is made by an appellate court where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was "unduly lenient."

26. Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of the reviewing court".

27. In *D.P.P. v. McCormack* [2000] 4 I.R. 356, the Court of Criminal Appeal allowed the appellant to appeal against severity and dismissed the DPP's appeal on grounds of undue leniency. It was stated therein that a custodial sentence is never mandatory in the absence of a statutory direction to that affect. This was notwithstanding the appellant's "appalling behaviour" in that case, having been sentenced to three years with two years suspended for the offences of aggravated sexual assault and attempted rape:

> "In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.
>
> Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but on the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

These principles were more recently reaffirmed *D.P.P. v. Derrick Stronge* [2011] IECCA 79.

28. Further, in *D.P.P. v. Redmond* [2001] 3 I.R. 390, the Court stated:

> "While the penalties imposed may be on the low side, there was no error in principle and the fines could not be said to be unduly lenient within the meaning of s. 2 of the Criminal Justice Act, 1993, as explained in *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356."

29. It is submitted that a "mere departure" from the norm is not sufficient to trigger an intervention by this Court in the sentence imposed. There must be a "substantial departure" from normal procedure such that the sentence actually imposed by the sentencing judge amounts to an error of principle. Sufficient deference must be accorded to the sentencing judge who heard and assessed evidence and witnesses in the first instance. It is not sufficient to increase the sentence imposed simply because an appellate court might have come to a different conclusion.

Decision

30. The most striking characteristic of these offences is the egregious breach of trust involved. The two ladies victimized were persons of ultimate vulnerability. They could not anymore do anything to protect their human dignity. We do not know, because it is unknowable, what level of comprehension, if any, they may have had of the indignities inflicted upon them. We do know from their victim impact statements that the families of these two ladies have been very badly affected by the assaults on their loved ones. It is hard enough to have to endure the gradual loss of a dear relative to dementia without hearing of such assaults upon them. It is clear from their eloquent statements that the families have found news of these shocking events very traumatizing. Their faith in the carers into whose hands they committed their grandmother and sister respectively have been shattered, probably forever.

31. The learned sentencing judge herein did approach his task in a careful and structured manner. However his view that the assaults were minor ones that might well have been dealt with at District Court level is in our view a clear error of principle that requires this Court to intervene. We will therefore quash the sentence imposed and will proceed to resentence. The maximum sentence is one of 10 years. Taking into account all the aggravating factors correctly identified by the learned Circuit Court judge we consider that the assaults in question do not merit a place at the upper or even the middle range. They may, we think, be best located at the upper end of the lower range. This would normally therefore attract a custodial sentence of up to three years. Applying the mitigating factors also already identified and taking account of the up-to-date information furnished to us today of his ongoing counselling and his voluntary work, we will reduce this to two years. Our usual practice when imposing a custodial sentence following an undue leniency appeal where no custody was originally imposed, is to reduce that sentence somewhat. We consider that the minimum sentence that could have been imposed in the Circuit Criminal Court was one of 18 months. Taking account of our above usual practice, we will therefore reduce the two years to 18 months on each count to run concurrently and in order to incentivise rehabilitation, we will suspend the last six months thereof subject to the same conditions imposed in the Circuit Criminal Court.