THE SUPREME COURT

Record no. 2022/009

Dunne J.

Charleton J.

O'Malley J.

Baker J.

Woulfe J.

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

v.

M.J.

APPELLANT

Judgment of Ms Justice Iseult O'Malley delivered on the 1ST of December, 2022

Introduction

1. In October 2018 the appellant was convicted by a jury of a number of indecent assaults committed in the summer of 1978. This appeal is concerned with the sentences imposed on foot of those convictions, and raises issues concerning the proper approach to be taken in sentence appeals where an error in principle on the part of the trial judge has been identified. In this case the Court of Appeal did not find that the trial judge had erred in his selection of the headline sentence, or in the imposition by him of consecutive sentences. However, it found that the trial judge erred in believing that there was no mitigation that could reduce the appropriate headline sentence. The Court of Appeal considered that only a "limited intervention" was necessary to redress that error and to acknowledge such mitigatory factors as it determined to be present. In particular, it referred to the fact that the accused had not offended during the 40-year period between the offences and the trial. It reduced the cumulative total of the consecutive sentences imposed in the trial court by suspending part thereof.

2. The appellant contends that the Court of Appeal erred in the process adopted by it, and argues that it should have undertaken a fresh consideration of sentence. In so doing it should have reassessed the question of whether this was a case for consecutive sentences, and should have taken greater account of certain factors specific to the case such as the antiquity of the charges, and the application of the totality principle.

3. I have come to the conclusion that the Court of Appeal did indeed fall into error. This judgment gives my reasons. However, the analysis here set out is incomplete, with certain principles being stated in the abstract without being applied to the circumstances of this case. That is because I propose that this Court should now undertake the re-sentencing of the appellant, and give a further written judgment when sentence has been finalised.

Factual background

4. In February 2019 the appellant was sentenced on five counts of indecent assault. The charges on the indictment were seen as sample counts in circumstances where the offences were alleged to have been committed on a frequent basis over a period of about four months

in the course of 1978. The victim was a young boy of about 11 years old who was staying with the appellant's family in a rural area. The appellant was some ten years older than him.

5. The complainant's evidence was that his mother was friendly with the appellant's mother. He travelled from the United Kingdom to stay with the appellant's family for several weeks while his mother was caring for her dying mother at home in England. During that time, he was groomed and then abused by the appellant in the family home, in ways that developed from fondling to making him masturbate the appellant and give oral sex. The appellant did not give evidence, and defence counsel concentrated mainly on exploring such inconsistencies and omissions as could be found in the prosecution evidence. It is apparent from the transcript that the defence case was that the incidents complained of never occurred. In an interview with investigating gardaí the appellant had maintained that the complainant did not come on his own for a lengthy visit, but only came for a short one accompanied by his parents. The complainant's mother gave evidence which supported her son in this respect and did not support the defence version.

6. In the sentence hearing, the trial judge was informed that the appellant continued to maintain his innocence. He was 61 years old and had no other criminal convictions. He was divorced and had one adult daughter. He had worked as a driver and had cared for his parents in their old age, and was now suffering from certain health conditions – chiefly, a heart condition, arthritis and sleep apnoea – that, it was said, would make prison more difficult for him. A report from the Probation Service indicated that despite his attitude to the verdict he was at low risk of reoffending.

7. The victim impact statement provided by the complainant described the long-term effects of the offending on the complainant. He had commenced drinking shortly after the events in question and had also developed a drug addiction and mental health issues that led to various criminal convictions and lengthy periods of treatment. His long term relationships had failed. Despite his difficulties he had qualified as a trainer in a sport that he enjoyed, and he felt he had helped other vulnerable people through this activity.

8. The trial judge considered that, having regard to the gravity of the impact on the victim, the offences were at the high end of the scale. The effective maximum sentence for indecent assault being two years, he determined that the appropriate headline sentence on each count

was 21 months. The question then was whether that figure should be reduced to take account of mitigatory factors. The probation report made it clear that the appellant continued to maintain his innocence, and therefore remorse was not in question. The appellant's lack of previous convictions was specifically discounted as being relevant in this context, with the judge saying:

> "*While he has no previous convictions, I'm not prepared to take the view that this entitles him to a mitigation. People are supposed to obey the law and I can't see how prior obedience of the law can act as a mitigating factor in a subsequent criminal conviction.*"

9. In the judge's view, all that might be said was that the offending was "out of character".

10. The trial judge concluded that the course of conduct in the case suggested that there was "no realistic scope" for mitigating the headline sentence. He then posed the question

> "*So where does that leave us in terms of the proportionality of the sentence? Does the 21-month sentence, if I were [to]take the view that all these sentences should run concurrently, adequately reflect the depravity and the factors that I've already identified?*"

11. Answering that question in the negative, the judge ordered the five sentences to run consecutively. He suspended the final 21 months for a period of three years, on the express basis that this was as a deterrent rather than for rehabilitative purposes.

