THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

209/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

R.K.

Appellant

JUDGMENT of the Court delivered on the 7th day of July 2016 by

Mr. Justice Birmingham

1. This is an appeal against the severity of sentences imposed in the Central Criminal Court on the 27th July, 2015. The sentences appealed are a sentence of eighteen years imprisonment with the final five years suspended in respect of a rape count and a concurrent sentence of thirteen years imprisonment imposed on a sexual assault count.

2. On Monday the 22nd June, 2015, the appellant pleaded guilty to one count of rape contrary to s. 4 of the Criminal Law Rape (Amendment) Act 1990 and one count of sexual assault. The sentence hearing took place on the 20th July, 2015, when the court heard that the pleas were entered on a full fact basis and reflected sexual abuse of the victim between the 1st July, 2009, and the 26th November, 2012. The victim was six years of age when the abuse commenced and nine years of age when the abuse ended.

3. The abuse included acts of compelling the victim to masturbate the appellant, oral penetration with the appellant ejaculating in the victim's mouth, digital penetration of the vagina, on one occasion the digital penetration caused bleeding, and anal penetration by the penis, which occurred some nine or ten times. The abuser was 18 years of age when the abuse commenced and 21 years of age when it ended. It is possible to date the ending of the abuse, because on the 26th November, 2012, the victim's brother referred to the abuse that was occurring when in a car with the victim's aunt, setting in train an inquiry. It should be explained that the abuser was in a relationship with the victim's mother, and it was this relationship that brought him into contact with the young victim.

4. The court heard of the very significant impact that this abuse has had on the victim. She attended a psychotherapist weekly for a year and thereafter fortnightly. At the time of the sentence hearing, she was again seeing the psychotherapist weekly, and it was expected that she would continue to do so indefinitely. The victim is still afraid to sleep in the dark for fear of her abuser appearing again. She felt "angry, dirty, sad, terrified, guilty and nervous". She was afraid that her abuser would kill her if he found out that she had told on him. The court was told that the abuse had serious effects on the victim's academic achievements and had stalled her emotional maturity. She displayed symptoms of post traumatic stress disorder.

5. The appellant had a number of previous convictions for theft, cultivation of cannabis and possession of drugs as well as convictions under the Road Traffic Acts, but he had no conviction that was in any sense comparable.

6. When imposing sentence, the judge outlined the aggravating factors as:-

> (i) The horrendous breach of trust.
>
> (ii) The very young age of the victim.
>
> (iii) The progressive nature and regularity of abuse.
>
> (iv) The profound and continuing effect on the victim.

7. In the course of his sentencing remarks of the 27th July, 2015, having previously put the matter back to allow time for consideration, the judge commented that he saw the plea of guilty as being the only significant mitigating factor, though he added that significant weight had to be attached to it. The judge felt that because of the nature of the crime, the appellant was not entitled, as he put it, to a straight forward discount but rather only to a conditional one, whereby the appellant would serve part of the sentence back in the community. He then proceeded to impose a sentence of eighteen years on the rape count, as the headline sentence, but suspended the final five years subject to conditions.

8. The appellant contends that the sentence imposed on the rape count, and indeed on the sexual assault count, involved an error in principle in that it is out of line with, and so disproportionate to, the normal range of sentences applicable for similar type offences.

9. The grounds set out in the notice of appeal were as follows:-

> 1. The learned trial judge erred in principle in respect of both counts in imposing sentences which are excessive and disproportionate in all the circumstances.
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> 2. The learned trial judge erred in principle in considering the appropriate sentence, absent mitigating factors, to be one of eighteen years imprisonment on count 1.

3. The learned trial judge erred in principle in failing to place the sentence as regards count 3 [sexual assault count] on the scale, thereby arriving at a particular sentence before considering mitigation.

4. The learned trial judge erred in principle in failing to make any deduction for mitigating factors as regards count 3.

5. The learned trial judge erred in principle in respect of both counts in imposing sentences that are inconsistent with and out of kilter with the normal range of sentences for similar type offences.

6. The learned trial judge failed to have due regard to the mitigating factors and/or failed to correctly balance the mitigating factors against the severity of the offences namely:

(a) the guilty plea by the appellant;

(b) the family circumstances of the appellant and his work history;

(c) the expression of remorse by the appellant;

(d) the willingness of the appellant to undergo rehabilitation and/or treatment in respect of his offending behaviour.

10. In the course of oral argument, it emerged that there were really two legs to the appeal. First of all, a contention that the starting sentence of eighteen years was significantly out of line with sentences imposed in similar cases. Secondly, it is said that the judge departed from the norm in an unacceptable manner by making the entirety of any reduction from the sentence of eighteen years that he was prepared to contemplate conditional.

