



THE COURT OF APPEAL

[156CJA/19]

The President
Edwards J.
McCarthy J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

GERARD FITZGERALD

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered on the 6th day of December 2019 in Cork by Birmingham P.

1. This is an application brought by the DPP seeking to review a sentence on grounds of undue leniency. The principle applicable to such reviews is not in dispute, though we were reminded of those principles by counsel on behalf of the respondent today. In truth, the principles have not been the source of any controversy since the first such of these cases, the case of DPP v Byrne in 1993. The sentence sought to be reviewed is a sentence of 18 months imprisonment with the final 12 months suspended that was imposed in respect of a count of sexual assault.

Background Facts

2. The sentencing Court was concerned with events that had occurred on 15th May 2017. On that occasion, the complainant, who was then aged 11 years, took a shortcut as she made her way home from school. Her route brought her into contact with the accused, now respondent. He initially put her at ease by talking to her about members of her family that were known to him, her father and an uncle of hers. He then led her off the route and out of view. He initiated physical contact under the guise of showing her how she should react with a boy on school on whom she had a crush. He then put his hands down inside her pants and digitally penetrated her vagina on two occasions.
3. In the course of the sentence hearing, the investigating Garda was cross-examined by defence counsel by reference to the contents of an interview conduct with specialist Garda interviewers by the child complainant. That was with a view to causing doubt as to whether there had in fact been penetration. However, that issue was returned to by counsel on behalf of the prosecution in the course of re-examination, and the state of the

evidence at the end of the sentence hearing was very clear that the prosecution case was that there had indeed been penetration.

4. The incident has had a very significant impact indeed on the victim. The Court heard that she was quite a vulnerable child, younger than her years. In the course of sentencing remarks, the judge said that she had made an excellent recovery, but unfortunately, that was not the complete picture.
5. The sentencing process became quite protracted. Evidence was initially heard from the prosecuting Garda on 18th December 2018. On this occasion, a statement prepared by the injured party was read to the Court. She begins by saying what her name is and then she said:

“When I was in 11, I was walking home from school and something bad happened to me. I didn’t know what he was doing to me or why he was doing it to me, I was so scared I froze and couldn’t run. After that, I was afraid to walk to school by myself. My mother had to walk me to school as I was terrified I would meet him on the street and he would do it again. When I went back to school after it happened, the kids in my class started playing a game called ‘The Miriam Disease’ (Miriam not actual name). This involved me having a disease and if they touched me, they would get the disease and so nobody would hold my hand in PE because they thought I had caught something from him. I felt sad and miserable and alone. I lost what friends I had because of what he did. I’m scared to go out to my local shop in case he’s there. I’m also afraid of men with moustaches. I’ve been getting a lot of flashbacks in school, and sometimes when I’m out, I break down and cry. My family are very angry at what happened to me. My family are not the same.”

And she ended it by wishing the judge a Happy Christmas.

6. Matters were not finalised on that date when the prosecution evidence was heard. They were not finalised because the defence were anxious to obtain a report a General Practitioner and put that report before the Court. In those circumstances, matters were adjourned to 6th February 2019, and on that occasion, a plea in mitigation was advanced by defence counsel. Having heard the plea, the judge commented “this is a very serious matter, in my view”. He said that he was not going to finalise matters that day. He said that it was a matter that he was going to give deep consideration to, and in those circumstances, the matter was then further adjourned to 5th June 2019. On that occasion, in the course of his sentencing remarks, the judge, in reprising the facts, commented that the complainant had told her mother that she had been approached by an elderly man who engaged her in conversation, hugged her, and put his hand inside her knickers. Dealing with the victim, he said that she came across as an intelligent and mature young lady. He said that he understood that she had made an excellent recovery from her ordeal, that she had moved on. He added “there is no victim statement per se, but the family were in Court at the sentencing hearing”.
7. When referring to the aggravating and mitigating factors that were present, the judge referenced as an aggravating factor the nature of the assault. He described it as placing

the hand inside the young girl's clothing. Another stage in the course of his remarks, he said that one would have to be of the view that this was not the worst case that the Court had come across in its experience. Nonetheless, he went on, the age of the victim was of enormous concern, adding "this is a serious matter, in the Court's view".

8. So far as the background and personal circumstances of the respondent are concerned, he was born in October 1961. Thus, at the time of the sentence hearing, he was 58 years of age, though it is the situation that in the course of the sentencing remarks, the judge had said that the accused was 67 years and a pensioner. He is unmarried, he is unemployed and he has an issue with alcohol, he is known for that in the rural village in which he lives and where the offence occurred. In February 2017, he was diagnosed with prostate cancer and the Court heard something of the treatment that he has been receiving in that regard. Of note, is that he has a previous conviction from 2007 for a sexual assault on a male child. It was dealt with in the District Court and he received a sentence of three months which was suspended.
9. In the Court's view, this was a serious offence. It was serious sexual assault on a young, vulnerable child. While it is true that there was no long-term pattern of grooming, it is clear that efforts were made on the day to gain the confidence of this child. The Court is also clear that it has to be approached on the basis that it was an offence that involved digital penetration. It is also the situation that the respondent has a relevant previous conviction. In that regard, it would have been desirable if further information in relation to the details of that had been made available to the sentencing Court.
10. Overall, the Court's view is that the sentence imposed simply failed to reflect the gravity of the offending behaviour that had occurred. The Court believes that a headline or pre-mitigation sentence of five years imprisonment would have been justified and the Court will take that as its starting point. It is true that there are mitigating factors present, perhaps the most significant of which was the plea of guilty which had the effect of sparing this young child from having to give evidence. But there were other elements present too, the health issue, and the fact that a mature man was now going to be incarcerated for the first time. In the Court's view, a reduction of the order of 40% to take account of the mitigating factors present would be justified, leaving a net sentence of three years imprisonment.
11. However, this Court resents as of today's date. On a number of occasions when called to resentence following applications to review on grounds of undue leniency, we have ameliorated the sentence that we regard as appropriate to take account of the disappointment factor. In our view, the disappointment factor must be particularly acute in this case in a situation where the respondent has served the sentence in full and has recently been released back into the community. To reflect that fact, we will suspend the final year of the 3-year sentence.
12. In summary, we quash the sentence of the Circuit Court. We substitute a sentence of three years imprisonment, but with the final year suspended and he will have credit for the time spent in custody to date.