The Court of Appeal

12. The appellant appealed unsuccessfully against the convictions, with the sole point argued being that the lapse of time in the case had rendered the trial unfair (see *People (Director of Public Prosecutions) v. M.J.* [2020] IECA 210). The appeal against sentence was heard on the 13th January 2021 and an *ex tempore* judgment was delivered the same day (by McCarthy J. – see *People (Director of Public Prosecutions) v. M.J.* [2021] IECA 233).

13. It was submitted on behalf of the appellant that the headline sentence had been excessive in that the offences had not involved gratuitous violence or threats. The appellant had not been a fully mature adult at the time. It was further submitted that the trial judge should have given some indication to counsel that he was considering the imposition of consecutive sentences so that they could address him on that aspect.

14. The Court of Appeal considered that the trial judge was entitled to exercise his discretion with regard to consecutive sentences, that the nature of the offences was such that the potential for such sentences was clear and that there was no obligation on the judge to give any form of warning. In the circumstances of the case, concurrent sentences would have meant that the appellant was in reality punished for only one offence. This was not a case involving a single transaction, in the sense in which that word is used in the context of imposing sentence for more than one offence. The Court also considered that the seriousness of the offences was such that in no circumstances could the headline sentence have been less than 21 months.

15. However, the Court did not agree with the trial judge that there was no mitigation present. The appellant had had been a very young man at the time of the offences and came before the court as someone who had not offended in the forty years since. The Court stated that these factors required a "limited intervention". It quashed the sentences and imposed five consecutive sentences of 21 months each, with the final 33 months (two years and nine months) suspended.

Issues and submissions in the Appeal

16. The parties have prepared a very useful statement of the issues, which I have found of great assistance, in which they set out their primary submissions and highlight the matters on which they disagree. There are two main areas of disagreement – firstly, whether this was a case in which the Court of Appeal, having identified an error in principle, should have re-sentenced the appellant *ab initio*; and, secondly, whether it was appropriate to impose consecutive sentences.

17. There is agreement between the parties in respect of the general principles relating to sentence appeals. They both see the starting point for an appellate court dealing with a sentence appeal as being an examination of whether an error occurred in the sentencing process. The necessity for re-sentencing arises, it is agreed, where an appeal court identifies an error of principle on the part of the sentencing court. The appellate process, therefore, can be said to involve an *"error in principle"* stage and, if an error is identified, an *"appropriate sentence"* stage. It is further agreed that the fundamental approach to sentencing (and to re-sentencing on appeal) is to start with a headline sentence which reflects the gravity of the offence, in light of the relevant facts and the culpability of the offender, and then to consider mitigating factors.

18. The parties also agree that re-sentencing on appeal should, in many cases, be conducted by way of that fundamental approach and on an *ab initio* basis, and not by using the original, erroneous sentence as a starting point. However, they both accept that there will be some cases where the process of identifying a particular error of principle will in turn inherently involve the identification of the appropriate sentence. They describe some of the cases in this latter category as "clear-cut" or "one dimensional" cases. The examples given are cases where, in the circumstances of the case, the appellant should have received the same sentence as a co-accused; or where it is clear that the sentence imposed should have been fully suspended; or where the sentences imposed on various counts were appropriate but only if given concurrently rather than consecutively.

19. The parties agree that, frequently, the overall approach for a sentence appeal will be as follows:

    (i) The identification of an error in principle.
    (ii) The quashing of the sentence under appeal.
    (iii) A consideration as to whether further submissions are required before resentencing and the hearing of further submissions if appropriate. The respondent's view is that these should be limited to submissions relating to the appellant's health, recovery from addiction or progress in custody.
    (iv) The identification of the correct headline sentence.
    (v) The imposition of the correct sentence having considered any mitigating factors.

