THE COURT OF APPEAL

[16CJA/18]

The President
Irvine J.
Donnelly J.

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 2 OF THE CRIMINAL JUSTICE ACT 1993
THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
APPLICANT

AND

PP

RESPONDENT

JUDGMENT of the Court delivered on the 31st day of July, 2019 by Ms. Justice Donnelly

Introduction

1. The respondent was sentenced to four years and six months imprisonment in respect of ten counts 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. All sentences were directed to be served concurrently. The court also took into account a further count of sexual exploitation contrary to s.3(2) of the Child Trafficking and Pornography Act, 1998 (as amended by s.6 of the Criminal Law (Sexual Offences) (Amendment) Act, 2007 and as substituted by s.3(2) of the Criminal Law (Human Trafficking) Act, 2008.

2. This is an application by the Director of Public Prosecutions ("the DPP") for a review of the above sentences on the ground of undue leniency pursuant to s.2 of the Criminal Justice Act, 1993 ("the 1993 Act").

The Offending Behaviour

3. The offending behaviour by the respondent concerned two young children for whom he was in *loco parentis*. He commenced residing with the victims' mother in 2007. The offending behaviour covers the period from the 1st July, 2009 to the 28th February, 2013.

4. The first victim was aged seven to ten years during the course of the sexual assaults and the second victim, her sister, was aged between four and eight years of age.

5. The older girl recalled the abuse starting in the house where they had initially lived together. The accused had "made her get naked" and he threatened her that if she told her mother he would kill her and her sister. When they moved to another address, she said that the abuse consisted of the accused making herself and her young sister play with the accused's penis. He made them "play with his penis" and had one of them kissing his penis at the same time. He kept switching them. At one stage, at his direction, the older girl had to lick his penis. At the time this was happening, he was naked and the two young girls were naked. This type of sexual assault occurred quite a number of times and happened in the bed in his bedroom.

6. The sexual exploitation charge relates to an incident which occurred in the final address to which they had moved. The accused put on a pornographic DVD and according to the older girl,

he made the younger girl compare and judge the size of his penis with regard to the penis on display on the DVD. It appears that the video depicted sex intercourse taking place.

7. The younger girl described various events and said in her own language, that the accused tried to touch his penis off her private parts. There was no evidence of penetration in the case but it appears he touched his penis against her private parts. This occurred while they were lying on the bed of the respondent and his partner.

8. The abuse came to light after the respondent had moved out of the home where he was cohabiting. He visited on one occasion and the older girl said to her mother "I want him gone or else I will commit suicide". She later disclosed the abuse to her mother in June, 2014 in the context of being informed by her mother that she and the respondent intended to resume cohabiting.

The Respondent's Circumstances

9. The respondent was interviewed on four occasions by members of An Garda Síochána in May, 2015. In the final interview, he admitted that sexual contact had occurred between himself and the two victims over a four year period between 2009 and 2013. These were valuable admissions, but it is also the case that what he admitted to did not accord exactly with the victims' account of the abuse. He did not accept that he had ever threatened them.

10. The respondent put forward in interview that the older girl had found him masturbating and that she in fact had been the person who put her hand on his crotch and then had put his hand on her vagina. He said the older girl put her hand down his trousers. He also stated that the younger girl had put her hand on top of his penis. He admitted that he put his hand down her pants and rubbed her vagina. He said that he was turned on when assaulting the girls and that he became aroused before he started touching them. He admitted the details of the sexual exploitation charge.

11. The respondent is aged 49. He has worked as a disc jockey and as an upholsterer. He has no previous convictions. His admissions were of benefit to the prosecution.

