THE COURT OF APPEAL

Record No. 263CJA/2017

Birmingham P.
Mahon J.
Edwards J.

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND–

MARTIN ARKINS

RESPONDENT

JUDGMENT (*ex tempore*) of the Court delivered on the 11th day of June 2018 by Mr. Justice Mahon

1. The respondent pleaded guilty to two counts at Kells Circuit Criminal Court on the 13th February 2017, namely:-

- Bill 02/2017:

Possession of child pornography for the purpose of distributing, publishing, exporting, selling or otherwise showing it, contrary to s. 5(1)(e) of the Child Trafficking and Pornography Act 1998.

- Bill 01/2017:

Possession of child pornography, contrary to s. 6(1) of the Child Trafficking and Pornography Act 1998.

2. The respondent was sentenced on 9th November 2017. In respect of Bill 02/2017 he was sentenced to four years imprisonment, while in respect of Bill 01/2017 he was sentenced to three years imprisonment. Both sentences were directed to be served concurrently and to date from 9th November 2017. The final eighteen months of each sentence was suspended for a period of three years post release resulting in a net custodial term of two and a half years.

3. The appellant has brought an application seeking a review of the sentences on the basis that they were unduly lenient pursuant to s. 2 of the Criminal Justice Act 1993. That provides as follows:-

> *"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the (Court of Appeal) to review the sentence.*
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> *(3) On such an application, the Court may either:-*
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> > *(a) quash the sentence and in place of it impose on the convicted person such sentence as it appears appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or*
> >
> > *(b) refuse the application."*

4. The background facts in relation to Bill 02/2017 are as follows. In September 2009 the respondent inadvertently transferred a number of images of naked boys onto a friend's computer. The matter was reported to the gardaí. The respondent's home was searched pursuant to a search warrant on the 11th September 2009 in the course of which a laptop was seized. The laptop was shown to include images of child pornography being seventy video clips of which sixty five included young boys engaged in sexual activity with an adult or another child. There were a smaller number of still images. When later arrested, in April 2016, the respondent made full and frank admissions and confirmed that he had shared the images in movie files with third parties. He pleaded guilty at an early stage.

5. The background facts in respect of Bill 01/2017 are as follows. Gardaí investigated an image found on the facebook page of a man called Sean Smith. This name was traced to the respondent, and his home was searched pursuant to a search warrant on the 7th April 2016. Various multi media devices, including an Apple iphone and ipad were seized for examination. The respondent co-operated fully with the gardaí in relation to aspects of their investigation including the provision of passwords. One thousand, one hundred and eight images were found on a Drop Box folder, together with two movie files. Five hundred and five images were of young boys under the age of fifteen years engaged in sexual activity, six hundred and seventy four of them depicted young boys under the age of fifteen years with their genital or anal area exposed and visible, and two movie files depicted young boys under the age of the ten engaged in sexual activity. One hundred and seventy nine relevant images were located on the Apple iphone, on which eighty nine depicted predominantly young boys under the age of fifteen engaged in sexual activity and ninety depicted young boys under the age of fifteen with their genital and anal area visible. The Apple ipad revealed twelve thousand images and eight movie files. Approximately

one third depicted young boys under the age of fifteen involved in sexual activity and two thirds depicted young boys under the age of fifteen with their genital and anal area exposed. The movie filed depicted young boys under the age of fifteen engaged in sexual activity.

6. The respondent was arrested by arrangement on the 16th August 2016. He made full admissions and accepted responsibility for all material identified. He confirmed that some of the material had been shared with third parties. He also pleaded guilty at an early stage.

7. The grounds on which this application is brought include the following:-

(i) the volume of child pornography in the respondent's possession on each occasion;

(ii) the nature and gravity of the material in the respondent's possession on each occasion;

(iii) the respondent was engaged in sharing child pornography;

(iv) the second offence was detected approximately five years after the detection in respect of the earlier offence, and

(v) the second offence occurred after the respondent had briefly engaged with therapeutic services and must therefore had been aware of the gravity of his offending conduct.

8. The maximum sentence in respect of the offences relating to Bill 02/2017 is fourteen years imprisonment, while in respect of Bill 01/2017 the maximum sentence is five years imprisonment.

9. The learned sentencing judge gave a detailed and lengthy sentencing judgment. He noted various mitigating factors, and the fact that the respondent had no previous convictions. In respect of Bill 02/2017 the learned sentencing judge stated:-

"The aggravating factor in the case is the serious nature of the offence. Now, the matter of his involvement in the offence, he was involved in accessing child pornography and he was involved in the distribution, involved in a file-sharing website in respect of the child pornography. The categories of the images, the ages of the children, the amount of images of the sexually explicit category, then the number of - and the nudity of the children and the type of images, that would be a middle range category. The sexually explicit would have been the highest category. The accused, Mr Arkins, by accessing the child pornography, was assisting in the sexual exploitation of young children and then by being involved in the distribution, the file-sharing website, this also was additional sexual exploitation of the young children. His involvement was both deliberate, intentional and for the purpose of his own sexual arousal or sexual gratification. They are substantial aggravating factors.