20. In the instant case, the parties disagree as to the classification of the case. The respondent maintains that having considered all submissions made to it, the Court of Appeal was not called upon to re-sentence *ab initio.* Rather, a limited intervention was sufficient in order to address the sentencing court's failure to recognise mitigating features of the case. It was open to the Court of Appeal to quash the sentence and proceed to re-sentence by deducting from the overall tariff in order to appropriately mark the mitigating features of the case.

21. The appellant, on the other hand, argues that the Court of Appeal ought to have comprehensively re-sentenced him rather than beginning its task from a starting point which he says had been found to be fundamentally flawed. He submits that it may be appropriate for an appeal court to invite further submissions from the parties in advance of re-sentencing when an error in principle has been identified. It is argued that this is particularly so in the present case where re-sentencing took place against the backdrop of rulings that consecutive sentencing did not amount to an error in principle but that the finding that there was no identifiable mitigation did amount to such an error.

22. The parties are agreed on the general principles applicable in relation to consecutive sentences. However, they disagree on the question whether the Court of Appeal correctly identified those principles. The appellant argues that there are fundamental errors in principle in the Court's decision in this regard. He submits that it gave no consideration to the possibility that the trial judge's factual error in relation to mitigation in this case had the effect of "contaminating" the exercise of his discretion to impose consecutive sentences. Further, he contends that the error contaminated, not just the decision to have some resort to consecutive sentencing in general, but also the specific decision to make each of the sentences consecutive to each other.

23. It is urged that the Court of Appeal did not address the inherent contradiction between the trial judge's finding that the offences had an *"incremental sequence of depravity"* and his decision to impose identical consecutive sentences for each count.

24. It is submitted that the Circuit Court and Court of Appeal both failed to consider the principle that consecutive sentences should be used sparingly. They did not have regard to the fact that the offences were committed over a single summer and therefore within a relatively short window of time (without a gap in offending) and against a single victim.

25. Finally, the appellant argues that, having decided that consecutive sentencing was appropriate, neither of the courts below adequately considered the principle of totality.

26. The respondent submits that a decision to impose consecutive sentences in a given case of repeated offending, involving the same complainant, does not amount to an error of principle provided the court's discretion to do so has been exercised rationally. This requirement was fulfilled by the Circuit Court, with the judge making a finding that concurrent sentencing would not meet the gravity of the case. The respondent emphasises that repeated offending against one victim is capable of attracting consecutive sentencing. Reliance is also placed on the fact that the Court of Appeal expressly referred to the fact that the appellant had not offended or come to adverse attention in the forty years since the offences.

27. The respondent submits that the Court of Appeal's approach to re-sentencing in this case was appropriate and in accordance with that Court's established practice in that, having quashed the sentence on one ground only and having found no error in principle in respect of any other aspect of the sentence, its obligation to re-sentence was confined to adjusting the sentence in order to correct the single error which had been identified. The appellant does not accept that there is such an "established practice".

Discussion

General

28. Sentencing for historic offences varies from the norm in certain significant ways. One obvious difference is that a far more extensive range of information is available to the sentencing court about the impacts of sexual offences in general, and in respect of both the victim and the perpetrator in particular. As compared to a judge sentencing a person this year for an offence committed in the recent past, the court in a historic case is in a position to be much clearer about any long-lasting harm that might have been inflicted on the victim, and also about the prospects of rehabilitation or risk of further offending on the part of the

offender. This case demonstrates both of these features. The sentencing court was fully aware of the extremely damaging consequences for the victim. It was also aware of the manner in which the appellant had lived his life for the forty years prior to the matter coming before the court.

29. Another significant difference is that the sentencing parameters for sexual offences have been altered several times by the legislature over the past forty years. This can give rise to a degree of tension between the older statutory provisions setting maximum sentences and the modern understanding of the harm caused by sexual offences, in particular where the victims are children. In this case, each offence before the court was subject (for historical reasons to do with rationalisation of a patchwork of different statutory sentencing provisions dating from different eras) to an effective maximum sentence of two years imprisonment. By contrast, the modern offence of sexual activity with a child under 15 years of age can carry a sentence of up to life imprisonment (s.16 of the Criminal Law (Sexual Offences) Act 2017, as amended).

30. A sentencing judge must, of course, sentence the accused person by reference to the law applicable to the time of the offence. However, it cannot be expected that the judge will put out of his or her mind everything now understood about sexual offending, or the way in which offences against children are now viewed by the law. In other words, a judge in the 2020s cannot be expected to approach a case as if he or she was a judge of the 1970s. However, the fundamental principles of sentencing must nonetheless be applied.

