THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.
157/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

E.T.

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 27th day of October 2016 by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentences under appeal were sentences of life imprisonment imposed in respect of four counts of defilement of a child under fifteen years of age and ten sentences of fourteen years imprisonment that were imposed in respect of counts of sexual assault.

2. The offences in respect of all of which there were pleas of guilty, occurred on the 7th December, 2008 and between the 12th February, 2009 and the 20th April, 2009, for the most part the counts on the indictment were sample counts relating to repeated incidences of oral sex and mutual masturbation being as follows – four counts related to the appellant putting his penis into the complainant's mouth, three related to requiring the complainant to put his penis into the appellant's mouth, three of touching the complainant's penis and four of requiring the complainant to touch the applicant's penis. The complainant was just eleven years old when the offences were committed.

3. The background facts are that the applicant, while on the sex offenders register had opened a shop, described in the transcript as a grocery sweet shop under a false name. He was asked by the young complainant and two of his friends to give them work around the shop. Somewhat unusually in these cases, it has proved possible to date the offending with reasonable precision. This is because very shortly before the offending started, the complainant witnessed an incident in which a neighbour was shot and killed following a confrontation with a group of teenagers who had thrown eggs at his home. Then, on a particular date, there was a very serious and violent incident within the complainant's family which was the subject of a garda investigation. The abuse can be dated as largely occurring between these two events.

4. After the complainant and his friends asked for a job, in the weeks that followed they and more particularly the complainant spent much of his time in the shop, stacking shelves, operating the till, doing deliveries and sometimes indeed travelling north of the border with the applicant in order to purchase wine. The applicant began to invite them to a one bedroom apartment at No. 27 Belvedere Place. The gardaí, it may be noted were not aware of this address and had been told that the applicant was residing at his parent's home at a different location in the city centre.

5. The first offence occurred at an address in Dundrum. The background is that at one stage the owner of that premises had given the applicant keys in order for him to carry out decoration work. Unknown to the owner, the applicant had retained keys and apparently it was his practice to call to the house regularly. On the occasion when the abuse commenced he brought the young complainant with him and having entered the premises, there was no one else there, the accused entered a bedroom, lay on the bed, took the hand of the complainant and required him to touch his penis in order to masturbate him until he ejaculated. The Dundrum incident was charged as a specific offence on the indictment.

6. Between the 12th February, 2009 and the 4th June, 2009, the accused invited the complainant to stay over with him two or three nights a week, mostly at weekends. The complainant's evidence was that on these occasions, he was required to engage in mutual masturbation and oral sex. The oral sex incidents are charged as acts of defilement. It appears that the complainant's parents were aware of his whereabouts but that naively believed that the accused was a good influence on him and was keeping him out of trouble.

7. From the perspective of the applicant/appellant matters began to unravel after the violent incident within the family. As part of the investigation into that incident the gardaí sought to establish where the different members of the family who occupied the house were on the night of the incident and as part of that exercise, it was established that eleven years old L, the complainant in the case had been spending time with a person known locally by the name of E.B. However, on further investigation it was established that the person known as E.B. was in fact the registered sex offender E.T. In these circumstances the gardaí became suspicious that the applicant had both groomed and abused the complainant. However, the complainant initially denied this both to gardaí and to counsellors.

8. Following the family incident referred to, the complainant went to live with an aunt in Coolock. It was noted that there was a significant deterioration in his performance in school where he was involved in a number of incidents giving rise to detentions and suspensions. However on the 6th October, 2011, the complainant broke down in tears and he told a cousin about the fact that he had been sexually abused by the applicant/appellant. The complainant's aunt contacted the gardaí and the complainant made a statement. That initial statement appeared to suggest that the abuse had ceased after the family incident. However it subsequently emerged that the complainant and two friends had called to the accused's apartment shortly before the 4th June, 2009 and at that stage was invited into the applicant's bedroom for a chat and that on this occasion the applicant forced the complainant to engage in mutual masturbation and put his penis into the complainant's mouth. That incident too was charged as a specific count on the indictment.