The Impact on the Victims

12. The victims' mother submitted a victim impact statement on their behalf. This detailed how they had been happy, confident outgoing and unsuspecting girls and it was clear that their trust was now broken in men. The family had received counselling but the older girl withdrew as she felt she was not ready to open up. The Garda gave evidence that both girls had become very withdrawn after the matter, but their mother had told him that they had found a sense of relief after telling their stories to the specialist victim interviewers. They were both getting on OK at school now. The older girl had left however, after her Junior Certificate but it appears she had her own reasons for leaving and was getting on OK with "Youthreach". It was said they may revisit counselling in the future but at the time they just felt a few months was enough for them.

The Judge's Sentencing Decision

13. In the course of his decision, the sentencing judge comprehensively identified the aggravating factors. These are set out in the transcript as follows: -

"*Insofar as the aggravating factors are concerned, there is the age of the children, between seven and four years of age when the abuse started . . . There is the abuse of trust. The accused effectively was in loco parentis while the mother was out working. There is the disparity of age. The accused would have been in his thirties or forties at the time. There is the fact that the accused was in a dominant position in the family structure. There was the nature of the abuse, highly sexualised, particularly in the light of the very young age of the children. The fact that it was premeditated, firstly on the older sibling and then on the younger sibling. There was the exposure to pornographic material, effectively a form of grooming the children. It is obvious that these assaults were carried out for his own pleasure. It is abundantly clear that the emotional and psychological trauma as a result of his actions as evidenced in the Victim Impact Statement, which is clear, erudite, harrowing and effectively a parent's worst nightmare. There is the venue, exclusively the family home, a place where children should feel safe and protected at all times and there were the threats to the older child*".

14. The judge then set out the mitigating factors in the following terms: -

"*Insofar as the mitigating factors are concerned, there is the early admissions which are of importance given the nature of the case. As cases of this nature can be very, very vague as such, again this is evidenced by the structure of the charges which are in three – month intervals and the State have clearly acknowledged at all times that the admissions were of critical importance to the prosecution. There is the plea of guilty, again very important in the scheme of things. The victims were not obliged to face the risk of further trauma by having to give evidence and also this is very important bearing in mind that they are still extremely young children. There is the remorse expressed by the accused for his behaviour. There is the acceptance of his full culpability in this matter. There is the fact that he has no previous convictions either before or since*".

15. Finally, in conclusion the judge observed: -

"*It is abundantly clear that this is a very serious case. The accused in this case has been guilty of a cold, cunning and premeditated systematic sexual abuse of these children for his own pleasure. He is guilty of the most appalling breach of trust of the children for all intents and purposes. He was in loco parentis for many years. His behaviour has had enormous impact, both emotionally and psychologically on the entire makeup of this family*".

16. The sentencing judge took the view that in his words "the appropriate tariff" on each count was one of five years and six months. Having factored in the mitigating and aggravating circumstances, the sentencing judge imposed a sentence of four years and six months in respect of each count, with all sentences to run concurrently. In conclusion, he went on to state that he was going to take the slightly unusual step of taking Count 31, the exploitation charge, into consideration in view of the plea.

The Submissions

17. Although in written submissions the DPP appeared to indicate that the sentence of four years and six months was inadequate in respect of the offences against each individual victim, in oral submissions counsel clarified that the appeal was not based upon inadequacy of the individual sentence.

18. The DPP's primary point was that in failing to make at least some element of the sentences consecutive, there was an error in principle. Counsel quoted from Prof. O'Malley's seminal textbook "*Sentencing Law and Practice*" 3rd. Edn. 2019 at paras. 5.27 and 5.31. He submitted that these statements were quoted with approval by the Court of Appeal in *The People (Director of Public Prosecutions) v. K.C.* [2019] I.E.C.A. 126.

19. Counsel for the DPP submitted that a consecutive sentence in the present case ought to have been imposed to reflect that there had been more than one victim and that there were many aggravating factors. The aggravating factors included that the victims had on occasions been sexually assaulted in the presence of each other. Counsel accepted that in undue leniency cases, there was a high degree of deference to the sentence actually imposed. He also accepted that the imposition of consecutive sentences was a matter for the discretion of the sentencing judge. In the present case, he submitted that the judge fell into error when he did not assess and take into account in the sentence actually imposed the fact of two victims and the particular circumstances of the offending. He departed substantially from what ought to have been the norm in these cases.

