THE COURT OF APPEAL

Record Number: 229/18

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

S. O'S.

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 28th day of July 2020 by Ms. Justice Kennedy.

1. This is an appeal against sentence. The appellant was convicted in Dublin Circuit Criminal Court of 24 counts of sexual assault relating to N.O and one count of sexual assault relating to T.O. The appellant received an ultimate sentence of 8 years' imprisonment with the final year suspended on terms.

Background

2. The complainants in this case are sisters. The appellant is the partner of the complainants' aunt, effectively their uncle. In respect of N.O, she was born in Spring 1998. The counts in respect of N.O relate to sexual assaults perpetrated between January 2005 and October 2010 when the complainant was between 6 and 12 years old. N.O. gave evidence to the effect that she was often sent to stay with her aunt and the appellant, between 3-4 times a week, although the frequency decreased as she got older. On nights that the complainant stayed over she would sleep top and toe with her cousin. During the night the appellant would come into the bedroom and he would pull the complainant towards him, he would put his hands down her pyjamas, into her underwear and then into her vagina. The complainant described this as happening every night she stayed over. N.O. gave evidence of the last incident which occurred on the night of her brother's Debs in 2010. She had been minding the appellant's son in his flat in Dublin. The complainant believed that nothing would happen as she heard the appellant get into bed, but he then proceeded to get out of his bed and tell her that he loved her more than his partner and he put his hand into her pyjamas and into her vagina. This led to the complainant telling her brother and sister what had occurred.

3. In relation to T.O., she gave evidence of an incident which occurred while she was staying at her grandmother's house when she was between 6 and 7 years of age. At the time, the appellant, his partner and their son were living in the house on the top floor. There was a bedroom with a double and a single bed. The appellant and his partner were in the double bed and the complainant was at the end of the single bed with her cousin. The complainant gave evidence that during the night she felt the appellant coming towards her, he got into her bed and put his hand down her underwear and touched her vagina. The complainant stated that she got up and told the appellant she didn't like what he was doing, and he told her to come back and that he wouldn't do it again. The complainant gave evidence that she told no one at the time because she didn't understand what had happened and she eventually told NO on the night of her brother's Debs.

4. A formal complaint was made to Gardaí in 2015. The trial against the appellant commenced on 12th February 2018 in respect of 33 counts. On 14th February 2018, the jury was discharged, and the trial re-commenced on 15th February 2018. At the close of the trial, counts 1-8 were withdrawn from the jury and verdicts of guilty were returned in respect of the remaining counts.

The sentence

5. The sentencing judge made the following remarks in identifying the aggravating factors:-

> "In advance of addressing the presence of mitigation, I must locate on the scale of gravity where these offences lie. There are two victims here, and the offending was over a decade, committed by a person of dominance abusing his position of trust. In theory, this man has no previous convictions, but since 2000/2002, he has been offending, with the first sexual assault being committed against T.O. in the incident that was identified on Count 33 in the indictment. Thereafter, he offended between 2005 and 2010, and I accept that there has been no substantial delay in terms of historic abuse cases standards, but his dominance with regard to N.O., and his betrayal and substantial breach of trust over all of those years, only serves to further aggravate the facts of this case. Additionally, the youth of both young women also serves to seriously aggravate the circumstances, along with a pattern of behaviour of exploitation and opportunism, where these children were sleeping at night, in bed, and he went into the room, often where his own child was present, and abused them.
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> The division of the former extended family unit is another aggravating factor, and bearing all the aggravating factors into account, the headline sentence will be one of nine years. He was entitled to contest the charges but has lost the potential mitigation in that respect."

6. In terms of mitigation, the sentencing judge observed that the appellant has no previous convictions although he had been committing the offences in question since 2000. The trial judge also made reference to the appellant's family circumstances, his work history and his productivity while in custody.