11. Counsel for the respondent acknowledged that the approach taken, i.e. making the entirety of the reduction from the headline pre-mitigation sentence conditional, was a departure from the norm and did give rise to a certain difficulty. However, he stressed that any focus on the way in which the sentence was structured should not be allowed to distract from the gravity of the offending behaviour, referring in that context to the nature of the abuse, the fact that the abuse continued over a prolonged period, the clear and obvious breach of trust involved, and the fact that the abuse was directed at a very young victim indeed.

12. The appellant submits that the sentences imposed represent a significant departure from the norm. He draws attention to the case of *The People(Director of Public Prosecutions) v. Ryan* [2014] IECCA 11, where it was observed:-

> "It has been said many times that the proper approach to sentencing requires both a consideration of the gravity of the offence (including the level of culpability of the accused) and the circumstances of the offender. **However, in addition, it is important that the courts strive to maintain, notwithstanding that complexity, a level of consistency so that, in at least a general way, like cases are treated in a similar fashion.**" (Emphasis added)

13. The appellant says that if one engages in the exercise of comparing the sentences imposed in this case with other sentences from this Court and its predecessor, the Court of Criminal Appeal, and also that if one factors in information on sentences imposed at first instance gained from the Judicial Researchers' Office report entitled *"Recent Rape Sentencing Analysis: The W.D. Case & Beyond"*, a report referred to by this Court in the case of *The People(Director of Public Prosecutions) v. Power* [2014] IECA 37, then it emerges that the sentences here are very significantly out of line.

14. Attention is drawn to the case of *The People(Director of Public Prosecutions) v. L.D.* [2014] IECA 53. There, the accused had pleaded not guilty but had been convicted in respect of 30 counts of sexual offences, including 19 rape counts which had occurred between 1975 and 1991 in relation to one victim, who was aged seven when the abuse commenced. There was a second victim in respect of whom the accused was found guilty of 11 rape offences. Both victims were the children of the accused. There, the accused was sentenced to fifteen years imprisonment on each rape count, with the last three years suspended.

15. The appellant says that if this case and LD are compared, the current case should not be regarded as being at a higher level of gravity and requiring a more severe sentence. In the *LD* case there were two victims, and the case was contested. It is acknowledged that, on the other side of the coin, the offences in *LD* were of some antiquity, and there were issues in relation to the age and health of the appellant. In *The People(Director of Public Prosecutions) v. F.G.* [2014] IECA 42, the accused pleaded guilty to multiple vaginal and anal rape offenses as well as sexual assaults in respect of the young daughter of his neighbour. The victim was just five years old at the time of the offence, and the offending continued over a period of three and half years. The incidents were accompanied by circumstances of particular depravity and perversion. In that case the accused pleaded guilty three days before the trial date was due to commence. The trial court imposed sentences of eight years on the fifteen rape counts and five years on the sexual assault counts. The Director sought to review the sentences on grounds of undue leniency. The Court of Appeal acceded to the application and imposed a sentence of fourteen years. The appellant says that, serious as the present case is, it lacks the particular depravity and perversion which was a feature of the *FG* case. The appellant says that, if the two cases are compared, it is clear that a significantly less severe sentence is appropriate in the present case.

16. In *The People(Director of Public Prosecutions) v. Griffin* [2011] IECCA 62, the accused pleaded not guilty but was convicted by a jury in respect of 11 counts, including two of rape, one of which was a s. 4 rape. The victim was the daughter of the appellant's partner, and the abuse in question spanned a period of some eight years. A life sentence was imposed by the trial court, but on appeal the Court of Criminal Appeal was of the view that the case did not fall into the exceptional category of where a life sentence was warranted. The Court of Criminal Appeal substituted a sentence of fifteen years. The appellant says that while there are similarities in terms of the offending behaviour, what is striking is that in Griffin there was a plea of not guilty and that accordingly the present sentence should be appreciably less than the one in *Griffin*.

17. *The People(Director of Public Prosecutions) v. S.P.* [2009] IECCA 1, was another case where the trial court had sentenced the accused to life imprisonment. In that case there were two victims: a boy aged between nine and eleven at the time of the offending, and a second victim who was aged between eleven and thirteen. In that case, the Court of Criminal Appeal, per Finnegan J., commented:-

> "The offences were committed at an apartment block where the applicant was caretaker, at his flat and in the home of the victims' father. All the offences are at the most serious end of the scale of the offences in question. On one occasion the abuse involved both boys where the applicant required them to perform acts on each other and to watch while he performed acts on them individually. The offences were attended by significant violence. At the sentence hearing the

applicant was described by a sibling of the victims as being like an uncle to the children of the family."

18. At a later stage, the Court observed:-

> "This court regards the nature of the offences committed and in particular the exceptional depravity involved, the number of offences and the frequency with which they occurred over a relatively short period, the element of significant force and the breach of trust on the part of the applicant as aggravating factors which place the offences in the more serious category of offences of this nature."