20. Counsel for the respondent submitted that not only had there been no substantial departure from the norm in the approach to sentencing or in the sentence imposed, but that there had in fact been no departure at all from the norm. Counsel placed significant emphasis on the contribution the respondent had made to the investigation. His admissions had assisted the prosecution greatly and he relied upon the conclusion reached by the trial judge in his final words on sentencing to the effect that he intended to deal with the matters in the way he did: -

> "*Having factored in the mitigating and aggravating circumstances and particularly the fact that the State acknowledges that the admissions by the accused were pivotal to bringing a successful prosecution.*"

21. Counsel submitted that there was a significant public interest that people admit their wrongdoing, and that this must be reflected in sentencing. He submitted that it was overstretching things to suggest that there had been an error in this sentence; it was within the discretion of the trial judge. He submitted that the case law demonstrated that where a judicial discretion was involved there had to be a careful objective examination of all factors regarding the discretion, in particular where an application in respect of undue leniency was at issue.

22. Counsel acknowledged that these were serious offences, and that there were certain matters that caused concern, such as the original threat to kill and indeed his admission of guilt in circumstances where he had initially sought to blame one of the protagonists. He submitted that while his client had not behaved perfectly in interview, the fact that he had ultimately pleaded guilty and accepted all that had been alleged against him was an important factor in the overall sentence.

Determination of the Court

23. It is accepted that in a review of a sentence for undue leniency, the onus lies on the prosecution to establish that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence by the court of trial from the norm. The appeal court should always accord great weight to the trial judge's reasons for imposing the challenged sentence. (See *People (DPP) v Byrne*, [1995] 1 I.L.R.M. 279 and *People (DPP) v McCormack* [2000] 4 I.R. 356).

24. At its core this case raises the difficult issue of consecutive sentences and in particular when the absence of consecutive sentences may be reviewed. This issue arises in the present case where sexual offending had occurred on a number of occasions over a period of years but particularly so where there were two victims.

25. In his book "*Sentencing Law and Practice*" 3rd edn., 2016 Professor O'Malley stated at para. 5-27: -

> "*In the absence of any particular statutory rule or restriction, a Court usually has considerable discretion as to the sequence in which multiple custodial sentences should be ordered to run. Many defendants are simultaneously convicted of several offences, while others may already be serving custodial sentences for unrelated offences. Insofar as there is any guiding common law principle, it is that concurrent offences should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from separate and unrelated incidents. But this, it should be stressed, is no more than a broad guiding principle. A Court's fundamental duty is to impose a sentence that fairly reflects the totality of the offending conduct, while making due allowance for personal mitigation and other relevant factors.*"

26. The above passage was quoted in *People (DPP) v. K.C.* [2019] I.E.C.A. 126 but was quoted as part of the respondent's submissions. This Court approves of the principles set out in that quotation.

27. At para. 5-27 Professor O'Malley proceeds to discuss the concept of the "one transaction rule" where sentences should usually be concurrent rather than consecutive. The difficulty with that approach has been to identify what can be considered as being 'one transaction'. He quotes the Australian decision of *Johnson v. The Queen* [2004] H.C.A. 15 which had held that it was both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. This Court is quite satisfied that where two victims have been sexually assaulted on the same occasion it must not be considered a single incident of offending. The sentence actually imposed must reflect that it is an aggravating feature of any sexual assault for one victim to be assaulted jointly with another victim or in the presence of another victim.

