THE COURT OF APPEAL

Record Number: 3/2022

McCarthy J.
Kennedy J.
Donnelly 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

MO'D

RESPONDENT

JUDGMENT of the Court delivered (ex tempore) on the 21st day of October 2022 by Ms. Justice Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of section 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence imposed on the 13th December 2021. The respondent entered signed pleas of guilty to 31 counts of sexual assault, 1 count of rape and 1 count of production of child pornography and confirmed those pleas on being sent forward to the Central Criminal Court. A sentence of seven years' imprisonment was imposed for the rape offence with the final two years suspended. Four years was imposed for the sexual assault offences occurring prior to the injured party turning 17 years old and three years for those offences occurring after she attained the age of 17 years.

Background

2. The injured party is the respondent's daughter. The sexual offending began when she was 12 years of age and concluded when she was 18. The relationship between the injured party's mother and the respondent broke down before her birth.

3. The respondent initially gained access to the injured party via court-ordered access and this progressed to overnight weekend access at the respondent's residence.

4. The injured party identified her 12th birthday as the occasion of the first sexual assault. The respondent collected the injured party from her primary residence with her mother and during the course of the car journey he engaged her in a highly sexualised conversation where he asked her which pornography she liked to watch and he informed her that his preference was for "daddy-daughter" pornography. The respondent plied the injured party with alcohol and drugs and made her watch pornography.

5. Plying her with alcohol and controlled substances was a feature throughout the offending. The injured party recalled the respondent sexually assaulting her by grabbing her hips and grinding his crotch against her bottom while grunting. He sexually assaulted her again 10-15 minutes later, grabbing her by the waist and thigh and rubbed her thigh and bottom.

6. The injured party stated that this type of sexual offending was a constant feature of her fortnightly weekend access visits with the respondent.

7. When the injured party was 13 and attending a family wedding, the respondent became extremely intoxicated, the injured party's grandfather asked her to take the respondent to his room. On the way to the room, the respondent pushed her against a wall, groped her breasts, kissed her on the neck, attempted to bite her neck and told her that he could bend her over and rape her. Shortly thereafter, he grabbed her from behind and proceeded to grind his crotch against her bottom so that she could feel his erection. He told her in crude terms that he intended to have sexual intercourse with her. The injured party was too terrified to sleep on the same floor of the apartment as the respondent and so resorted to sleeping on a couch downstairs. She even climbed in and out of a window to use the toilet.

8. The background to the rape offence is to be found in that in December 2016, when she was 15, she was alone with the respondent at his residence and he again plied her with alcohol and drugs. She recalled that she became unconscious due to her level of intoxication and had in fact vomited in her bed and on her clothing. The respondent moved the injured party into an adjoining bedroom where he raped her while she was in a state of semi-consciousness. She described her father grunting and her leg dangling and hitting her father's leg as a result of the force he used while penetrating her. She described the pain and the bleeding; her vaginal area was wet with blood and blood clotted on her legs. She described how the following morning, the respondent told her that he had seen everything, that he had seen her naked and that she was moaning.

9. In a subsequent Garda interview, the respondent admitted to having recorded this incident on his mobile phone but that he later deleted it.

10. After the December 2016 incident, the respondent continued to sexually assault the injured party during her access visits by groping her breasts and bottom and at one point, touching her vagina through her underwear. The offending came to light in late 2019 when the injured party disclosed the offending to her family and subsequently in February 2020, a family member informed the Gardaí of the abuse and the investigation

commenced. He had initially denied the allegations to family members. However, shortly thereafter, the respondent contacted the Gardaí and said that he had sexually assaulted his daughter and recorded it on his phone. He was arrested, detained, and interviewed and made admissions. When the respondent presented at the Garda Station, arrangements were in train to take a statement of complaint from the injured party.