19. The Court of Criminal Appeal then went on to substitute a sentence of fifteen years imprisonment with the last two and a half years suspended for the life sentence originally imposed. Again, the appellant says that if *SP* is taken as a comparator, the present sentence is clearly excessive and disproportionate.

20. There has also been reference to a number of sentences at first instance, which are outlined at pp. 20-23 of the sentencing report referred to above. One, which is dated the 30th November, 2010, saw an accused who had pleaded guilty to 45 sample counts in respect of the grooming and subsequent raping of five grandchildren over a period of nineteen years sentenced to fifteen years with the final three years suspended. A case from the 27th May, 2011, saw an accused who had pleaded not guilty but was convicted of the daily sexual abuse of his daughter over a period of four years, commencing when she was nine years of age, receiving a sentence of fifteen years imprisonment with the final three years suspended. A case from the 6th November, 2012, saw an accused who had pleaded not guilty but was convicted of multiple offences of rape and sexual assault in respect of his daughter, when she was eight years of age, receiving a sentence of fifteen years imprisonment with the final five years suspended. The appellant acknowledges that the case of *The People(Director of Public Prosecutions) v. M.F.* 19th July, 2011, did see a sentence of eighteen years imprisonment with the final four years suspended imposed, which is a similar, though marginally more severe, sentence to that which was imposed in the present case. However, in that case the victims were four boys who had been raped and sexually abused on a weekly basis over a period of four years in their school, where the accused was a caretaker. Again, the appellant says that if this case was taken as a guideline then, given that there were four victims there, the sentence in the present case should have been appreciably less.

Discussion

21. Cases vary significantly, and even in those cases of offending behaviour which at first sight appear very similar in character, on closer examination, significant differences will often emerge. For that reason, a degree of caution is required when comparing sentences in one case with sentences in another. However, that said, if one has regard to the cases that were referred to earlier in the course of this judgment that would indicate that the sentences in the present case are, to a significant extent, out of line with other sentences in this area. The Court is of the view that a starting sentence of fifteen years, rather than one of eighteen years, is more in keeping with sentences that have been imposed in other cases. Such a starting sentence still reflects the many aggravating factors present in this case, as any proper sentence must do.

22. In this case there was a plea of guilty, albeit not at the earliest possible opportunity. The trial judge rightly stated that considerable significance had to be attached to this. However, in addressing this issue only through the mechanism of suspending the sentence in part, the trial judge departed from the usual procedure. Indeed, counsel for the respondent accepted that this gave rise to a possible difficulty.

23. This was a case which was always going to have to be met by a significant sentence. The trial judge felt very correctly that considerable weight had to be attached to the plea. However, in the Court's view leaving in place the very substantial starting sentence, which is among the very longest determinative sentences that has ever been imposed and modifying it only by way of part suspension did not fully meet the situation. The more usual response to a plea of guilty is that a sentence is imposed which is less than would have been imposed had there not been a plea of guilty and had the case been fully contested. In the view of the court this was not a case for departing from the usual practice. The court would have preferred to see the judge identify his starting point and then imposing a sentence somewhat less than that to take account of the plea and such other mitigating factors as were present at the time of sentence. When that net sentence was identified the question of whether there was an opportunity to incentivise rehabilitation in the future by suspending any element of the sentence would arise for consideration.

24. In the view of the Court, having identified a sentence of fifteen years as the starting point, it would have been more appropriate to reduce the sentence of fifteen years first considered, to one of twelve years in order to take account of the plea of guilty as well as the other factors that were in favour of the accused such as his relative youth, family circumstances and work history. In addition, given his professed determination to avail of all the services that would be available to him while serving his sentence of imprisonment, it would have been appropriate to consider suspending a portion of the remaining sentence to incentivise rehabilitation. Accordingly, in the Court's view an appropriate sentence would be one of twelve years imprisonment with the final two years suspended, and the Court will substitute that sentence for the sentence imposed in the trial court having concluded that there was an error in principle disclosed in the original sentencing process.

25. In deciding to impose the sentence that it now does, the Court has had regard to the fact that it has been told that the appellant has made good progress while in prison, in that he has followed up on the indications that he gave to the trial court regarding availing of counselling and participating in the various programmes that were available.

26. So far as the sexual assaults are concerned, the sentence of thirteen years imprisonment imposed, when the maximum available was fourteen years, gives very little credit for the plea of guilty that was entered. The Court agrees with the trial judge that the sexual assault element, which was designed to deal in particular with the acts of digital penetration, was very much at the upper level of offending. Nonetheless, the Court feels that it would be appropriate that the sentences for sexual assaults should be clearly less than those imposed for the rape offense. Accordingly, the Court will substitute a sentence of eight years imprisonment in respect of the sexual assault count. The Court also proposes to provide for two years post release supervision. Accordingly, the Court will allow the appeal and substitute the sentences indicated for those imposed in the Central Criminal Court.