10. In respect of Bill 01/2017, the learned sentencing judge remarked:-

"The aggravating factors in the case are the serious nature of the offence, the manner of his involvement in the offence, the accessing of the child pornography images. This was deliberate with intention for his sole purpose being sexual self-gratification or sexual arousal. When he accessed the child pornography site he was involved in the sexual exploitation of these young children. The amount of images, the categories of the images, they are serious aggravating factors in this case."

11. In respect of both offences the learned sentencing judge said:-

"…I must have regard to the serious nature of the offences. First, I'll deal with the first indictment. I think it's the correct way because they are separate indictments and they are separate consequences. In respect of the first indictment, that's in respect of - that's count No. 2, where the maximum custodial prison sentence is 14 years, I must have regard to the serious nature of the offence and to the substantial aggravating factors in the case and to have regard to the mitigating and to the personal circumstances and this is compounded by the matters I referred to in the aggravating factors, by reason that it was used for distribution, the child-sharing website, in addition to the aggravating factors, but I will have regard to the mitigating and the personal circumstances as I am required by law…"

12. The appellant has brought to the court's attention the issue of consecutive sentencing and the fact that it was open to the learned sentencing judge to impose consecutive sentences on the basis that the two offences were related and committed many years apart. The court's attention in particular was directed to the judgment of Geoghegan J. in *DPP v. McKenna* [2002] 2 I.R. 345 wherein the following was stated:-

"...The court notes that "not guilty" verdicts were entered by direction in respect of counts No. 16 and 17 because they related to the periods from the 1st August, 1989 to the 1st November, 1989 and the 1st November, 1989 to the 1st February, 1990, when the respondent was apparently out of the jurisdiction. During those periods, he had time to reflect and it was particularly reprehensible that he should resume the offending after the 1st February, 1990. The court, therefore, considers that taking that factor into account and taking into account the particularly depraved nature of some of the offences, the sentences in respect of counts 18 to 33 should be concurrent with each other but should run consecutively to the concurrent sentences imposed in respect of counts 1 to 15. The court is strongly of the view that it would be an injustice to the public not to impose consecutive sentences in this case."

13. Reference was also made to the decision of this court in *DPP v. Walsh* [2014] IECA 10 wherein the following remarks were made:-

"In the present case, it is the view of this Court that no error in principle was made by the trial judge in deciding to impose consecutive sentences here. They were two quite separate assaults, two quite separate injured parties and the assaults took place within a number of months, one of the other. There was a certain similar modus operandi, but, apart from that, these two serious matters required to be dealt with as they were dealt with by the trial judge by a consecutive rather than a concurrent sentence. The interests of justice would not have been served by a concurrent sentence being imposed."

14. The basis upon which an application pursuant to s. 2 of the Criminal Justice Act 1993 will be considered by this court, and the principles which will apply to its decision whether or not to review a particular sentence are well known and have been stated in many similar type applications in the past. In *DPP v. Byrne* [1995] 1 ILRM 279 the Court of Criminal Appeal listed four principles for

application in this type of application. They are:

> (i) The onus of proof to show that the sentence was unduly lenient rests on the DPP.
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> (ii) Great weight should be afforded to the trial judge's reasons for imposing the sentence at issue. In particular, if the trial judge has kept a balance between the circumstances of the case and the relevant circumstances of the offender, the decision should not be disturbed.
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> (iii) The test is not the converse of that when there is an appeal by the appellant. It is not a query as to whether a more severe sentence could have been imposed and upheld as been right in principle. Rather, it is an enquiry as to whether the sentence was 'unduly lenient'.
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> (iv) Nothing but a substantial departure from what would be regarded as the appropriate sentence would justify intervention.

15. The evidence in this case suggested that the respondent was strongly addicted to child pornography. He sought help and engaged with therapeutic services for a relatively short period but then re-offended. It is argued by the Director that this history indicates a significant degree of awareness on the respondent's part of his wrongdoing and that consecutive sentencing was therefore justified and appropriate. It was submitted on behalf of the respondent that if the Director was promoting the appropriateness of consecutive sentencing in the case, she ought to have made that clear in the court below, and she did not do so.

16. It must be said however that the first offence in time was the more serious, although they constituted, separately and cumulatively, serious offending.

17. The risks and damage to children from child pornography are well known. It is a crime which causes untold damage to society generally, but particularly to young children, and especially those who are forced or persuaded to participate in various types of depravity. The secret and underground nature of the offending renders it difficult to detect and control, and the courts traditionally hand down severe sentences to those who are successfully prosecuted.

18. The sentences imposed in these cases resulting in a net two and a half years in custody were undoubtedly lenient and less than the members of this court might have imposed at first instance. However, they were nevertheless within the limits of the discretion available to the learned sentencing judge having regard to the unusual features in the case and the extent of the admissions and co-operation provided by the respondent. In those circumstances the court will not intervene. .