THE COURT OF APPEAL

Birmingham J
Sheehan J.
Edwards J

122/14

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

T.B.

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of July 2016 by Mr. Justice Sheehan

1. The appellant pleaded guilty to fourteen counts of indecent assault and received an overall sentence of nine years imprisonment.

2. Counts 1 and 2 on the indictment refer to indecent assaults against SS which occurred in 1987. These offences were contrary to s. 10 of the Criminal Law (Rape) Act 1981, which provides a maximum penalty of ten years imprisonment. The appellant was sentenced to three years imprisonment on count 1 and eighteen months imprisonment on count 2, both sentences to run concurrently.

3. The remaining counts referred to indecent assaults against BT and were committed between 1978 and 1984. On counts 5, 6, 9, 11, 12, 15 and 16, the appellant was sentenced to eighteen months imprisonment. These offences were contrary to s. 6 of the Criminal Law (Amendment) Act 1935 and were deemed at the time to be subject to a maximum sentence of two years imprisonment. These sentences were to run concurrently. On counts 21, 24, 25 and 27, the appellant was sentenced to six years imprisonment. These offences being contrary to s. 10 of the Criminal Law (Rape) Act 1981, which provides for a maximum penalty of ten years imprisonment. The court directed that the sentences on counts 1 and 2 be consecutive to the six year sentences of imprisonment imposed on the remaining counts.

4. The sentencing judge also directed that the appellant undergo eighteen months post release supervision.

5. The principle grounds of appeal advanced on the appellant's behalf were that the sentencing judge had failed to give adequate weight to the mitigating factors failed to structure a sentence to allow the appellant to undergo therapy and had failed to identify the appropriate headline sentence in respect of any of the offences.

Background
6. The offences committed by the appellant first came to light when he went to a garda station in January 2010 and made a number of voluntary admissions. At that point no formal complaint had been made against him.

7. Counts 1 and 2 on the indictment relate to a niece of the appellant. The offences in question occurred on dates unknown between the 1st May, 1987 and the 30th September, 1987. The offences occurred when SS was six and the appellant was 33.

8. SS was friendly with the daughters of the appellant and as a child she had sleepovers in his family home. She described how she slept in the same bed as the appellant's two daughters and that the appellant would abuse her as they read stories in bed. She said that he would kneel on one side of the bed while the girls took turns to lie in the middle of the bed to read the story. She said that when she got to the side where the appellant was kneeling, he would take her hand and rub it up and down his penis. She would try to remove her hand away, but he forced her to keep it there.

9. SS also recalled an occasion where she was lying face down on the bed and the appellant was behind her with his penis out. He rubbed his penis between her legs and against her vagina.

10. The remaining counts were in respect of offences committed against BT a sister in law of the appellant. She described how she was first abused by the appellant in 1978 when she was five years of age and the appellant was 24 or 25 years old. The appellant would bring her for walks on a golf course behind her father's house take down her pants and touch her vagina. The abuse continued on a regular basis whenever the appellant was alone with BT, around three times a week and sometimes more than once in one day. He would make her touch his penis and he would touch and lick her vagina. He would put her on his lap and rub himself against her.

11. BT stated that the abuse worsened around 1981 when the appellant and his family moved home. On her visits to the home and in other places she said the appellant would abuse her at every opportunity by digitally penetrating her, performing oral sex on her, making her masturbate him and rubbing and kissing her chest. The assaults continued through 1982 and 1983 and included the appellant getting BT to perform oral sex on him. At the sentencing hearing both BT and SS victim impact reports were read to the court.

12. The abuse of the victims in this case came to light when the appellant attended at the garda station in 2010. He told the gardaí that he was suicidal and required medical attention. The gardaí described him as trembling and emotional on presentation at the garda station and although he had made a number of admissions he was deemed unfit for interview and was admitted as an inpatient to a psychiatric hospital.

13. The appellant acknowledged all responsibility for the offences and expressed deep remorse and feelings of guilt.

14. The aggravating factors in this case are:-

1. The serious breach of trust.

2. The harm done to the victims as evidenced by the victim impact reports.

3. The young age of the victims when the offending started.

4. The length of time over which the offending occurred and the progression of the abusive behaviour from indecent touching to oral sex.

15. The mitigating factors are:-

1. The appellant's remorse as evidenced by the fact that he himself went to the gardaí and reported his own wrongdoing.

2. The plea of guilty.

3. The absence of previous convictions.

4. The appellant's personal circumstances which include the fact that when he was aged eight or nine he was repeatedly raped by a person to whose care he was entrusted.

5. His health difficulties.

16. While BT and SS both have supportive husbands and families the crimes committed by the appellant against them have had a profound and disturbing effect on both their lives and these effects were incorporated in the victim impact reports. At the time of sentence both victims were receiving counselling. BT stating that "it's the help and support of my husband, family, doctor and counsellors that keeps me going". SS concluded her victim impact report by expressing hope for her future.