9. On the 16th April, 2012, the applicant was arrested pursuant to warrant. During interviews the applicant denied the allegations. However, in exchanges with the investigating gardaí he did make admissions and he later met with the gardaí on a voluntary basis and indicated to them that he would not be contesting the charges.

10. In terms of the accused's background and circumstances, he was 33 year of age at the time of offending and had 24 previous convictions in total. Of particular significance is the fact that six of these related to sexual offences. Two were in respect of a sexual assault on a boy in 2006 for which he received two years, one involved a charge of failing to notify gardaí of changes of addresses in 2008 and 2009 which was dealt with through community service and three of sexual assaults on two young boys in 2007 for which he received a five year term of imprisonment, the final year of which was suspended.

The sentence hearings
11. At the sentence hearing a victim impact report was read by gardaí which referred to the fact that these events have had a very serious effect indeed on the complainant who had attempted suicide and self harm. The sentencing court was told that during the applicant's early period in custody that he had refused to participate in counselling. The gardaí in giving evidence indicated that it was a question of refusing but other evidence suggested that it may have been the situation that the first sentence was too short in order to provide an opportunity for participation, but what is of significance is that for some three years prior to the sentencing hearing he had been involved in counselling and had been a participant on a programme in Arbour Hill.

12. Prosecution counsel initially indicated that the offences were at the upper mid end of the scale, aggravated by three factors, the use of an alias to conceal the fact that he was a registered sex offender, the grooming of the complainant who he knew was vulnerable and the continuing abuse following the family incident. The trial judge expressed surprise at this submission, indicating that he felt that this might be one of the rare cases where the Court of Criminal Appeal might uphold a life sentence. At that stage counsel, following a conversation with junior counsel corrected himself and said that his instructions were that the offending was at the upper end of the scale.

13. Again at the sentence hearing there was evidence that the applicant had a difficult family background, that he had been himself sexually abused during his teenage years and that he had difficulties with alcohol and depression, though notwithstanding that that he had a good work record.

14. A significant development during the sentence hearing was that a probation officer who was called on behalf of the applicant gave evidence about the fact that the applicant had sought the assistance of the Psychology Service and had engaged in a considerable number of sessions with them and during those sessions, he disclosed his own history of being abused. His level of involvement with the Psychology Service and the nature of his participation on the programme that had been offered resulted in a decision being taken which allowed him to continue to engage with that programme and for that reason he remained in Arbour Hill while on remand following the end of the sentence that he had been serving rather than moving to Cloverhill as would be the more usual situation.

15. The judge put the matter back for consideration and then on the adjourned date said that the only matter that he found in favour of the accused was the plea of guilty. He referred to the following factors:

1. The inherent nature of the offences.
2. The effect on the complainant.
3. The age of the complainant.
4. The disparity in ages.
5. The multiplicity of offences.
6. The failure to comply with obligations in relation to the sex offenders register.
7. The fact of relevant previous convictions.
8. The grooming of a boy known to be vulnerable.
9. The continued abuse after the family incident, when the complainant was particularly vulnerable.

16. The judge referred to an amount of case law relating to discretionary life sentences and then went on to conclude that the case was so grave and so exceptional that a life sentence was appropriate and he accordingly sentenced the applicant to life on the defilement charges that were before the court and to the maximum sentence of fourteen years on the sexual assault charges.

17. The grounds of appeal that have been argued and which have been presented in oral and written submissions are that the judge erred in law in imposing a maximum sentence on all counts, notwithstanding the fact that pleas of guilty were entered, that the judge erred in particular in imposing life sentences on the defilement charges and also that the judge failed to take adequate account of the efforts of the applicant towards rehabilitation. Really the gravamen of the appeal is that this was not a case for maximum sentences and in particular was not a case for non mandatory life sentences.

18. As already indicated the trial judge was clearly very conscious of the jurisprudence surrounding the imposition of maximum sentences after pleas of guilty and in particular the jurisprudence surrounding the imposition discretionary life sentences.