7. Having identified a headline sentence of nine years the sentencing judge imposed sentences of seven years in respect of Counts 9 to 31. In respect of Count 33, six years' imprisonment was imposed and in respect of Count 32, eight years with the final year suspended was imposed, all to run concurrently. The sentences were imposed from the date of sentence.

Grounds of appeal

8. The appellant puts forward the following nine grounds of appeal:-

   i. The sentence imposed by the learned trial judge was excessive in all the circumstances.

   ii. The learned trial judge erred in law or in principle in failing to impose a sentence proportionate to both the offence and to the personal circumstances of the Appellant.

   iii. The learned trial judge erred in law in placing significance on and identifying inappropriate aggravating factors.

   iv. The learned trial judge erred in law and in fact and failed to place adequate significance on the mitigating factors in the case.

   v. The sentencing judge erred in law in assessing the gravity of the offence at as being at the high end for offences of this nature.

   vi. The sentencing judge erred in law in failing to take any/or adequate account of the fact that the appellant had no previous convictions.

   vii. The learned trial judge erred in law in failing adequately or at all to set out the basis upon which the court viewed 8 years imprisonment as appropriate in the circumstances of the case before it.

   viii. The court fell into error in not back dating the Applicant's sentence to the date of incarceration.

   ix. The learned trial judge erred in law in failing to give adequate consideration to the appellant's personal circumstances.

Submissions of the parties

9. Although there are nine grounds of appeal, the parties have made submissions under four main headings, which are laid out below.

Gravity of the offences and errors in fixing the headline sentence

10. The appellant submits that the headline sentence of nine years was too high in the circumstances. In particular the appellant points to the following factors: the offending did not involve oral abuse, anal abuse or abuse with the penis or other degradations, the frequency of the offending against N.O. lessened over time, there were no threats or use

of violence and in relation to T.O., it was a once-off incident and did not involve any digital penetration.

11. The appellant refers to the judgment of Charleton J. in *The People (DPP) v. FE* [2019] IESC 85 wherein he provides guidelines for sentencing in rape cases and it is submitted that by analogy, a headline sentence of nine years, in effect, places the offending in the more serious category of rape cases.

12. In relation to Count 33, the appellant submits that the sentencing judge erred in handing down a sentence of six years as the timeframe for the count in question, that being July 2000 to July 2002, straddled the commencement date of the Sex Offenders Act, 2001.

13. The appellant further submits that the sentencing judge erred in describing the offending in respect of Count 33 as involving the digital penetration of the vagina when she stated that the appellant "put his hand down and inside her underwear and put his hand into her vagina." In fact the act in question was the rubbing or touching of the vagina.

14. The respondent submits that the headline sentence of nine years is in keeping with the twelve-year headline sentence indicated by the sentencing court in *The People (DPP) v. SA* [2018] IECA 348. In *SA* sentences of nine years' imprisonment, but with the final 18 months suspended, were imposed in the Circuit Court in respect of a number of counts of sexual assault. The appellant was the uncle and godfather of the complainant, who was aged between 15 and 17 at the time of offending. The offending was very frequent and involved oral sex. The appeal was dismissed. While the offending in *SA* was more serious than the offending in the present case, the offending spanned a period of just two years and ended when the complainant turned 17. In the current case, where a lower headline sentence was identified, there were two complainants of much younger years, with the offending spanning a significantly longer period.

15. The respondent refers to *The People (DPP) v. KC* [2016] IECA 278 where a sentence of nine years' imprisonment was imposed by the Circuit Court in respect of indecent assault offences, following a contested trial. The offences had been committed during the period 1983 and 1987 when the complainant was aged between 7 and 11 years. The appellant was the female complainant's brother. The appellant argued that the sentence was excessive. The appeal was dismissed. While the offending in *KC* differs from the nature of offending in the current case, in that *KC* involved oral sex and the rubbing of the appellant's penis against the complainant's vagina area, parallels can be drawn vis-à-vis the abuse of trust and the duration and repetitive nature of abuse. Of note also is the fact that the maximum custodial sentence the court was dealing with in *KC* was one of ten years, a lesser maximum sentence than that available in the current case.