31. One of the most fundamental principles, as identified by Denham J. in *People (DPP) v. M.* [1994] 3 I.R. 306, is that the court must take into account both the nature of the crime and the personal circumstances of the accused. That principle is implemented in the sentencing process by **firstly** considering the "nature of the crime", a phrase which includes any relevant aggravating or mitigating factors relevant to the offending conduct under consideration. That leads to the identification of the appropriate headline sentence. **Next**, the personal circumstances of the accused are taken into account in deciding on the appropriate reduction, if any, from that headline figure.

32. It follows, in my view, that an error in the selection of a headline sentence will normally require an appellate court to reassess the sentence in its entirety. However, it does not follow that all errors in the sentencing process at trial level will have that consequence. It is necessary to ask whether there is any logical connection between the identified error and any other decision made in the process, and in this regard I would not accept as a general proposition that an erroneous decision made by a trial judge on one aspect of a case necessarily "contaminates" other, separate aspects even if that logical connection is absent. I do not believe that it would be helpful or practical to attempt to categorise cases beyond that – this is not a situation calling for a "bright line" rule.

The nature of the crime

33. It is true that, as has been urged on behalf of the appellant, his crimes did not involve violence. He also says that they did not involve degradation beyond that inherent in the offending. However, consideration of the nature of the crime in a case of this nature must include certain clearly aggravating factors. The victim was a young boy, away from his home and family, under the protection of the appellant and his family. The offending behaviour included what appears to have been a classic pattern of grooming, culminating in serious incidents of sexual abuse involving degradation of the victim. The effects on the victim were disastrous and have done great damage throughout his life.

The personal circumstances of the accused

34. In *People (DPP) v Kelly* [2004] IECCA 14 Hardiman J., delivering judgment on behalf of the Court of Criminal Appeal, pointed out that this principle was well established and was derived at least partly from the Constitution. In this regard he referred *inter alia* to the judgment of Henchy J. in *State (Healy) v Donoghue* [1976] I.R. 325, and the statement therein that the constitutional guarantee of a trial in due course of law means that a citizen should not be deprived of his liberty by a trial conducted so as to shut out "a sentence appropriate to his degree of guilt *and* his relevant personal circumstances" (emphasis added).

35. The absence of criminal convictions is always a very significant relevant personal circumstance, even in the case of a relatively young offender. It is particularly so in the case of an older person. Any evidence of positive good character (such as support of family, work record, community involvement etc.) is also to be seen as relevant, although its significance may be lessened by reference to the gravity of the offence.

36. In *People (DPP) v. P.H*. [2007] IEHC 335 Charleton J. considered this aspect in the context of sentencing an elderly offender convicted of historic offences and said:

> *"The court might then usefully look at the date on which the offences were committed. A sentencing court, in structuring any sentence, is obliged to have regard to the subsequent life circumstances of the victim. In terms of settling on the final tariff of sentence, the offender's conduct in the intervening years will be of particular importance. If there was evidence of genuine repentance of the offending; if the offender had led a good life of family, or friendship, and work; or if the offender had sought in some meaningful way to make up for his abuse of the victims, this should be taken into account. The reason that I mentioned these factors is that part of the settled sentencing principles operated by the Superior Courts emphasise that while punishment must be meted out to an offender in order to ensure the social stability of the community, and that deterrence is a necessary aspect of sentencing policy, one of the ultimate goals of the sentencing processes is the rehabilitation of the offender. If he has managed to effect that purpose, in the intervening years between offending and sentence, by his own efforts, then, it seems to me, a discount, perhaps substantial in appropriate cases, of the relevant sentence might be contemplated."*

37. It is also the case that the appellant in this case was a young man at the time (although in law an adult and fully responsible for his own behaviour).

Sequential offending, consecutive sentences and totality

38. As I observed earlier, it cannot be expected that a judge today will regard sexual offending against children in quite the same way as a judge of forty years ago might have done. Furthermore, where the modern judge is operating a legal regime that permits of a maximum sentence of two years only, it is entirely possible that the judge will feel that although the evidence demonstrates a series of offences of increasing seriousness, even the less serious may warrant a headline sentence of close to the maximum. That is not in itself illogical. Subject to what may be required by the totality principle, it is not necessary to artificially reduce the headline in respect of any individual offence.

