THE COURT OF APPEAL

Record Number: 111/19

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JOSEPH MCGRANE

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 26th day of November 2020 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. The appellant was convicted of eleven counts of indecent assault contrary to Common Law and seven counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 in respect of four complainants. The appellant received a sentence of thirteen years' imprisonment with the final twelve months suspended.

Background

2. By way of background, the offences took place between 1984 and 1993. Three of the four complainants are related and one of the complainants was a childhood friend of the other complainants. The appellant was a frequent visitor to the family home and was distantly related to the family and was regarded as a family friend. At the time of the offending the complainants worked for the appellant at various stages in some capacity.

3. The appellant was found guilty of ten counts of indecent assault in respect of one complainant, relating to events which took place during 1985 and 1989 when he was a teenager. He described a particular occasion on which he was babysitting in the appellant's sister's house and the appellant gave him a glass of Coke laced with alcohol before proceeding to assault him in the bathroom. The assaults also took place at the appellant's home and at a caravan park in another location. The assaults comprised of acts of masturbation, anal penetration and oral intercourse.

4. The appellant was found guilty of six counts of sexual assault in respect of another complainant, between 1990 and 1993 when the complainant was a teenager. The assaults

took place at two locations where the appellant was living at the times involved. The assaults often involved the presence of alcohol and comprised of acts of masturbation in the appellant's bedroom where the appellant would get into bed with the complainant and indecently assault him.

5. The appellant was found guilty of one count of indecent assault in respect of the third complainant, between 1984 and 1986 when the complainant was also a teenager. The complainant gave evidence that he was working for the appellant at the time and went on a trip to a caravan park with one of the complainants and another individual. The complainant went to the campsite bar and had several drinks before returning to the caravan in a state of intoxication. He got into bed and the appellant was in bed beside him and began to touch his genitals, the complainant pushed his hands away, but he continued to touch his genitals inside his underwear and gyrate against his back.

6. The appellant was found guilty of one count of sexual assault in respect of the fourth complainant, between 1991 and 1993 when she was in her early twenties. At the time, she was working for the appellant. The appellant and the complainant attended a work event together and she consumed alcohol. The appellant offered her a lift home but he proceeded to bring her to his house on the basis that he didn't want her mother to see her with alcohol taken. She gave evidence that she went to sleep in a bedroom in the appellant's house and awoke to the appellant behind her. She could feel the appellant's penis against her, and he attempted to pull her underwear to one side so that he could insert his penis into her vagina. The appellant also attempted to unclip her bra. Despite her protestations, the appellant kept trying to open her legs and insert himself inside her until eventually he desisted and went to sleep.

7. The complainants made statements to Gardaí in this matter in 2016.

The sentence

8. In terms of the aggravating factors the trial judge remarked as follows:-

> "The aggravating factor in these matters are; one, the seriousness of each of the offences in and of itself. Two, the abuse of trust and position of the accused in terms of trusted adult and employer of your people, and three, the premeditated use of alcohol by the accused in his efforts to take advantage of the complainants. As a result of the cumulative effect of the above aggravating factors, this Court must conclude that the moral culpability of the defendant is at the higher level."

9. The trial judge identified the following mitigating factors:-

> "The mitigating factors which the Court takes into account are; one, the accused's previous good character, taking into account his age, his history of work and employment provisions over many years, and his long work history as a productive member of society, three, the support of his family which is ongoing, four, all of the testimonials handed in which the Court notes, five, his age now and the difficulties faced by somebody not previously having been in prison at this age, six, the fact

that he has not come to the attention of the gardaí since in or about 1993. And I note Mr Greene handing in this morning the medicolegal report and the contents of same which Mr Greene has outlined relates to pulmonary issues related to smoking. And also, the Court notes that the placement of the accused on the sexual offenders register is penal in nature."

10. In terms of the counts relating to the first complainant: the trial judge identified a headline sentence of three years and six months for Count 1, this was reduced to two years and ten months. For Counts 4-8 headline sentences of five years were identified and this was reduced to four years and four months. Headline sentences of eight years were identified for Counts 12, 13, 18 and 19, this was reduced to seven years and following the application of the totality principle this was further reduced to five years with all sentences to run concurrently inter se.

11. In terms of the counts relating to the second complainant, a headline sentence of four years was identified for Count 25 and this was reduced to three years and four months. This was ordered to run concurrently to the sentences imposed in respect of Counts 33-37 where headline sentences of six years were reduced to five years. Applying the totality principle, the sentence of five years was further reduced to four years. These sentence were ordered to run concurrently *inter se* but consecutive to the sentences imposed on Counts 12, 13, 18 and 19.