The Sentence Imposed

11. The sentencing judge identified a headline sentence of twelve years' imprisonment in respect of the rape offence, this was reduced to seven years in light of the mitigating factors. Headline sentences of seven years' imprisonment were nominated for each of the sexual assaults occurring when the injured party was under 17 years of age, and these were each reduced to four years. Headline sentences of five years' imprisonment were nominated for each of the sexual assaults occurring after the injured party attained the age of 17 and these were each reduced to three years. A headline sentence of seven years was identified in respect of the production of child pornography offence, and this was reduced to three years.

12. The judge ordered the sentences imposed on the sexual assault and child pornography offences to run concurrently to the sentence imposed on the rape offence.

13. The judge identified the aggravating factors as the breach of trust, the age of the injured party, the frequent nature of the offending, the provision of drugs and alcohol by the respondent to the injured party when she was a minor and the impact of the offending on her.

14. In terms of mitigation, the judge had regard *inter alia* to the respondent's very early admission of guilt, his acknowledgement of the depravity of his actions, his entering into signed pleas of guilty before the District Court, his lack of previous convictions, his employment record and his assessment as being at a low risk of reoffending.

Grounds of Application

15. The Director relies on the following grounds:

"The learned sentencing Judge:-

1) Failed to fully appreciate the seriousness, gravity and duration of the offences as committed by the offender;

2) Departed in a significant way from the norm that would be reasonably expected in a case of this nature;

3) Failed to have sufficient regard to the deterrence aspect of the sentence;

4) Failed to have sufficient regard to the aggravating factors;

5) Attached too much weight to the mitigating factors;

6) *In respect of the sentence imposed for the offences, failed to have sufficient regard to the particular character of the victim and/or the content of the victim impact statement and the effect the offending has had on her life."*

Submissions of the Director

16. The Director submits that there was a failure to have sufficient regard to the aggravating features of the respondent's offending. Particular attention is drawn to the respondent's breach of the injured party's trust. It is said that the respondent took advantage of the injured party both through his position of power as her father and by virtue of the access arrangement where she was in his custody at the weekends without her mother or any other relative present. The respondent's introduction of alcohol and drugs into the offending and the persistence of conduct over five years are also cited as aggravating factors.

17. The Director takes issue with the sentence of seven years' imprisonment imposed for the rape offence. It is accepted that the respondent was entitled to significant mitigation for the signed pleas of guilty, however, it is submitted that such merited a reduction of no more than one third.

18. In terms of other mitigating factors, the Director says that in line with *The People (DPP) v Hearne* [2019] IECA 137, the absence of previous convictions is of limited significance to a case of this nature.

19. It is the Director's position that some element of consecutive sentencing should have been imposed for these offences as each had an impact on the injured party and each amounted to a breach of her trust. It is said that where an offender is convicted of multiple offences of a similar nature, the overall sentence should be so structured as to reflect the totality of the offending even if most of the individual sentences are ordered to run concurrently.

20. In respect of the child pornography offence, it is suggested that this should have been treated as a factor which aggravated the sexual assault offence during which it arose. *The People (DPP) v McD* [2021] IECA 31 is cited in this regard.

21. Finally, the Director says that it was inappropriate to suspend part of the sentence in circumstances where the overall sentence failed to reflect the gravity of the totality of the offending conduct.

Submissions of the Respondent

22. The respondent submits that in imposing sentence, the sentencing judge took account of the aggravating factors and, expressly referred to the most culpable degree of breach of trust; that being between a parent and child, the young age of the injured party, her exploitation, that the rape was committed in the context of frequent sexual assaults over a period of years, that the injured party, was given alcohol and drugs, and the impact on her. Therefore, it cannot be said the judge "failed to fully appreciate the seriousness, gravity and duration of the offences as committed by the offender."

23. It is the respondent’s position that there is a unique level of mitigation in the present case; arranging a meeting with Gardaí, his admissions, the admission to the production of a video of the abuse, his regret and remorse and the signed pleas of guilty.