39. It is true that the courts of this jurisdiction have often approached sentencing in a case of sexual assaults against one victim on the basis that concurrent sentences are more appropriate than consecutive, and that it has been said that consecutive sentences should be utilised "sparingly". However, "sparingly" does not mean rare, or exceptional. It is not necessarily an error in principle to impose consecutive sentences where the trial judge considers that concurrent sentences will not adequately reflect the gravity of sequential offending against one victim – see, for example, the decision of the Court of Criminal Appeal in *People (DPP) v. McKenna (No.2)* [2002] 2 I.R. 345. The court has a duty to impose a sentence that fairly reflects both the gravity of the accused's behaviour and his culpability, and it may be that, in a given case of historical offending, concurrent sentences within the maximum parameters of the available sentences will not do so.

40. In *People (DPP) v Farrell* [2010] IECCA 68 O'Donnell J. described the necessity to observe the totality principle in the following terms:

> "*The imposition of a consecutive sentence carries with it a particular obligation to ensure that what is described somewhat cumbersomely as the "totality principle" is observed. It is a commonplace of many types of assessments that the consideration of the component parts risks sometimes missing or exaggerating the value of the whole. This observation applies in the context of sentencing because the construction of the sentence involves not just the identification of the harm to victims, but also an assessment of the culpability of the accused.*
>
> *In the field of sentencing, it is certainly the case that there is a principle of totality, which requires that when consecutive sentences are employed, a court must be careful to take account of the overall impact of the sentence, the moral blameworthiness of the accused and the prospect of rehabilitation, and*

therefore recognises that the total sentence in some cases should be less than the sum of the component parts."

41. As in many other contexts, the decision of a trial court or, for that matter, an appellate court, will not necessarily be vitiated by failure to specify and expressly analyse every matter that must be taken into account in reaching a decision. However, if a significant factor is not expressly dealt with then it should at least be implicit in the court's reasoning. Unfortunately, I cannot discern from either the transcript of the Circuit Court or the judgment of the Court of Appeal that the principle of totality was taken into account. The language of the judgment, expressly resting the decision on the age and lack of criminal convictions of the appellant, does not seem to me to leave any scope for inferring that it was.

42. The sentence as it stands is one of eight years and nine months. I do not consider that it would be appropriate to describe it simply as a six-year sentence, thus ignoring the suspended portion. Normally, that portion will be related to the specific mitigatory or rehabilitative aspects of a case, although I do not rule out the relevance of deterrence in some cases. However, the point is that the overall sentence, including the suspended element, must reflect the sentencing court's overall assessment of the gravity of the case and the circumstances of the accused. An accused person should not be subjected to the possibility that he or she may have to serve a longer sentence than the sentencing court believes they merit.

43. In this case, therefore, the result is that the sentence is one that equates to many rape or buggery sentences after trial in the Central Criminal Court. I would not suggest that no case involving multiple indecent assaults could ever compare in gravity with such matters, and should not be taken as making a finding at this stage that the case under consideration did not. However, it is a feature that I think would require some explanation and rationalisation in the light of the totality principle. The absence of such explanation or rationalisation seems to me to amount to an error in principle such that the decision of the Court of Appeal cannot stand.

Jurisdiction of this Court to impose sentence

44. In *People (DPP) v. F.E.* [2020] IESC 5 this Court confirmed that it had, where necessary, jurisdiction to take on the role of a sentencing court in an appeal. The circumstances in which it would do so were described in paragraph 40 of my judgment as follows:

> "*No constitutional principle applicable to sentencing has been identified that could prevent this Court from making an appropriate order if it finds an error in the judgment of the Court of Appeal. However, in seeking to identify the appropriate order it seems to me that the Court should bear in mind certain factors. The first is that the correct approach to the outcome will be largely dictated by the nature or categorisation of the appeal. The second is that this Court does not have, and is not likely to accrue, the day-to-day experience of sentencing that is undoubtedly possessed by the trial judges and the Court of Appeal. It is therefore undesirable in principle that the Court should take on the role of a sentencing court where it is not necessary. It seems to me that, as a general principle, it is only if the Court concludes that both of the lower Courts erred in principle that it should embark on the sentencing process itself. However, I would not wish to be taken as excluding the possibility that it might be appropriate in other, exceptional circumstances.*"

45. As I consider that in this particular case both the trial judge and the Court of Appeal fell into error in not considering the totality of the sentences imposed, I propose that this Court should fix a hearing date for the purpose of hearing submissions on the appropriate sentence.