THE COURT OF APPEAL

Record No. 15/2017
Birmingham J.
Mahon J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

J. H.

APPELLANT

JUDGMENT of the Court delivered on the 7th day of July 2017 by Mr. Justice Mahon

1. The appellant pleaded guilty and was convicted on the 22nd July 2016 at the Central Criminal Court of four offences, two of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001, and two of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. In respect of the first sexual assault offence the appellant received a six month sentence and in respect of the second, he received a twelve month sentence. In respect of one of the rape convictions, the appellant received a two year sentence, and in respect of the other, a sentence of four years imprisonment. Sentences were directed to be served concurrently and to date from the 28th November 2016. The final two years of the four year sentence was suspended on conditions for a period of two years from the date of his final release from prison. The appellant has appealed against these sentences.

2. At the time of the offences the female complainant was eleven years old, while the appellant was fifteen years old. As of the date of sentence their respective ages were nineteen years and twenty three years. The offending occurred in 2008 in circumstances where the complainant would visit the appellant's home with her friend, the appellant's sister, after the two girls had finished their horse riding lessons. The appellant would persuade the girls to play a game which involved them being blind folded, and while blind folded they would have to guess the identity or description of something placed in their hand, or in their mouths by the appellant. In the case of the appellant's sister the items in question were entirely innocuous, but in the case of the complainant the item in question was the appellant's penis, with the consequence that otherwise innocent childhood games became an occasion of serious and repeated sexual assault. Details of the instances were reported to the gardaí in 2013 when the appellant made a full statement. None involved violence or the threat of violence.

3. When contacted by the gardaí in 2013, the appellant attended the gardaí station and made a voluntary statement. He described his actions as experimental and said he was very sorry for what had occurred.

4. The negative impact on the victim was and remains considerable. She bravely revealed to the court below, in a detailed victim impact statement read by her in court, of the enormous struggle she has endured in coping with the abuse inflicted on her by the appellant.

5. The appellant has no previous convictions. He subsequently went to college and qualified as an engineer. The learned sentencing judge expressed his satisfaction that there was no risk of reoffending.

6. In the course of his comprehensive sentencing judgment, the learned sentencing judge determined that the appropriate headline sentence was one of eight years *"in normal circumstances"* but that that would drop to four years imprisonment on the basis of the appellant's youth and lack of maturity at the time when the offences where committed. He considered as aggravating factors the *degree of subterfuge deployed* and the repetitive and escalating nature of the conduct.

> *"So, in my view, the basic ingredients of the conduct required to commit these offences in question, the basic ingredients are sufficiently aggravated in my view and I come to this conclusion, I have to say, with reluctance because it is not something which is in any way enjoyable or brings any satisfaction, but I am afraid that the surrounding ingredients that I have just mentioned are sufficient to bring this case across the line from one where an non custodial disposal would be appropriate to one where it seems to me that the justice of the case when one stands back and takes an overall view in terms of the conduct, the position of the parties and the overall harm done and the matters I have referred to is such that some degree of a custodial sentence is, in fact, required in the circumstances."*

7. The following grounds of appeal are contended on behalf of the appellant:-

> (i) The learned sentencing judge erred in principle and in law in failing to give due allowance in sentencing the accused to the fact that at the time of the offences he was then aged fifteen years and he was the youngest in his school class with consequent underdeveloped maturity.
>
> (ii) The learned sentencing judge erred in principle and in law in failing to give adequate weight to the fact that the accused had co operated with the gardaí in their investigation and that he pleaded to the counts for which he was indicted at an early stage.
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> (iii) The learned sentencing judge erred in principle and in law in failing to properly recognise that the accused had been rehabilitated in the years following his offending and had lived a blameless life in that period.

8. The offences in question were very serious sexual offences and included oral rape. They were not isolated in the sense of being a one off. They were committed over a period of time and in a determined and calculated manner, and cannot be reasonably described as merely experimental in the context of what might be expected to fall within the bounds of natural curiosity of a fifteen year old boy. It is difficult to understand, if such case was to be made, that the appellant was not fully aware that his actions, involving as

they did, an eleven year old girl, were entirely wrong and seriously inappropriate.

9. It is urged by Mr. Hartnett S.C., on behalf of the appellant, that although an adult at the time of sentencing the appellant ought to have been sentenced as a fifteen year old, and in effect on the basis that a custodial sentence should have been considered only as a last resort. It is evident however that the learned sentencing judge did in fact approach sentence with the fact of the appellant's youth at the time the offences were committed very much in his mind. There are a number of references to this aspect of his approach to sentencing in his judgment. For example, he said:-

> *"This case is exceptional in that sense in that the first analysis is or the first point of analysis is as to whether there should be a custodial sentence as a matter of principle in the first place, and therefore it follows that I totally accept Mr. Hartnett's submission that the starting point in this case is that there should be a non custodial sentence unless the circumstances indicate otherwise and that's by reference to the age of the accused man at the time when he committed these offences being aged fifteen years or so."*

10. The learned sentencing judge made a number of references to the immaturity of a fifteen year old.

11. The submission by Mr. Hartnett that a custodial sentence should have been considered only as a last resort prompted by s. 143 of the Children Act 2001 which provides that a *"court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child…."*

12. Section 143 of the Children Act 2001 mirrors Article 37 of the United Nations Convention on the Rights of the Child which, inter alia, provides as follows:-

> *"(b) No child shall be deprived of his or her liberty unlawful or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."*

13. Section 143 is primarily designed to ensure that the detention of a child offender should be a sanction of last resort because such detention is likely to disrupt the child's normal development and education and thereby hamper the opportunity for the child to achieve adulthood in what might be described as normal circumstances. Undoubtedly also, there is the concern that places of detention facilitate children getting into bad company and paving the way towards criminality in adulthood.

