THE COURT OF APPEAL

[236/2016]

Birmingham P.
Edwards J.
McCarthy J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT

- AND -

J.A.

APPELLANT

JUDGMENT of the Court delivered on the 26th day of October, 2018 by Mr.Justice McCarthy

1. This matter comes before us on the accused's appeal against conviction and sentence and that of the Director of Public Prosecutions for a review of the sentences on the grounds that they are unduly lenient. The accused was convicted of one count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 and 12 counts of sexual assault contrary to s. 2 of the same Act. On the 28th of July 2015, he was sentenced to a term of six years imprisonment in respect of the s. 4 counts and three years imprisonment on each of those contrary to s. 2 of the same Act, all sentences to run concurrently and with a commencement date of the 13th of February 2015. We deal first with the appeal against conviction.

2. The offences were committed between August 1992 and May 1995 when the complainant was between 12 and 15 years of age. The accused was in his mid forties. It appears that the accused befriended the complainant and a friend and that they began to visit his house. He was described as treating them as equals. He was engaged in a campaign against drug dealing in the area and was the editor of what was a small privately published newspaper. The second boy was not present when the offences occurred. The abuse involved masturbation and fondling and, on one occasion, inducement of the complainant to perform oral sex. The accused sought to have the complainant penetrate him anally on at least one occasion. The complainant and his friend found the accused interesting. They visited the apartment many times for the remainder of the summer in which they first met him. He showed them photographs. On the day before he started secondary school, the complainant was there with the accused. As the complainant put it, in the course of what he described as "play fighting or tickling or that sort of thing", the accused began to rub his penis, pulled down his own trousers, and masterbated himself. The accused asked the complainant to masterbate him, but the complainant left. The complainant described himself as having been shocked and "terrified, sick". He did not wish his parents to know about what had occurred. They had assumed that he was playing in a local field during the summer rather than spending several hours a day in an adult's house about whom they did not know. He felt in retrospect that the accused had gained his trust and he revisited on many occasions thereafter. He described himself as being very confused about his sexuality, as he was attracted to girls and he could not fathom, as he put it, how he continued to allow the accused to engage in the sexual conduct in question. He described himself as participating in a routine whereby he would visit the accused on Saturday mornings before playing rugby, and would on arrival, after some chit-chat, remove his clothes and get into bed with the accused. He hazarded a guess that he had been sexually assaulted at least twenty times in 1993 or 1994 and he said that incidents of abuse happened on seven or eight, or possibly more, occasions in 1992. From the start, he said he knew it was not right but was fearful of breaking away from him and he was afraid that the accused would tell someone.

3. One of the issues canvassed in cross examination by Mr Gageby, counsel for the defence, pertained to the repeated visits of the complainant to the accused's home with particular reference to visits on Saturday mornings prior to playing rugby – effectively he agreed that those visits were a routine. He agreed with Mr Gageby that his evidence was to the effect that he persistently made time in his schedule to visit the accused and that the accused did not make threats. He suggested to him that the complainant would not have repeatedly gone to the accused's home if his allegations were correct and he said he had done so and the events were occurring.

4. On the basis primarily of the latter evidence elicited in cross examination, Mr Gageby in his closing speech submitted that whilst no defence in law of consent by the complainant to the acts complained of could arise, the fact of the repeated return of the complainant to the house was what he characterised as an "oddity" on the premise that "the burnt child avoids the fire", such that, by implication at least, repeated visits were at odds with the proposition that the events occurred.

5. In the course of the charge where he dealt with the matter of consent, the trial judge said that:

> "[The complainant] said that he did not give his consent to the putting of his penis in his mouth…I just want to pause there because I have not mentioned the word "consent" because there is no controversy about that. Consent is a red herring in this case and is not to be considered. All the charges relate to a time when he was under 16, from under 15, from the age of 12 to under 15, he was 15 in May of—on the 20th of May 1990, sorry 1995. There is no question as I say of the relevance of consent in this case. If these events happened they happened without consent because he was not capable of giving consent."

6. The Court was requisitioned by Mr Gageby as to the question of consent. In the course of his submission, he referred to the fact that it seemed that up to the age of 15 and beyond (perhaps this latter is not accurate) of his own volition the complainant returned to the accused's home: consent, he said, was relevant to the factual, though not the legal issue. The Court acceded to the requisition (and such it was even though it may not have been articulated as such) by saying that:

> "I said and rightly said in relation to consent that consent was not in issue at all in relation to the guilt or innocence of the accused, because of the age of the child, and we are dealing with a child in this case, the age of the child at all

> times. However, the defence case, the case as put by the defence, was slightly more subtle than that, because it was suggesting that going back voluntarily to the house over this period until-- from the beginning until he was 15 or almost or beyond even was suggestive of-- didn't ring true so to speak as I understood it put. So they were suggesting that that is the relevance – if he did this regularly was he telling the truth at all? And that's my best summary of it."