19. In the court's view there were factors present which meant that it was inevitable that maximum sentences would be considered. Over and above the factors such as the young age and vulnerability of the victim, the duration and intensity of the abuse which sadly are not unique to this case, there were more distinctive factors such as the presence of directly relevant serious prior convictions and the circumvention of the obligations under the Sexual Offenders Register. The seriousness of that is compounded by the fact that there was an earlier offence involving the Sexual Offences Register which should have served as a reminder. However, it was not a question of a reminder being needed, because the failure to comply with the obligations was not through inadvertence. It was cynical and premeditated. The notion of a repeat sex offender opening a shop and employing local children and thus putting himself in a position to abuse is too awful to contemplate.

20. There are good reasons why the courts are reluctant to impose maximum sentences even in very serious cases. It is very much in the interests of victims that offenders should be incentivised to plead guilty and to offer those pleas of guilty at an early stage. There is also the utilitarian argument that encouraging and providing an incentive to plead assists in the administration of justice. Nonetheless courts of first instance and appellate courts have on rare occasions concluded that the case before them fell into a category which meant that if it was to be dealt with appropriately the imposition of a maximum sentence was required.

21. One of the arguments advanced in this case as to why the maximum sentences were inappropriate is that it is said that the judge failed to engage with the issue of rehabilitation and failed to have regard to the volume of expert evidence that was put before the court. It is said that it was not a question of the judge ignoring the issue, but positively dismissing the reports that were put before him. Before the court was a report of the clinical psychologist Michael Dempsey and also an earlier forensic Psychologist Service report from February 2011. The reports refer to the fact that the appellant was himself a victim of abuse between eight and twelve, though in one case it speaks of the abuser as a priest and the other as a male PE teacher. Mr. Dempsey in the course of his report drew attention to the fact that the appellant had commented that he hopes that his victim will not turn out like he did and says that that is indicative of good insight on the offender's part into his own offending behaviour and its seriousness.

22. Particularly significant in the context of sentence hearing was the evidence of Paul Duffy of the Probation Service who was involved in delivering the Better Lives Programme in Arbour Hill Prison. His evidence was very clear that Mr. T had engaged fully and completely with the programme over the course of three years. He reported that there was a consensus across the services that Mr. T had fully engaged during his time in Arbour Hill. The judge was indeed somewhat dismissive of the extent to which he was receiving assistance from the various experts' reports. He commented:-

> "In relation to the professional opinions I have been furnished with to the effect that the accused man can be dealt with by community sanctions, I reject his naivety. Those giving such advice are not the ones who would have faced the enduring public opprobrium were I to accept it."

23. It does seem that the sentencing judge may have misinterpreted what was being urged on him, perhaps because Mr. Duffy at a time when he was dealing with Mr. T who was then serving a limited sentence was addressing his mind to the post release situation. But in truth it does not seem that anyone was suggesting that a case of this seriousness could have been dealt with in the community. If anyone was of that view, then indeed they were being very naïve indeed, but the court does not believe that was in fact the situation.

24. In this Court's view the work that was undertaken towards rehabilitation was a significant factor and moved the case out of that small category for which maximum sentences and indeed indeterminate sentences, such as life sentences, would be appropriate. To that extent the sentences imposed do involve an error in principle.

25. It remains nonetheless that the case was for the reasons referred to by the sentencing judge and touched on earlier in the course of this judgment, a case of extreme seriousness indeed. A very significant sentence is clearly called for. In resentencing, the Court has had regard to material from Arbour Hill that was made available to us. This indicated that Mr. T was doing well, though not at present engaged with the Psychological Services. That was explained to us by counsel on his behalf on the basis that the initial four year course that he had undertaken had been completed and he has stressed to us that Mr. T is ready to re-engage fully with the professional services at an appropriate stage in this sentence.

26. In the circumstances the court will deal with the matter by setting aside the life sentences imposed in respect of the defilement charges and substituting therefore in each instance a sentence of fifteen years imprisonment. In respect of the counts that were dealt in the Central Criminal Court by sentence of fourteen years imprisonment, the court will in each instance substitute a sentence of eleven years imprisonment. The sentences are concurrent and will date from the same day as was specified as the commencement date in the Central Criminal Court which was the 14th March, 2014.