16. The respondent accepts that the timeframe of Count 33 straddled the commencement date of the Sex Offenders Act, 2001 and the sentencing judge decided to impose a sentence of six years' imprisonment. If this is deemed to be an error then it is submitted that the effect of any such error is non-consequential, given that the sentence imposed on Count 33 was ordered to run concurrently.

17. The respondent further argues that it had been reiterated throughout the trial that in respect of the offending against T.O., the appellant had touched her vagina. While it is accepted that the sentencing judge did use the phrase "into her vagina", the judge did not make any reference to digital penetration.

Matters relating to aggravation

18. The appellant takes issue with the sentencing remarks of the judge in relation to the evidence of K.O. and B.O. The sentencing judge stated as follows:-

> "I mention this as the jury clearly rejected what both K.O. and the grandmother said in her evidence, which was that these women never stayed at the times alleged. And these lies only served to demonstrate how divided the once close family are now, following the revelations of the sexual abuse. And this is an aggravating factor, which I will attach weight to in this regard, as it is a distinctive consequence of the substantial breach of trust on the part of SO'S…
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> He called evidence, as I have already said, and clearly the jury did not believe the two witnesses called. In fact, the blatant lies were so incredulous on the part of B.O. and K.O. that only seemed to aggravate matters that were presented before the Court."

19. The appellant takes issue with the finding of fact by the sentencing judge that the witnesses were lying. It is submitted that the jury did not have to conclude that B.O. and K.O. were lying in order to come to a verdict of guilty.

20. It is further argued that the sentencing judge seems to regard the calling of this evidence as an aggravating factor itself and was in effect penalising the appellant for contesting the charges and the manner in which they were contested. The appellant refers to O'Malley on *Sentencing Law and Practice* (3rd Ed., Round Hall, 2016) at para 5.18:-

> "Defendants are permitted to give evidence in their own defence, though they are never obliged to do so. But they should not be subject to unfair disincentives when deciding if they should testify. The possibility of enhanced punishment for suspected perjury would be one such disincentive. In People (DPP) v Gillane the Court of Criminal Appeal remarked that the appellant had fought the case "tooth and nail", as he was perfectly entitled to, and that this would not add one day to the appropriate sentence."

21. The appellant further argues that the sentencing judge erred in linking the purported lies to the division in the family, which the sentencing judge characterised as an aggravating factor.

22. The respondent submits that rather than declaring that these witnesses had been lying throughout their evidence, the sentencing judge confined her finding to the evidence surrounding when the complainants had overnighted at the addresses in question. This, it is submitted, is a finding that the sentencing judge was perfectly entitled to come to, given the evidence in the case.

23. The respondent submits that there is nothing to support the appellant's claim that he was penalised for calling evidence in his defence and at no point did the sentencing judge refer to such as an aggravating factor.

24. In respect of the division of the family as an aggravating factor, it is submitted that the sentencing judge clearly explained her rationale for deeming it an aggravating factor, stating that the division was a direct result of the abuse perpetrated by the appellant. The respondent submits that the trial judge was entitled to deem the family division an aggravating factor and the effect of such division was clearly reflected in the victim impact statements of the complainants.

Matters relating to mitigation

25. The appellant submits that due weight was not given to the lack of previous convictions as the sentencing judge seemed to take a minimising attitude to the fact of no previous convictions. The position of no previous convictions not only related to the good character of the appellant for the period prior to the offences the subject matter of the trial, but also related to the eight-year period since the last offence.

26. The appellant further submits that due weight was not afforded to the personal circumstances of the appellant, his cooperation with Gardaí, the delay in the case and the appellant's good use of time spent in custody.