14. The same concerns will not however necessarily be present (if indeed present at all) in circumstances where a child offender is being sentenced as an adult. In such a case, a sentencing court is free to approach sentencing in a different and less constrained manner than if the offender was still a child. In such circumstances, the court is not concerned, in general terms, with the potential detrimental effect of a custodial sentence on the offender, at least to the same extent as it would in the case of a child.

15. What is relevant in the context of sentencing is the fact that the appellant, although now an adult, committed the crimes in question when he was fifteen years old. A sentencing court is required to access the offender's level of maturity at the time of the commission of the offence and to accordingly access his culpability as of that time.

16. In *R v N, D & L* [2010] EWCA Crim 941, the English Court of Appeal stated the following (in a case involving a serious sexual attack on a thirteen year old girl by three teenage boys):-

> *"There will from time to time be individual offenders whose maturity levels are well in advance of those to be expected of most youths of a similar chronological age. All these decisions are specific and individual. They must reflect all the material available to the sentencing judge, including the circumstances of the offence and the behaviour of the offender whose case is under consideration in the context of that offence. If justified, the maturity of a youth is a factor to which weight should properly be given because on this basis such mitigation arising from the youth of the offender is or would be proportionately reduced or diminished, sometimes (on rare occasions) to virtual extinction. When they are made, expressed findings by the sentencing judge are required. Nevertheless, the sentencing principles as they affect young offenders are clear, long established and effectively unchanged, although most recently summarised in the latest definitive guideline. It is therefore inappropriate for a blanket ruling relating to a group of young offenders to ignore the fact of youth".*

17. Of particular relevance to the instant case, is another English Court of Appeal decision to which Mr. Hartnett has drawn the court's attention. In *R v. Ghafoor* [2002] EWCA Crim 1857, the court said:-

> *"The approach to be adopted where a defendant crosses the relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as "a powerful factor". That is for the obvious reason that … the philosophy of restricting sentencing powers in relation to young persons reflect both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults and, (b) the recognition that inconsequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrents than in the case of adults. It should be noted that the "starting point" is not the maximum sentence that could lawfully had been imposed, but the sentence that the offender would have been likely to receive."*

18. In *R v. Bowker* [2007] EWCA Crim 1608, the English Court of Appeal rejected the argument that to impose a penalty any heavier than could have been applied when the offence was committed because the offender, while now a young adult, was then a child violated Article 7 of the ECHR. It held that Article 7 was designed to ensure that changes in the law were not retrospective or retroactive.

19. While it is impossible to speculate at this remove how a court would have dealt with the appellant had he been prosecuted for these offences as a fifteen year old boy, a possibility, if not the likelihood is that any period of detention imposed would have been in the region of twelve months, followed by a period of supervision, such as is provided for in s. 151 of the Children Act 2001.

20. In *DPP v. M.H.* [2014] IECA 19, this court, in a judgment delivered by Edwards J., considered a case in respect of which the factual background was not entirely dissimilar to the instant case, although the sexual offences in *M.H.* were of a more serious nature. The decision in that case is of interest because the sexual offences commenced when the accused was a child but continued into his early adulthood. The sentence in that case was reduced from nine years imprisonment with the final three years suspended to

one of seven years with the final three years suspended.

21. In the instant case, the learned sentencing judge suggested that but for the appellant's *young age and associated lack of maturity and judgment* (and the associated reduction in culpability), a headline sentence of eight years imprisonment would be appropriate. This court takes no issue with that assessment. The learned sentencing judge then went on to place the headline sentence for this appellant at one of four years because of his *young age and lack of maturity at the time when the offences were committed.*

22. In the court's view, the learned sentencing judge did not sufficiently discount the headline sentence on the basis of the appellant's young age and lack of maturity at the time when the offences were committed and more particularly with regard to the fact that he was a fifteen year old child at the time the offences were committed. It is noteworthy that s. 52 of the Children Act 2001 provides that, firstly, a child aged under twelve years is incapable of committing an offence, and, secondly, that there is a rebuttable presumption that a child aged between twelve and fourteen years did not have the capacity to know that the act or omission concerned was wrong. These legislative provisions help to place the culpability of a fifteen year old in context.

23. The court is satisfied that the appropriate headline sentence for the appellant in the particular circumstances of this case, particularly having regard to his youth and immaturity at the time the offences were committed, is two years and six months imprisonment rather than four years nominated by the court below. Because of the strong mitigating factors in the case, and in particular the extent to which the appellant has admitted his wrongdoing, cooperated with the garda investigation and pleaded guilty at an early stage in the proceedings, and also his lack of previous convictions and good behaviour in recent years, the actual sentence imposed will be one of eighteen months imprisonment with the final six months of that term suspended for a period of twelve months on his entering into a bond in the sum of €100 to keep the peace and be of good behaviour.