THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

239/16

The People at the Suit of the Director of Public Prosecutions

Respondent

V

E.H.

Appellant

Judgment of the Court delivered on the 20th day of January 2017

by Mr. Justice Birmingham

1. This is an appeal against the severity of sentences imposed on 22nd July, 2016 in the Central Criminal Court. The sentence appealed is one of four years detention with the final twelve months suspended. The appellant had come before the court on foot of an indictment containing 41 counts, charging offences of rape, s. 4 rape, sexual assault and exploitation of a child.

2. This was a case where there was an early plea of guilty. On 29th February, 2016, the appellant entered a guilty plea to count number 1 on the indictment, a rape count, and he was then remanded on continuing bail to the 25th May, 2016. On that occasion, pleas were entered to twelve additional counts and the court was told that these pleas were acceptable and that the case would be dealt with on a full facts basis.

3. The background to the case is that the complainant is the half sister of the appellant. Her date of birth is the 14th July, 2005 and she was just short of her ninth birthday when the offending commenced. The appellant was fourteen years old at the time of the offending behaviour and just over sixteen and a half years at the time of sentence. While the complainant is the half sister of the appellant, her father has acted in all respects as the father of the appellant and it is the case that the complainant and appellant were reared at all stages as brother and sister.

4. On 13th August, 2014, the complainant asked her mother and father why the appellant was always touching himself and touching his private area. The appellant immediately admitted that he had been engaged in abusing his sister. The appellant also informed his step father/father that he had been sexually abused by an older family member.

5. In the course of discussions another sibling stated that he too had been sexually abused by that same man. That night the gardaí were informed of all three complaints. Having admitted abuse to his family, the appellant then made admissions to the gardaí including admissions during the course of formal interviews. It is true that these admissions did not correspond with what was alleged by the complainant as they tended to minimise his activity. In that regard, the complainant alleged and the pleas entered reflected the fact that she had been vaginally raped, anally raped, orally raped and subjected to digital penetration, both vaginally and anally. Incidents had occurred at her family home and in the house of a former step grandparent at night time or in the early morning. During the offending period incidents occurred on a very regular basis.

6. At the sentence hearing on the 25th May 2016, the defence put before the court a report from Dr. Fitzpatrick, a Senior Clinical Psychologist. That report indicated that in the view of the author E.H. was at a low risk of re-offending, the risk being described as minimal. The report also referred to the fact that the author had been informed by E.H. that he had been abused by an older adult relative as a young child.

7. The trial judge was obviously somewhat uncomfortable with the way in which this issue of the appellant having been abused was being dealt with and interjected to point out that the fact that there was a reference of this nature in a report was not sufficient.

8. The plea in mitigation laid emphasis on the factors in favour of the appellant stressing his very young age, his admissions, his early pleas and the fact that he was regarded as being at a low risk of re-offending. Counsel on his behalf urged that this was one of the very exceptional cases where a custodial sentence could be avoided in a rape case.

9. The judge was unhappy about proceeding to sentence in the absence of reports or other interventions in the case from the HSE and/or Tusla. In these circumstances the matter was adjourned to the 18th July, 2016, in order to facilitate the preparation of a probation and welfare report and in order to provide time for a contribution from a senior social worker with Tusla. It was in these circumstances that the matter was adjourned to the 18th July, 2016.

10. On that day further evidence was heard and further submissions were made. The judge then adjourned the matter to the 22nd July, 2016 for sentence. However, when the matter was first mentioned on that occasion the judge indicated that he was not "completely happy to give judgment today" and that he proposed adjourning the proceedings to the following week. However, he was reminded that the reason that the case had been listed for the 22nd July and not a week later as had at one stage been suggested, was because the appellant's mother and the complainant were both required to attend a court case in the Circuit Court the following week involving alleged sexual abuse on the part of another relation of the parties. The judge agreed to pass sentence that day and ultimately did so late that afternoon. The appellant now contends that because the sentence was passed on a date earlier than the judge was proposing, that the sentence was not as considered as it ought to have been and that matters of real importance were not addressed.

11. The grounds of appeal advanced are as follows:-

> 1. The judge failed to attach any or any sufficient weight to the evidence that the applicant and the complainant, both still children, are brother and sister and that significant progress has been made within the family in restoring a normal relationship which can only benefit both parties.

2. That the judge failed to attach any or any sufficient weight to the prospects of rehabilitation and the reintegration of the applicant into his family and into society generally.

3. That the judge failed to attach any or any sufficient weight to the objectives of the Children's Act 2001 as amended.

4. That the judge failed to have any or adequate regard to the child's best interest in imposing a custodial sentence.

5. That the judge failed to attach any adequate weight to the child's age and level of maturity, nor did he consider the views of the child in imposing a term of custody/detention.

6. That the judge failed to identify that a period of detention/imprisonment was the only suitable way of dealing with the child and why that was so.

7. That the judge did not have any or any adequate regard to the impact being transferred to an adult prison would have on the applicant.

8. That the judge failed to attach any or any sufficient weight to the evidence that the applicant had himself been a victim of sexual abuse.

9. That the judge failed to take sufficient or any account of the impact on the applicant of being identified to his friends and community on Facebook as an offender, the publication of certain details on Facebook resulted in the applicant having to leave his school and then experiencing isolation in the community.

10. That the judge failed to attach any or any sufficient weight to the applicant's admissions and to the very early plea of guilty.

11. That the judge failed to attach any or any sufficient weight to the evidence that the applicant had demonstrated significant and genuine remorse.

12. That the judge erred in disposing of the sentence of the applicant in circumstances where it was clear that he was not in a position to fully consider the matter and had not done so.

13. In handing down the sentence the judge failed to articulate the sentence in a language that was appropriate to the age and level of understanding of the child concerned.