27. The respondent argues that if this Court agrees with the submission advanced by the appellant that the sentencing judge demonstrated a minimising attitude towards the mitigating factor of no previous convictions, that such an attitude was merited due to the persistent and prolonged offending the appellant was convicted of, spanning a period of ten years. The appellant committed repeated acts of sexual abuse over a number of years, rather than an isolated criminal act, which might indeed be deemed to be out of character for a person with no record of previous convictions.

28. The respondent further submits that the trial judge clearly took account of all other relevant mitigating factors and given the limited mitigation, the reduction of the headline sentence by one year was adequate.

Failure to take account of time spent in custody

29. The appellant was remanded in custody on the 27th February 2018 and was sentenced on the 27th July 2018. In imposing sentence the trial judge indicated that she was "utilising her discretion" in imposing the sentence from the 27th July 2018, rather than backdating the sentence.

30. The appellant refers to *The People (DPP) v. Flaherty* [2015] IECA 161 where the Court stated as follows:-

> "While it is generally the practice, when arriving at the appropriate sentence for a particular offence and a particular offender, to allow full credit for time spent in custody prior to the sentencing date, it is not mandatory that this be done, and indeed in some instances which might be described as exceptional, it would not be

appropriate to so do. Sentencing judges should have a discretion to decline to give any credit, or alternatively to give limited credit, for time spent in custody in appropriate cases, and with due regard to the totality principle."

31. The appellant further refers to O'Malley on *Sentencing Law and Practice* (3rd Ed., Round Hall, 2016) at para 5.53:-

> "This approach was confirmed in People (DPP) v Byrne [2015] IECA 235, para. 36 where it was claimed that the trial judge had failed to give credit for time spent on remand. However, in that case the judge had expressly said that the sentence would have been longer were it not for the period spent on remand. The Court of Appeal found no error of principle. This case simply illustrates the point that it matters little how a judge takes account of time already spent in custody as long as it is duly credited. Yet, there is a strong argument for adopting a consistent practice of either specifying that credit is being given for the entire period spent on remand, or else explaining why no credit is being given for some or all of that period"

32. The appellant submits that the sentencing judge made no reference to the period spent in custody; the Court made no reference to taking this period into account in its calculation of the appropriate sentence; the Court made no reference to the totality principle; and the Court identified no reasons at all for not backdating the appellants sentence never mind any reason that would bring the case into the "exceptional" category per *Flaherty*.

33. The respondent submits that the sentencing judge explained that she didn't state that she was giving the appellant credit for time spent in custody but that she was suspending twelve months of his sentence. The respondent submits that credit is sometimes given by suspending a portion of the sentence and while the sentencing judge did not explicitly state that this was her intention, she did allude to this when asked about backdating the sentence, that her decision was that twelve months of the sentence would be suspended.

Discussion

34. We first consider the issue of the nominated pre-mitigation sentence of nine years' imprisonment. Mr Carroll SC for the appellant contends that the nature of the offending conduct did not warrant a headline sentence of that order, and that as a consequence the resulting sentence was simply excessive. While he accepts that prolonged sexual misconduct may warrant a greater headline sentence notwithstanding that the nature of the offending may be of a less severe order, it is said that the headline sentence is too high.

35. Two points must be made on this issue, first, this is indeed a case of prolonged sexual offending in respect of N.O., factors such as the abuse of trust, the age of the children and the vulnerability of the victims render the offending of a serious kind. These factors must be weighed in the balance with the nature of the offending, while the offending conduct was not at the upper level in terms of seriousness, nonetheless, the touching of a child's private parts and the persistent digital penetration of a child is serious in nature.

36. The second matter is the issue of consecutive sentences. The judge in the present case obviously determined not to impose consecutive sentences, although it was within her discretion to do so. In imposing concurrent sentences, it was within her discretion to impose a greater overall sentence to reflect the gravity of the conduct and the circumstances of the appellant.

37. It is said that the judge did not explain this process, but it is self-evident that the judge imposed concurrent sentences and the principle remains that in so doing, she was entitled to nominate a greater sentence than might otherwise have been nominated in the instance of consecutive sentences.