7. It seems to us that the judge properly and sufficiently recharged the jury on the point in question. A judge is not required to summarise the defence or the prosecution case. It will be sufficient for the trial judge to summarise all relevant parts of the evidence, having regard to the case made by either party. Thus, in a case such as the present it would be a matter for the jury, as they saw fit, to attribute significance to the repeated return of the complainant to the defendant's home and in particular whether or not the proposition advanced that this was at variance with the contention that the events occurred at all was well founded. However, in the light of the necessity for the Court to address the issue of consent as a matter of law, it was best that he should have made the point or submission advanced by the defence. This might be regarded as an exception to the ordinary rule on the facts of the present case.

8. Mr Condon on behalf of the Director of Public Prosecutions has contended that what Mr Gageby is doing is raising a point not, or not sufficiently, canvassed at the trial- something which he may not do having regard to the well-known decision of *DPP v. Cronin (No. 2)* [2006] 4 IR 329, which expressly prohibits such a course absent exceptional reason having regard to the justice of the case. He submits that if Mr Gageby had difficulty with what the judge said in terms of answering the requisition and properly putting the proposition advanced by the judge on this topic, he ought to have requisitioned the judge on what he said when recharging the jury, and that Mr Gageby cannot now complain. Of course it is the case that if the judge has fallen into error in the recharging it may be appropriate to further requisition him. This is not such a case – the point was made with sufficient clarity. The judge fully understood it. Each case will depend on its own facts but counsel for the accused is not required, in general, especially on issues of fact, to seek to parse and analyse a charge or any recharging and seek to have placed before the jury, a summary of the facts in terms only to his liking. It is commonplace for such requisitions to be unnecessarily made, perhaps out of abundant caution or, in some instances, to amount to a failure to submit to the judge's ruling. Certainly this was not a case where the judge could or should have been asked to say anything more on the topic. The rule is fundamentally directed to excluding in retrospect requisitions which might have been made at the time rather than disputation with the judge as to any particular form of words.

9. Accordingly, the trial was satisfactory and this Court therefore rejects the grounds of appeal against conviction.

10. Turning then to the question of sentence, the accused has appealed against its severity and the prosecutor has sought a review on the ground that the sentences were unduly lenient. Effectively the parties have confined themselves to criticism of the sentence of six years imprisonment imposed in respect of the rape contrary to s. 4 of the 1990 Act. Mr Gageby was not in a position to pursue his appeal other than nominally and the focus was on whether or not the prosecutor had discharged the burden of proof upon her to show undue leniency.

11. The accused is 69 years of age and the offences occurred between 23 and 26 years ago. There is no suggestion that he is otherwise then of good character and that he deserves credit for his active opposition to dealing in controlled drugs. However, the effects of the offence on the victim have been very grave. He did not, to use his own words, "have a chance to grow up like normal people, because my childhood and teens were interrupted in the most horrendous way and taken from me". This is undoubtedly true. He rightly believes that he was manipulated and used without any care for his wellbeing. The assaults left him felling confused about his sexuality, as must have been difficult in his teens, having regard to his fear of his contemporaries finding out what was occurring. He was attracted to girls but was unsure of his disposition. He had difficulties with school; he left early, rebelled, began to take drugs and to drink quite heavily. He describes heroin as having been found by him to be a perfect drug as it numbed his pain and suppressed the fear and worry he had as a result of the abuse – this is merely a summary of the ill-effects. The trial judge explicitly identified the offence contrary to s. 4 as being an isolated one, though he did find that it formed part of the pattern of sexual assault. The complainant further stated that:

> "The last twenty four years have been a huge strain for me. The abuse I suffered as a child set the scene for many years of fear, stress, depression and chaos. People have told me that I might get some closure after the trial. I don't think I'll ever forget the abuse I suffered or the lasting damage it has done, but I do hope to be able to move on and not have the abuse I suffered on my mind every day."

12. The Director of Public Prosecutions has advanced seven grounds of appeal as follows:

> (i) The six-year sentence imposed did not reflect the gravity of the offence and the serious nature of the offending behaviour.
>
> (ii) The learned sentencing judge erred in law in failing to place the offences on the appropriate position on the spectrum of similar offences.
>
> (iii) The learned sentencing judge erred in law in failing to attach sufficient weight to the evidence of the aggravating factors in the case: the complainant's age and in particular the age disparity, evidence of premeditation and planning, evidence of what could be considered grooming, the frequency and repetition of the offences and the considerable period of time over which these offences were perpetrated.
>
> (iv) The learned sentencing judge erred in law in failing to attach sufficient weight to the aggravating factors and in particular the impact on the complainant as set out in the evidence including the victim impact statement.
>
> (v) The learned sentencing judge erred in law in that he did not give sufficient consideration to imposing consecutive sentences.
>
> (vi) The learned sentencing judge erred in law in attaching too much weight in mitigation, in particular to the age of the respondent, 69 years at the time of sentence and also in relation to the absence of previous convictions.
>
> (vii) The learned sentencing judge erred in law in that the sentence imposed did not adhere to the principle of proportionality.

13. It is fair to say that the first ground asserting the imposition of a sentence which did not reflect the gravity of the offence or the serious nature of the behaviour and the last ground that the sentence did not adhere to the principle of proportionality are of a high level of generality to the point where the substance of the matter is to be found in the remaining grounds.

