THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 173

Record Number: 15/19

Birmingham P.
Kennedy J.
Ní Raifeartaigh J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

S. O'L

APPELLANT

JUDGMENT of the Court delivered on the 29th day of June 2020, by Ms. Justice Kennedy

1. This is an appeal against sentence. The appellant pleaded guilty to five counts including a count of defilement contrary to section 2 of the Criminal Law (Sexual Offences) Act 2006, a count of sexual exploitation contrary to the Child Trafficking and Pornography Act 1998 as amended and three counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by section 37 of the Sex Offenders Act 2001. The appellant received a sentence of nine years' imprisonment with the final two years suspended on terms.

Background

2. The offences in question occurred between the 30th September 2014 and the 10th August 2015 when the complainant was aged between 13-14 years old. The complainant, who has an intellectual disability, resided with her mother at the time. The appellant lived nearby and began a relationship with the complainant's mother. This relationship was characterised by significant alcohol consumption. The appellant often stayed at the home of the complainant and her mother. The complainant began to view the appellant as a father figure and she described how one day he approached her and began kissing her. The complainant stated that more grave sexual intimacy took place thereafter, including sexualised contact by text, inappropriate touching of the complainant and her being invited to touch the appellant. The complainant moved into her aunt's house in August 2015 and the revelations came to light in October 2015.

3. When the appellant was initially questioned, he denied that any of this had taken place. He later conceded that there had been kissing but contended that this had been initiated

by the complainant. The appellant made further admissions, stating that further contact had occurred including the masturbation of the appellant and oral sex, all, he said, initiated by the complainant. The appellant denied that he had engaged in texting of a sexualised variety with the complainant.

4. A trial was to proceed with a number of different counts on the indictment, however, on the day of trial, a fresh indictment was preferred, on which indictment the appellant entered pleas of guilty.

Personal circumstances of the appellant

5. The Court heard that the appellant was 45 at the time of sentencing. He has six previous convictions, two of which are relevant to this appeal. One of these convictions was the indecent assault of a male and this occurred when the appellant was 15 years of age. The second conviction concerned sexual assault when the appellant was 20 years of age and he received a sentence of four years and six months' imprisonment. The appellant has a particularly dysfunctional family background and has alcohol problems.

The sentence

6. In imposing sentence, the sentencing judge identified the following aggravating factors: the nature of the offending, the age of the complainant, the particular vulnerabilities of the victim and the appellant's attitude to the offending as reflected in his interviews with the Gardaí and in the probation report. The sentencing judge was concerned that the appellant was attributing fault to the injured party, as appeared from those reports. He further highlighted the impact on the complainant and the appellant's previous conviction for sexual assault, although the Court stated that it would not take his juvenile conviction into account.

7. In terms of mitigation, the sentencing judge identified the following: the early pleas of guilty and the appellant's own tragic background. The judge accepted in mitigation that the previous conviction for sexual assault was committed when he was 20 years of age and that since that time he has not been involved in any serious type of offending, including any type of sexual offending. He excluded the earlier conviction from his consideration. The sentencing judge further accepted that the offences in question began as opportunistic in nature.

8. The sentencing judge went on to impose a headline sentence of twelve years' imprisonment in respect of each count which was then reduced to nine years with the final two years suspended on terms, to run concurrently.

Submissions of the appellant

9. The appellant submits that the sentencing judge erred in characterising the appellant's attribution of fault to the complainant as an aggravating factor. While it may be relevant at sentencing, it is not an aggravating factor.

10. It is said that the Court did not give sufficient weight to the appellant's admissions to Gardaí and his co-operation. On the contrary, the Court regarded the appellant's attitude

to the allegations, as expressed in the garda and probation interviews, as an aggravating factor. To this extent it is submitted that the Court fell into error.

11. The appellant accepts that the Court did consider the guilty pleas to be significant mitigation but it is submitted that the overall sentence imposed does not reflect the full value of the pleas.