12. In terms of the count relating to the third complainant, a headline sentence of four years was reduced to three years and four months. Following the application of the totality principle this was further reduced to two years and ordered to run consecutively to the sentences imposed on Counts relating to the second victim.

13. In terms of the count relating to the fourth complainant, a headline sentence of four years was reduced to three years and four months. Following the application of the totality principle this was further reduced to two years and ordered to run consecutively to the sentences imposed on Counts relating to the third victim.

14. The aggregate sentence imposed was one of thirteen years' imprisonment and taking into account the possibility for rehabilitation the sentencing judge suspended the final year of imprisonment on terms.

Grounds of appeal

15. The appellant is proceeding with the following three grounds of appeal:-

    (1) That the trial judge placed an excessive weight on the aggravating factors and insufficient weight on the mitigating factors with respect to the defendant. The appellant is a man of previous good character, with a long working history and with health problems that make his incarceration more difficult to bear in all the circumstances.

    (2) That the trial judge erred in failing to have due regard to the effect of her earlier ruling in refusing to sever the indictment, on the totality principle at sentencing.

(3) That the trial judge erred in handing down an overall sentence which is excessive and oppressive in all the circumstances.

Submissions of the appellant

16. The appellant submits that the trial judge placed excessive weight on the aggravating factors and insufficient weight on the mitigating factors. In particular, the appellant takes issue with the sentencing judge's remark that it was "difficult to identify any substantial mitigating factors, given the particular facts of this case." The appellant submits that the fact that there were no previous convictions and the lengthy time involved between the dates of offence and the date of sentencing are significant mitigation along with his long working history and current medical status.

17. The appellant submits that the sentencing judge erred in failing to have due regard to the effect of her earlier ruling in refusing to sever the indictment on the totality principle at sentencing. The appellant argues that the principles of totality and proportionality are of particular relevance when making sentences consecutive in circumstances where the counts do not refer to sample counts but rather to specific incidents, as in the present case. As such, the punishment aspect ought not to be as severe in such cases. The appellant contrasts the aggregate sentence imposed with three other cases involving multiple complainants. The first of these cases is *The People (DPP) v. PS* [2009] IECCA 1. Here the Court, in place of the life sentence imposed, fixed an aggregate sentence of fifteen years with the final two and a half years suspended in respect of various charges of rape and sexual assault against two victims.

18. The appellant further refers to *The People (DPP) v. LD* [2014] IECA 53. Here a sentence of fifteen years with three years suspended was imposed in respect of 24 counts of rape and six counts of indecent assault perpetrated against two victims who were the daughters of the appellant.

19. The appellant also refers to *The People (DPP) v. WL* [2017] IECA 139 where an aggregate sentence of nine years in respect of 18 counts of sexual assault concerning three complainants was reduced to seven years on appeal.

Submissions of the respondent

20. The respondent submits that the trial judge took into account all mitigation present and she explained that while she gave due weight to the mitigating factors, a substantial sentence was still warranted due to the culpability and harm done.

21. In relation to the appellant's submission on the totality principle the respondent submits that the trial judge repeatedly applied the totality principle and specifically referred to it throughout sentencing.

22. The respondent submits that the sentencing judge set out her sentencing decision in a comprehensive and complete manner in order to ensure that the sentence imposed was proportionate and struck the balance between the offending conduct and the personal circumstances of the appellant.

Discussion

23. Having heard the evidence and plea in mitigation, the judge adjourned the matter for the imposition of sentence. No issue is taken with the methodology adopted by the judge in her approach to sentence. Indeed, the judge took the greatest of care in her approach.

24. The primary issues identified in oral hearing concern the reduction for mitigation and the ultimate adjustment of the indicative sentence to take account of the totality principle.

25. Issue is taken with the headline sentences, insofar as it is said that the counts were not representative counts, but it is fair to say the gravamen of the appeal rests in the reduction and adjustment afforded.

26. We will now address the headline sentence; this complaint concerns the counts relating to the first and second complainants where the counts on the indictment were specific counts and so Mr Greene SC on behalf of the appellant argues that the headline is excessive in circumstances where the counts were not preferred as representative counts of repetitive conduct.

27. However, there were nonetheless a significant number of counts concerning the first and second complainant and each of those counts involved many aggravating factors including the use of alcohol, abuse of trust, the manipulation of young and vulnerable boys, the impact on the victims and the nature of the activity in which the appellant engaged.

28. The judge carefully assessed each of the allegations and nominated the appropriate headline sentence for each of the particular offences in the instance of the first complainant taking account of the factors particular to each count.

29. She performed the same exercise in the case of the second complainant, and correctly identified, in our view a greater headline sentence on Counts 33-37 than on Count 25, subject to the situation set out hereunder.