Is the criticism of the judge's approach to sentencing justified

12. It is true that the judge's sentencing remarks were relatively brief, probably briefer than he would have intended in a case of this seriousness and sensitivity. The judge was very proactive in seeking the assistance of the HSE for the sentencing process. Moreover, the sentencing remarks cannot be seen in isolation, but have to be seen in the context of the judge's approach to sentencing throughout this case and the various exchanges that occurred between counsel and the sentencing judge. Those exchanges leave no room for doubt about the fact that the judge was very cognisant of the provisions of the Children's Act 2001 and that he was very aware of the fact that the live issue in the case was whether it was one of such seriousness that it could be met only with a custodial sentence or whether he could accede to the arguments on behalf of the appellant that this was one of the rare cases where a custodial sentence could be avoided.

13. It is clear that he was acutely conscious of the fact that he was being called on to sentence a very young person indeed and that the offending in question had been committed when E.H. was a young teenager and that accordingly, he should impose a custodial sentence only if that could not be avoided and if imposing a custodial sentence, that it should be no longer than necessary. In the circumstances, this Court is not persuaded that the criticisms of the judge's approach to sentencing are substantiated.

14. However, there is one area that concerns the Court and that is that insufficient attention was paid to the question of where the appellant would be accommodated for the currency of any sentence and what impact that would have on how the sentence might be structured.

15. As a sixteen year old at the time of sentence the appellant would be committed to Oberstown Detention Centre and would begin to serve his sentence there. The judge in the course of the hearing of his own motion adverted to the possibility of a young offender being transferred from a detention centre to an adult prison during the currency of a sentence. The Court feels that the judge might have received greater assistance in this regard. In the course of this appeal hearing, this Court has been told that in the ordinary course of events the expectation would be that the appellant would be transferred to an adult prison on the 28th November, 2017, his eighteenth birthday. In the course of the hearing the staff from Oberstown, who had accompanied E.H. to court, indicated that their understanding was that if that happened that thereafter he would be required to spend ten months in an adult prison.

16. However, it was also indicated that the option existed of his remaining in Oberstown until May 2018 particularly with a view to pursuing and completing educational courses that he had been following. The Court is convinced that, had the sentencing judge been told that a sentence only marginally shorter than the one that he was imposing would allow E.H. to complete his sentence in a detention centre without a transfer to an adult prison, that he would in all likelihood have structured his sentence accordingly.

17. In the Court's view the interest of justice requires an intervention by this Court and certainly intervention was mandated if one is to have regard to the best interests of E.H. who, of course, is still legally a child.

18. The Court, in the course of the hearing, gave an indication of its thinking. At that stage there was a surprising development. The Oberstown staff members, who had provided the helpful information referred to earlier in relation to the future progress of E.H.'s sentence, indicated that if the Court intervened in relation to sentence this might, and the word might is stressed, cost E.H. his place in Oberstown and might see him committed to an adult prison.

19. Naturally, the Court was concerned about this emerging information and was anxious to have further information that would be reliable and comprehensive. In those circumstances. the matter was put back for mention to today, 20th January, 2017 and further information has now been put before the Court and the Court is very grateful to both sides in the case and to the authorities in Oberstown for their efforts over the past week.

20. Today the Court has been provided with a very helpful report from Oberstown in the name of the Deputy Director. This indicates in broad terms that E.H. is making very good progress in Oberstown. In particular, there is reference to the fact that he is studying a number of subjects in the school there at leaving certificate level.

21. Correspondence between the Chief Prosecution solicitor and the Oberstown authorities that was put before the Court confirmed that while ordinarily a detention would come to an end on his eighteenth birthday, in this case the 28th November 2017, that there is, however, provision pursuant to s. 155 of the Children Act 2001 as amended by the Children Act 2015 for a young person to be kept there until eighteen years and six months which in this case would be the 28th May, 2018.

22. This fact has an obvious relevance and indeed in the view of the Court an obvious attraction particularly in the circumstances where he is doing well there and more particularly in the light of the educational studies that he is following.

23. The Court also has taken into account the fact that the mother of the appellant in the course of the hearing made clear through her son's counsel her wish that he would remain in Oberstown and complete his sentence there rather than be transferred. The appellant's mother is of course in the position where she is the mother of the appellant but is also the mother of the victim so she seeks to support both the abused and the abuser.

24. The Court is clearly of the view that the best interests of E.H., in law still a child, are served by varying the order of the Central Criminal Court and it will do so by varying the element of the sentence that is to be suspended. The Court stresses varying in a situation where the indication has been that a varied sentence would not bring into question his continued presence in Oberstown whereas the issue of a new warrant would.

25. What the Court will do is vary the element of the sentence to be suspended and it will, in particular, provide that all the un-served portion of the sentence will be suspended as of the 27th May, 2018. It will be suspended on the same terms and conditions as previously applied in respect of the suspended portion of the Central Criminal Court's sentence. That does mean that he will not be detained in Oberstown when the 2018 leaving certificate exams take place. However, as has been confirmed through enquiries made by the solicitor for the appellant over the last few days, there are a number of exam centres in Dublin which are available to people sitting exams as it were on an independent basis. E.H. has made clear that he very much wishes to sit his leaving certificate. Indeed the Court has been told that he would hope to sit seven subjects and has been told that he will avail of one of the Dublin exam centres to sit the papers.

26. The Court would ask that every assistance would be provided in terms of ensuring that he is registered in one of the appropriate exam centres in a situation where the likelihood is that he will be doing the oral part of the exam in Oberstown and the written part in one of the Dublin exam centres.

27. The Court wants to stress that it is varying the sentence of the Central Criminal Court and is doing so in a way that will maximise his time in Oberstown and will obviate the need for a transfer to an adult prison.