12. The appellant submits that significant errors arise out of the headline sentence which was identified and applied to all counts at the start of the sentencing process. First of all, it is submitted that the sentencing judge erred in applying the same headline sentence to all counts in circumstances where the nature and quality of the specific sexual acts or acts occurring in the context of sexual contact or invitations to sexual contact varied widely. Secondly, the appellant submits that if one considers the count of defilement to be the most serious count, given the nature of the sexual act, then a headline sentence of 12 years appears to be wholly out of kilter with what might be described as the norm and especially when one has regard to the guidelines provided in The People (DPP) v. FE [2019] IESC 85.

13. Finally, the appellant submits that the mitigating factors present, including the appellant's troubled background and significant difficulties, the pleas of guilty and the cooperation and admissions made, were not adequately reflected in the final sentence imposed.

Submissions of the respondent

14. The respondent submits that the headline sentence was approached from the view that consecutive sentencing was both available and possibly appropriate under the circumstances, however a concurrent sentence would be achieved through the nomination of a headline sentence and any relevant reduction for mitigation.

15. The respondent submits that as a result a single headline sentence was nominated by the sentencing judge, reflecting the combined and ongoing nature of the offending, while avoiding the possible harsh result of consecutive sentencing on a lesser headline level in each case, but to a cumulatively disproportionate amount.

16. The respondent further submits that in the course of sentencing, the judge made clear all matters that influenced the formation of the headline sentence by him, and the mitigation thereof through not alone rendering it concurrent in nature, but further mitigating the sentence.

17. It is submitted that the sentencing judge has not deviated in principle from the correct applicable law in sentencing. In this instance, he indicated early on, that consecutive sentences might well be appropriate but he intended not to pursue that course to avoid a disproportionate sentence. As indicated, he identified a headline sentence, which it is submitted, fairly reflects the period of offending and all the aggravating features outlined above.

Discussion

18. In oral submissions Mr Cody SC for the appellant concentrated on the headline sentence identified by the judge, asserting that such sentence was too high.

19. Prior to advancing his substantive argument, Mr Cody refers to *The People (DPP) v. FE* [2019] IESC 85, where in the context of consecutive sentences, Charleton J. said at para. 35:-

> "While there is no obligation to impose consecutive sentences, it may be appropriate to do so by reason of a gap in offending, there being more than one victim, or where the facts are not related. All of this is a matter of good sense and it would not reflect good sense to consider a series of offences over years against the same victim of the same seriousness to each carry a sentence as if that crime were isolated from what came before or after. This might result in a series of offences against the same victim receiving an inappropriate sentence where the human reality was that each offence made recovery from the others increasingly difficult. The totality principle means that the judge should objectively consider the overall impact of the offence on the victim or victims and also the rehabilitative effect of the overall result in light of the final total, and the justice of the retribution and the need to mark the harm to the victim or victims."

20. Mr Cody mentions this issue in that he asserts that consecutive sentences were not appropriate in the present case either in informing the headline sentence or otherwise.

21. In that respect, it is clear, in our view, that the judge approached the issue of sentence with scrupulous care, he carefully considered whether consecutive sentences would be appropriate, and concluded that such would give rise to a disproportionate sentence. He said:-

> "Again, in relation to these matters, the Court has a duty to decide whether the sentences should be imposed consecutively or concurrently and in doing so the Court has to consider the totality principle so that a cumulative sentence is not cruel and unusual punishment. If the Court decides that consecutive sentencing is appropriate it is entitled to reflect that in the sentence is imposes, but impose those sentences concurrently for the reason that when applying the totality principle the individual sentence for the crime does not reflect its seriousness and that's the situation that arises here."

22. Having set out the principles, the judge exercised his discretion in a manner which did not involve sentencing on a consecutive basis. He said as follows:-

> "In relation to the counts, they occurred over a period of time. So, the Court considers that it's entitled to sentence consecutively, but as part of mitigation in the circumstances it will sentence concurrently, but it is taking into account the fact that it can sentence consecutively in respect of the headline sentence from which it mitigates."