14. Of these, it seems to the Court that the third ground stating that the trial judge "erred in law in failing to attach sufficient weight to the evidence of the aggravating factors, the complainant's age, the age disparity, evidence of pre-meditation and planning, evidence of what could be considered grooming, the frequency and repetition of the offences and the considerable period of time over which the offences were perpetrated" could be considered, in turn, to encapsulate the principal relevant factors with the addition of the impact on the victim. There is a freestanding point: in addition the failure of the trial judge to place the offences on the appropriate position (objectively speaking) on the spectrum of similar offences; by this it seems the Director is raising the necessity for a trial judge to decide a so-called "headline sentence" (that is to say the sentence which, objectively speaking, was appropriate having regard to aggravating factors and those which might diminish the moral culpability) thereafter reducing such sentence by any relevant mitigating factors.

15. It is true that the trial judge did not in this case set a so-called headline sentence – he quite properly referred to the maximum, no doubt to indicate the fact that the Oireachtas has taken the view that offences of this kind are to be regarded as of the utmost seriousness. Even though the position is accordingly less than the ideal, it does not prevent us from addressing the topic on the merits.

16. The trial judge referred extensively to the ill-effects of the abuse on the victim, to the fact that the age of the accused was the greatest mitigating factor (which is undoubtedly the case), the fact that there were no previous convictions with the assumption that the accused was of good behaviour since May 1995, a substantial period of time, and the lapse of time occurred. In respect of the s.4 rape, he plainly took into account that it formed part of the pattern of sexual assault though it was a single act – and so it was. The facts were outlined by the Garda witness, Garda McAnaspie, and he did not reprise them but he obviously was conscious of them.

17. Whilst the trial judge did not refer explicitly to the evidence of premeditation or planning or evidence of what might be considered grooming, it seems to us that in truth he had regard to all relevant factors, either expressly or by implication, otherwise referred on behalf of the Director of Public Prosecutions. He paid particular attention to the adverse effects on the victim and was obviously conscious of the repetitive nature of the acts as well as their frequency. The age disparity must have been a consideration as he referred to both the age of the victim and of the accused. It is arguable that he did not have regard to elements of premeditation or planning or what might rightly be inferred to be grooming, but it must be implicit in his reference to the Garda evidence and what he said in sentencing explicitly that he was aware of these relevant aspects.

18. A number of comparators have been advanced on behalf of the accused. We think that Mr Condon rightly said that he was simply seeking to draw upon first principles and he identified what in his view was the appropriate sentence as being between eight and ten years. In the absence of a guilty plea, such a sentence imposed represented a substantial departure from sentencing principles to the extent that it amounted to an error in law.

19. The decisions to which reference is made on behalf of the accused are *The People (DPP) v. James Maher* [2016] IESC 31 (several counts of indecent assault perpetrated separately on two young boys on various dates between 1982 and 1984, giving rise to a sentence of on all counts, to run concurrently, but increased on appeal to consecutive sentences, but ultimately with a suspension of the last year), *The People (DPP) v. Hustveit* [2016] IECA 271 (where a fully suspended concurrent seven-year sentence was imposed for rape and a concurrent sentence of two years for sexual assault on what was described as a "full facts basis" – giving rise to the plain implication that the offending went beyond merely one rape and one sexual assault but reflected several incidents and frequent sexual assaults committed over a seven-month period), this Court upheld the seven year sentence but suspended all of it save to the extent of 15 months). The accused also relies on *The People (DPP) v. Maguire (ex tempore*, CCA, 2015) and the authorities quoted therein stating the general principle that where a custodial sentence is required in the public interest, the same need not be unduly prolonged because it is the fact of the sentence rather than its duration which is the principal fact – something with which no one has any difficulty), *The People (DPP) v. Stewart* [2016] IECA 369, where on a plea of guilty to sexual assault a three-year suspended sentence was imposed and where the Court varied the sentence to the effect that nearly two years and three months would be suspended, *The People (DPP) v. Krol* [2017] IECA 205, where a two-year suspended sentence was varied to give rise to a period of seven and a half months in custody, and finally, *The People (DPP) v. Zimants* [2017] IECA 124, where a seven-year sentence was replaced by one of nine years for aggravated sexual assault, two counts of s. 4 rape in circumstances where the accused was on bail for another serious offence.

20. These authorities are of limited assistance to us: like all comparators they must depend on their own facts.

21. The sentence must be regarded as lenient in the circumstances but not sufficient to discharge the burden of proof which lies on the Director in cases of this kind.

22. The Director has made reference to the fact that the learned trial judge effectively failed to consider the question of consecutive sentences. He was certainly entitled to exercise his discretion to impose a consecutive element to the sentences and it is submitted that by failing to impose such a consecutive or consecutive sentences there was a breach of the proportionality principle. We do not think that a trial judge falls into error, *per se*, by failing to consider consecutive sentences in a case of this kind, although subject to the proportionality and totality cases, there are many cases where it will be legitimate to do so. We think, however, that if the learned trial judge has taken into account all relevant factors in sentencing, as here, he cannot be faulted for because he did not do so. We therefore dismiss the appeal.