17. Prior to imposing sentence, the trial judge stated:-

> "I declare the accused as sex offender as required by law. The facts of this distressing case are fully set out in the transcript and need not be rehearsed again here. I would find it too upsetting to do so. I take account of (i) the unspeakable severity of the facts proved, (ii) the breach of trust involved, (iii) the ages of the victims, (iv) the multiplicity of the offences involved, (v) the time span over which these offences extended and (vi) the affect on the victims as manifested by the victim impact evidence. In favour of the accused I take account of (i) his presenting himself to the guards in the event of any accusation being made against him, (ii) his pleas of guilty, (iii) his strong work ethic and (iv) the antiquity of the offences alleged to against him."

18. In our view the significant factor about the sentencing remarks is that they make no reference whatsoever to important matters addressed in the forensic psychologist report that was presented to the court on behalf of the appellant. This report was prepared and signed by three psychologists.

19. In particular no mention is made of the fact that the appellant had been repeatedly raped over a period of a year when he was eight to nine years old. The appellant had commenced offending when he was 24 years of age and the fact that he was raped when a child was something which required to be factored into an assessment of his level of culpability at the time the offences occurred.

20. The psychologist's report described the appellant as a psychologically vulnerable individual who as a result of his own experience of sexual abuse experienced low mood and chronic levels of low self esteem for the majority of his life. Due to his inefficient coping mechanisms he resorted to alcohol and self harm to cope with his unresolved feelings of anger, confusion and shame surrounding the abuse he had experienced. The report describes these matters as being relevant to the context of his offending behaviour.

21. The report concludes that the appellant is ashamed regretful and remorseful for his behaviour and that he accepts responsibility for the offences.

22. While a sentencing judge does not have to refer to every aggravating or mitigating factor in a case, it was necessary for him in this case to have regard to the psychological report. If he did not accept the findings or took the view that they were irrelevant he ought to have said so.

23. In *DPP v Flynn* [2015] IECA 290, a judgment of this Court delivered by Edwards J. and which is relied on by the appellant, the court stated:-

> "13. It is convenient to deal first with the complaint that the judge failed to identify his starting point (ground ii) i.e. the appropriate headline sentence having regard to the available range based on an assessment of the seriousness of the offence taking into account aggravating factors but before applying any discount for mitigating factors. It is correct, and it represents a legitimate criticism, to say that the trial judge failed to indicate his starting point, and merely indicated where he ended up. The trial judge's failure to do so represented a departure from best practice, and has made this Court's task somewhat more difficult.
>
> 14. There is a strong line of authority starting with *The People (Director of Public Prosecutions) v M* [1994] 3 I.R. 306 ; and continuing through *The People (Director of Public Prosecutions) v Renald* (unreported, Court of Criminal Appeal, 23rd November 2001); *The People (Director of Public Prosecutions) v Kelly* [2005] 2 I.R. 321; and *The People (Director of Public Prosecutions) v Farrell* [2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in The People (Director of Public Prosecutions) v McCormack [2000] 4 I.R. 356.
>
> 15. Two quotations are sufficient to illustrate the point.

16. In The People (Director of Public Prosecutions) v M Egan J. in the Supreme Court said at p. 315 of the report:-

> "It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence available. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made"

17. In *The People (Director of Public Prosecutions) v Farrell* , Finnegan J giving judgment for the Court of Criminal Appeal, reiterated yet again (at p.2 of the judgment) that:

> "A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered."

18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question."

24. In the present case it is difficult for us to be clear as to what credit the appellant was given for the mitigating factors. It is unclear what account if any, the trial judge took of the fact that the appellant had been raped on a regular basis over a year when he was eight or nine years old. While a failure to identify a headline sentence is not always fatal, it makes the task of this Court in reviewing a sentence a more difficult one.

25. It appears to us that the sentencing judge failed to adequately factor into the sentence important matters which were contained in the psychological report and for this reason we take a somewhat different view to counsel for the respondent who submits that the sentence imposed does not represent such a substantial departure from an appropriate sentence as to justify our intervention. We agree with counsel to the limited extent that an overall sentence of nine years imprisonment absent the psychological report was not far from what we consider the correct sentence to be. However, the important matters in that report which we have highlighted require that some portion of the nine year sentence be suspended.

26. In approaching the question of sentence we are guided by the principle of proportionality and the need where possible to incorporate the penal aim of rehabilitation. While these offences occurred a long time ago, they are nevertheless exceptionally serious and their adverse effects continue to be experienced by both victims. However, we also note that the appellant will return to the community when he completes his sentence and it is important that when this happens he will be ready and able to live a crime free life. He has expressed a willingness to undergo the Better Lives Programme while in custody. Accordingly we will vary the overall sentence in his case by suspending the final eighteen months of the six year sentences on condition that he participates in this programme for sex offenders while in prison.

27. We will set aside the original sentence and vary the sentences imposed in the following way.

28. We impose a sentence of three years imprisonment on count 1 and a sentence of eighteen months imprisonment on count 2 and we direct that both these sentences run concurrently and commence on the 26th May, 2014.

29. We impose the same sentences that were imposed on the remaining counts and direct that these sentences be concurrent with each other but consecutive to the sentence imposed on count No. 1.

30. We then order that the final eighteen months of each of the six year sentences be suspended on condition that the appellant participates in the Better Lives Programme while in prison.

31. We also direct that the appellant be subject to a post release supervision order for a period of eighteen months following his release.