23. Insofar as the judge took into account the fact that consecutive sentences were open to him on the facts of the case in nominating the headline sentence; this does not give rise to an error on his part. He clearly pointed out that as the offences occurred over a period of time, he was entitled to impose sentences on a consecutive basis. The fact that the offences occurred over a prolonged period was certainly a factor which aggravated the offending and so was relevant to the identification of the headline sentence.

24. It is also said that the judge imposed a headline sentence which was out of kilter with the principles in *The People (DPP) v. FE* [2019] IESC 85 and Mr Cody says that the sentence nominated is redolent of the kind of sentence in more serious cases. He refers to para. 57 where Charleton J. said:-

> "There is a category of rape cases which merit a headline sentence of 10 to 15 years imprisonment. What characterises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust."

25. It is contended that the features identified by Charleton J. were not present in the instant case.

26. Finally, on behalf of the appellant, Mr Cody says that the judge attached disproportionate weight to the attribution of fault to the complainant by the appellant. He argues that it is possible that the Probation Officer may not have been familiar with the sequence of events in that when the appellant was interviewed, he made certain admissions of a sexual nature and at a later stage voluntarily came to the station and made further admissions. It is said that the indictment reflected the admissions made by the appellant and his approach marked his remorse.

27. With this latter submission, we cannot agree. It is accepted that the judge was entitled to take into account the fact that the appellant indicated that the complainant initiated the sexual contact, as this is clearly relevant to the degree of insight and remorse shown by the appellant. We are not persuaded that the judge attached disproportionate weight to this aspect of the appellant's approach.

28. Insofar as the headline sentence is concerned, these were undoubtedly very serious offences. The aggravating factors were many; and included the fact that this was a particularly vulnerable victim, the age of the victim, the prolonged nature and escalation of the sexual activity, the sending of inappropriate texts, the relevant previous conviction, and, while it was accepted by the judge that the initial offending was opportunistic, the appellant thereafter, certainly preyed on a particularly vulnerable and young victim, the impact on the victim and of course the abuse of trust.

29. These matters warrant a significant headline sentence in our view and while it is so that the nominated pre-mitigation sentence was somewhat high, we are not persuaded that it was not within the margin of appreciation afforded to the judge. In *FE* Charleton J. places rape cases in the more serious category and thus meriting a headline sentence of 10-15

years, where certain characteristics are present, such as "the use of violence or intimidation beyond that associated with the offence, ***or the abuse of trust***". (Our emphasis).

30. The abuse of trust is heightened by the vulnerabilities of the victim in the present case and thus we are not persuaded that the judge erred in nominating a headline sentence of 12 years. We are also influenced by the fact that it is crystal clear that the judge approached the imposition of sentence in a most careful and thoughtful manner.

31. Whilst the judge did not differentiate in the sentences imposed on the different categories of offending and mark the gravity of each category separately, form is of a lesser importance than substance and we are satisfied that the overall sentence imposed was appropriate.

32. When we look to the ultimate sentence imposed by the judge; it is readily apparent that the judge was determined to impose a proportionate sentence. He properly assessed the aggravating factors and in considering the mitigating factors, he, *inter alia*, acknowledged the value of the appellant's plea of guilty, the fact that it was an early plea in light of the amendments to the indictment, and that the appellant had not offended in relation to any serious matter for 25 years. In those circumstances the judge was of the view that concurrent sentences were appropriate and he reduced the nominated pre-mitigation sentence to one of 9 years' imprisonment and suspended two years of that sentence to incentivise rehabilitation.

33. It cannot, in our view, be gainsaid but that the ultimate sentence was a proportionate one. The sentence ultimately imposed was a just and fair sentence, marking the seriousness of the offending conduct, taking account of all mitigating factors and encouraging the appellant's rehabilitation by suspending a portion of the sentence on terms specifically designed to promote his rehabilitation. Thus the sentence was entirely in accordance with sentencing principles and we find no error in the approach adopted by the judge.

34. Accordingly, the appeal is dismissed.