24. Emphasis is placed on the respondent’s engagement with One in Four, and his lack of previous convictions.

25. The respondent refers to several cases involving signed pleas; including, *The People (DPP) v Tiso* [2018] IECA 377, *The People (DPP) v Collopy* [2018] IECA 387, *The People (DPP) v McInerney* [2019] IECA 312, *The People (DPP) v Cambridge* [2019] IECA 133,*The People (DPP) v Hayes* [2020] IECA 257 and *The People (DPP) v Tache* [2021] IECA 280.

26. In response to the submission on the part-suspension of the sentence, it is said that the respondent’s case merited part-suspension in the circumstances which pertained.

27. In response to the suggestion that some element of consecutive sentencing should have been imposed, the respondent relies on *The People (DPP) v Farrell* [2010] IECCA 68 wherein O’Donnell J stated that consecutive sentences “should be used sparingly.”

28. The respondent submits that the present case is not one in which it would be expected that consecutive sentences would be imposed and that the judgment in Farrell suggests that the opposite principle applies: that consecutive sentences will not be imposed where the offending involves a series of offences committed against the same complainant.

Discussion

29. In oral argument, the parties elaborated on the written submissions with the Director contending that the ultimate sentence imposed was simply inadequate to reflect the gravity of the overall offending conduct. This, in itself, it is argued amounts to an error in principle. Prof. O’Malley SC for the Director says if the Court finds an error in principle then the Court may proceed to re-sentence either by imposing a global sentence to reflect the gravity of the entire offending or by the imposition of consecutive sentences.

30. The Director contends that the judge erred in imposing sentences on a concurrent basis and that the respondent received an effective 5 year sentence in respect of the rape offence. The Director indicated in the court below that the case fell within the category of cases identified by Charleton J. in *FE* as “more serious cases” and thus it is accepted that the trial judge placed the rape offence, considered by itself, in the right category and, while he might have nominated a higher headline sentence, he was acting within his discretion in selecting a 12-year headline. Further, he was correct in granting a reduction for mitigating factors. However, where the offending involved sexual assaults over a prolonged period of time, it is said that the ultimate sentence is simply too low to reflect the gravity of the offending conduct. The sentence imposed must of course be proportionate to the offending conduct.

31. Whilst the principal error identified by the Director is the fact that the sentences were imposed on a concurrent basis it is argued that the judge permitted too great a discount for mitigation and that the overall sentence does not reflect the gravity of the offending.

Moreover, it is said that whilst rehabilitation is a sentencing objective, the judge erred in suspending two years of the sentence, imposing an effective custodial sentence of 5 years' imprisonment for very serious offending. Prof. O'Malley, in arguing that this is a case where a court could impose sentences on a consecutive basis, refers in particular to two egregious assaults where the injured party was aged 12 and 13 years respectively. These incidents concern the first sexual assault and the assault in the hotel corridor. It is said that the penalty on those offences could have been imposed on a consecutive basis.

32. In response, Mr. Bowman SC argues that the Director struggles to identify an error in principle and simply says that the sentence is too low. He agrees that the offending falls within the category of "more serious cases" as identified in *FE*, however, he says the judge carefully considered the aggravating and mitigating factors and appropriately considered the applicable case law in determining the ultimate sentence which it is said is one within the margin of appreciation afforded to a sentencing judge.

33. In our view, there is no doubt but that the judge properly identified the aggravating factors in the present case. The offending conduct is of a serious order where the aggravating factors include the egregious breach of trust; the injured party was entitled to be protected by her father but instead was sexually abused by him over a protracted period of time. We consider the fact that he secured a court order granting access rights, which he then used to facilitate the abuse, to be a significant aggravating factor. He abused his daughter from the age of 12 to 18 years in a number of locations including in his own home where she was entitled to feel safe and protected. The judge properly considered that the respondent grossly betrayed his responsibilities as a parent by sexualising, demeaning and degrading the injured party for his own gratification. Plying her with alcohol and drugs is, of course, another aggravating factor. Recording the brutal rape is yet another; informing her that he had seen her naked on that occasion and that she was moaning further served to humiliate and degrade her. The showing of pornography to the injured party is another aggravating factor. The respondent controlled and denigrated the injured party through his words and actions over a protracted period of time. Add to that, the very severe impact on the injured party and we conclude that these offences are serious indeed.