28. The decision in *The People (DPP) v. McKenna (No. 2)* [2002] 2 I.R. 345 acknowledged that although there had been previous decisions indicating that the imposition of consecutive sentences should be the exception rather than the rule, there were circumstances where

consecutive sentencing may be more appropriate. The primary concern of the courts must be as Professor O'Malley states: -

> "*That the final sentence should reflect the overall gravity of the offender's conduct while making due allowance for any relevant personal circumstances.*"

29. This Court also accepts the following as set out by Professor O'Malley at para. 5-31: -

> "*Where there are several victims, as occasionally happens in child sexual abuse cases, courts are now inclined to impose a set of concurrent sentences in respect of the offences against each victim but to order those sets of sentences to run consecutively to each other. Otherwise, an individual victim may feel that the harm inflicted on him or her has gone unpunished. However, this is just a general principle that has developed through recent practice.*"

30. A close reading of the transcript in the present case reveals that the sentencing judge set out in detail the facts that were aggravating and the facts that were mitigating. At no point did he expressly address the issue of whether the sentences should be consecutive or otherwise. At the end he indicated the appropriate tariff on each count to be one of five years and six months but, having factored in the mitigating and aggravating circumstances and in particular the assistance the admissions had given to the prosecution, he imposed the sentences of four years and six months.

31. In the view of the Court, having regard to the principles referred to above, the point has been reached where it is generally an error in principle to fail to consider whether it is appropriate to impose a consecutive sentence where there has been more than one victim of sexual assaults. This applies with even greater force where the victims are children. On the other hand, as has been acknowledged, the final sentence imposed by a court must reflect the overall gravity of an offender's conduct while making due allowance for personal circumstances. Imposing the correct sentence may not always require the sentences to be stated to run concurrently. Where the same sentence is being imposed upon each count and is to run concurrently, the just and appropriate sentence may nonetheless be imposed if the sentence on each count reflects the particular gravity of all the circumstances of the offending. Thus, where the same sentences have been imposed on a number of counts to run concurrently with each other, but the trial judge has acknowledged that the sentence is greater than that which might otherwise have been imposed in the absence of the repetition of the behaviour and the fact that it was committed against more than one victim, no error in principle may necessarily have occurred.

32. In the present case, neither party takes issue with the headline sentence of five years and six months. In reducing that sentence by one year, the trial judge stated that he was taking into account all the aggravating and mitigating circumstances, in particular the valuable guilty plea. In the view of this Court, to only allow one year for mitigation in the circumstances he described, may, in the ordinary course, have been open to some criticism that insufficient credit had been given to the mitigation. In this case, it was accepted by all at the sentencing hearing and at the hearing of this application, that the pleas offered, following his admissions, were

highly valuable to the prosecution. This was particularly so in respect of the younger victim. The pleas were therefore a significant mitigating factor in the present case.

33. On the other hand, the trial judge had indicated considerable aggravating factors in this case, including the ages of the children, the nature of the abuse and the period over which it occurred together with the impact on the children. In those circumstances, particularly where he had made significant reference to the two children involved, it appears there was some element in the overall sentence of acknowledging that these latter factors required the imposition of a longer sentence than might otherwise have been imposed for this criminal conduct. Even if a consecutive sentence had been imposed, the sentencing judge would have been bound by the principles of totality and proportionality in respect of the final sentence to be served.

34. In the circumstances and bearing in mind the principles that this Court must apply on a review under s.2 of the 1993 Act, the Court cannot be satisfied that, despite the failure to expressly acknowledge the importance of factoring in the repetitive nature of the abuse and the two separate victims, that the overall sentence imposed deviates significantly from the norm. We therefore refuse the application to review the sentence.

35. Finally, the Court wishes to record that as there is a legitimate public interest in ensuring that offending behaviour against more than one victim is considered and dealt with appropriately in sentence, it is incumbent on a sentencing judge to communicate to the offender, the victims and the public at large that this factor has been taken into account in the sentence actually imposed. If sentences are consecutive that factor is apparent on its face. Where a consecutive sentence has not been imposed, the sentencing court should expressly state the reason why a global sentence is more appropriate. If the sentence has not been increased even though there has been a multiplicity of victims, it is also important that the reason for this is readily ascertainable.