38. Issue is taken with the judge taking into account as an aggravating factor, evidence called on the part of the appellant at trial. In this regard the judge said:-

> "I mention this as the jury clearly rejected what both K.O. and the grandmother said in her evidence, which was that these women never stayed at the times alleged. And these lies only served to demonstrate how divided the once close family are now, following the revelations of the sexual abuse. And this is an aggravating factor, which I will attach weight to in this regard, as it is a distinctive consequence of the substantial breach of trust on the part of SO'S…"

39. In actually imposing sentence, the judge did not reference this issue, but relied on the abuse of trust as an aggravating factor. However, any accused is fully entitled to contest a trial, and of course, if that person is convicted of the offending conduct, he/she is then deprived of the powerful mitigating factors of a plea of guilty and remorse, which factors are of great value in the instance of sexual offending. Breach of trust is a clear aggravating factor and this is particularly egregious in the instance of child sexual abuse. Children are entitled to feel safe in their home environment and with their family and extended family.

40. However, the manner of contesting a trial is not an aggravating factor and in this we believe the judge erred. However, we are not satisfied that the error in the circumstances amounted to an error of substance in the nomination of the headline sentence.

41. In the circumstances, we are not persuaded that the nominated sentence in the instance of N.O. was unjustified.

42. This brings us to the issue of the maximum sentence for the offence concerning T.O. The offending straddles the Criminal Law Rape (Amendment) Act 1990, where the penalty for sexual assault was a maximum term of 5 years and the Sex Offenders Act, 2001, where the penalty for the sexual assault of a child is that of a maximum of 14 years' imprisonment.

43. While in some instances, it is possible to draft the indictment so that the offences preferred do not straddle the relevant Acts by preferring counts under each statute, in the

present case, the complainant was unsure as to whether she was 6 or 7 years old at the time, resulting in a single count.

44. We are satisfied that the maximum penalty was that prescribed under the 1990 Act, being 5 years' imprisonment. We will address that count presently.

45. Mr Carroll contends that insufficient discount was given to the appellant for the mitigating factors. It seems to this Court that the mitigating factors were very limited. It is said, in particular, that the judge, in her remarks gave little credit for the absence of previous convictions. It is so that the absence of previous convictions may be a significant mitigating factor, but this is not so where an individual has engaged in undetected prolonged offending such as in the present case. While some credit may be afforded to an appellant in those circumstances, that credit is significantly reduced.

46. We are not satisfied that the judge fell into error in the discount she afforded for the mitigating factors, such as they were.

47. We now come to discuss the failure by the judge to backdate the sentence. The appellant was lodged in custody, having been convicted by the jury and clearly this was well within the discretion of the judge as his circumstances had radically altered. This occurred on the 27th February 2018. At the conclusion of the sentence hearing on the 27th July 2018, the appellant having entered into the bond in respect of the suspended element of the sentence, Mr Carroll sought to have the sentence backdated. The judge indicated that the sentence was imposed from the 27th July and stated that she was exercising her discretion to do so.

48. The judge sought to clarify her reasoning in indicating that she had suspended 12 months of the sentence.

49. It is correct to say that it matters little how a judge gives credit for time spend on remand pending sentence, as long as such credit is given. This may be done by simply indicating that an accused be given credit for time served or by backdating the sentence or indeed in some circumstances a judge may be justified in not giving credit for time spent in custody, but there must be good reason for not doing so.

50. In the present case, while it was within the judge's discretion not to backdate the sentence, we believe that she did not sufficiently explain her reason for not doing so and consequently, we will adjust the sentence by backdating it to the 27th February 2018.

51. So far as the sentence on count 33 concerned, where the maximum penalty is one of 5 years imprisonment, we consider the appropriate headline sentence to be one of 3 ½ years imprisonment and impose a sentence of 3 years to take account of mitigation, the sentence is imposed on a concurrent basis.