34. The Director placed the rape offence, taken alone, in the "more serious cases" category as identified by Charleton J. in *FE* as meriting a headline sentence of between 10 and 15 years. If this were to include all the offending it would, of course, be to understate the gravity of the offending. If any member of this Court were sentencing at first instance, we observe that a higher headline sentence may have been nominated; that is a sentence at the outer limits of the indicated range or, indeed, higher. However, the issue for this Court on review is whether the sentence imposed is a substantial departure from the norm. The judge nominated a sentence of 12 years' imprisonment as falling within the indicated range. The Director now seeks to review the sentence on the effective basis that the overall sentence imposed is simply too low and that the judge ought to have considered the imposition of sentences on a consecutive basis.

35. The primary mitigation in this case is the signed pleas of guilty for reasons which are obvious to all. We acknowledge, as did the sentencing judge, that credit and significant credit must be given for this course of action. The respondent made admissions to the Gardaí, having attended at the Garda Station prior to a formal statement being made by the injured party and whilst he was aware of the allegations and knew that his arrest was imminent, he nonetheless must be given credit for this.

36. We consider the fact that he presented before the court without previous convictions to be of limited if any value in a case of this nature. There is no doubt that the respondent did not come before the Central Criminal Court as a person of good character.

37. Mr. Bowman properly accepts that no weight can be placed on the report of the neuropsychologist given the partisan role adopted by her in "*imploring the court to show all possible leniency"* and, again, the judge properly did not do so in sentencing the respondent.

38. Equally, Mr. Bowman accepts the family testimonials are of no value. Therefore, the mitigating factors identified are the signed pleas of guilty, the remorse inherent in those pleas, the admissions and the manner in which the admissions came about and, to a substantially lesser degree in terms of weight, given the nature of the offending, the respondent's work history.

Decision

39. Taking all the above factors into account, we are satisfied that the ultimate sentence imposed was simply too low and a substantial departure from the norm. This constitutes an error in principle and, being of that view, we are compelled to quash the sentence imposed and we will proceed to re-sentence the respondent as of today's date.

Re-Sentence

40. In resentencing the respondent, we do not intend to rehearse the egregious nature of the offending conduct. Suffice to say that when one considers the totality of the aggravating factors, the appropriate global headline figure on the rape offence to mark the serious nature of all the offending is one of 15 years' imprisonment, taking into account the Director's nomination of the headline sentence as falling within the range of 10 to 15 years' imprisonment. This notional sentence is imposed to properly reflect the gravity of the overall offending. As we are imposing the sentence on a global basis, we do not accordingly alter the sentences imposed on the sexual assault offences. Those sentences remain as imposed by the court below and are imposed on a concurrent basis.

41. We then move to consider the mitigating factors as identified above. We have also considered the Probation Report furnished and the Prison Governor's Report. Giving the appropriate reduction for the mitigation and bearing in mind that the signed pleas of guilty are central to this consideration and, incorporating the other aspects of mitigation present, we will reduce that sentence to one of 10 years' imprisonment. We understand that the respondent attended the organisation One in Four for therapeutic sessions before his incarceration; and clearly his rehabilitation is a desirable objective and so we will

suspend the final 6 months of that sentence on the same terms as ordered by the court below.

42. The sentencing judge ordered post-release supervision and we also consider supervision to be necessary, however, whilst we impose that supervision on the same conditions as imposed in the court below, we order supervision for a period of 5 years post release. The respondent will remain on the sex offenders register.