30. An error was identified in the information given to the judge as to the maximum penalty for the offences relating to the second complainant where she was misinformed that the penalty was one of fourteen years as opposed to five years. This led to the judge imposing a pre-mitigation sentence of four years on Count 25 and on Counts 33-37 inclusive of six years.

31. This clearly was an error in that she identified the headline sentence in each instance with regard to the incorrect maximum penalty available to her.

32. In those circumstances, the sentence imposed on Counts 25 and 33-37 inclusive will need to be addressed.

33. Mr Greene contends that the judge failed to take sufficient account of the absence of convictions and the appellant's good character in the intervening period since the conclusion of the offending conduct in 1993 and the sentence date.

34. On that issue, while it is said that the judge said she was taking these factors into account, she did not, in reality give sufficient discount.

35. It must be said that in her detailed sentencing remarks, the judge clearly identified and pointed to the mitigating factors, including his previous good character and that he has not come to garda attention since 1993.

36. The judge, at a later stage observes that:-

> "[i]t is difficult to identify any substantial mitigating factors, given the particular facts of the case."

37. In our view, the judge was correct in her view that it was difficult to identify any *substantial* mitigating factors, given that the greatest mitigating factor; a plea of guilty, is not present. We do not see any error in her comment.

38. Concerning the issue of intervening good character, in the context of prolonged sexual offending, the absence of previous convictions may carry little weight.

39. However, the question of weight, must, in each instance be carefully assessed. The lapse of time since the end of the offending with no suggestion of intervening misconduct is a factor which a court may consider as a mitigating factor in any given case depending on the circumstances and in the present case, the judge clearly took these factors into account and reduced the sentence accordingly.

40. Insofar as it is said that she failed to afford adequate reduction for mitigation, we have examined the headline sentence and the discount for mitigation in each instance. Where we look to the sentences of eight years and six years, the judge allowed a discount of on year for mitigation respectively and in the instance of the four-year sentence, a discount of eight months. Given the mitigation present, we are not persuaded the judge erred in the reduction afforded.

41. The next issue concerns the adjustment for the principle of totality. As we have indicated, the methodology adopted by the judge is beyond reproach.

42. Having identified the headline sentences in each instance, she then reduced for mitigation, came to her indicative sentence of 18 years and 8 months, then stood back and adjusted the sentence in light of the totality principle, resulting in a sentence of thirteen years with one year suspended.

43. In our view, again, no issue can be taken with the adjustment afforded for totality. The purpose of the principle is to ensure that the ultimate sentence imposed where sentences are consecutive, is one which is just and proportionate in the circumstances. The judge reduced the indicative sentence of 18 years and 8 months to one of thirteen years with one year suspended. This was an exceedingly generous reduction in our view and indeed could be said to be excessive.

44. Notwithstanding the error identified regarding the maximum penalty pursuant to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 we are not persuaded when we consider the overall sentence imposed for a series of sexual offending on young individuals with the aggravating factors identified, that the judge erred in imposing an actual custodial sentence of twelve years.

45. However, we must intervene to the extent required in order to give effect to the maximum penalty of five years' imprisonment on Counts 25 and 33-37 inclusive. We believe that the judge correctly identified that the second complainant was a very vulnerable individual and that the offending conduct had a significant impact on him.

46. We consider the appropriate pre-mitigation sentence on Count 25 to be one of three years and on Counts 33-37 inclusive, a sentence on each count of four and a half years' imprisonment. With the limited mitigation, we reduce those sentences to two and a half years and four years respectively, concurrent inter se and consecutive as directed by the sentencing judge.

47. This results in an indicative sentence of 17 years and 8 months. As we consider the judge was overly generous in adjusting the indictive sentence in light of the totality principle, we consider the overall sentence ultimately imposed to be a just and proportionate sentence reflecting the offending conduct and the circumstances of the offender.

48. We also intervene to the extent that in suspending the final year of the sentence, the suspension referred to the final year of the sentence imposed on Count 12. In order to give effect to the decision of the judge, we consider it appropriate that the final year of the overall sentence be suspended, therefore the final year of the sentence imposed on Count 49 is suspended.

49. Finally, we note that the sentencing judge indicated that the sentence would be suspended if the appellant availed of courses while in custody; in effect indicating a precondition to the suspension of the sentence. We understand that the participation in courses such as the Better Lives Program is voluntary in nature.

50. Consequently, we simply suspend the final 12 months of the sentence on the usual mandatory condition and also on the condition that he stay away from his victims in perpetuity. The bond to be entered into before the Governor or Assistant Governor of the prison.