



THE COURT OF APPEAL

Record Number: 20/20

**Woulfe J.
McCarthy J.
Kennedy J.**

BETWEEN/

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT**

- AND -

A.V.

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 16th day of July 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. The appellant pleaded guilty to four counts in respect of two complainants on a full facts basis. These include a count of defilement of a child under the age of 15 years of age contrary to section 2(1) of the Criminal Law (Sexual Offences) Act, 2006 as substituted by section 16 of the Criminal Law (Sexual Offences) Act, 2017; a count of defilement of a child under the age of 17 years of age contrary to section 3(1) of the Criminal Law (Sexual Offences) Act, 2006 as substituted by section 17 of the Criminal Law (Sexual Offences) Act, 2017 and two counts of meeting a child for the purpose of sexual exploitation contrary to section 7 of the Criminal Law (Sexual Offences) Act, 2017.
2. The appellant received a sentence of twelve years' imprisonment with the final three years suspended on terms.

Background

3. The offending relates to two complainants: Complainant A and Complainant B. In respect of Complainant A she was fourteen years old when she met the appellant through a friend who had initially met the appellant on the internet where it appears the appellant was seeking to meet young girls through his interactions on Instagram. They were enticed to

the appellant's house on the promise of ecstasy tablets. The appellant was aware of the complainant's age.

4. Following this meeting the appellant connected with the complainant via Snapchat and he took a taxi from his home to her house which was in a rural area. From there, he brought the complainant back to his apartment via the taxi. The appellant gave the complainant ecstasy pills and proceeded to have sexual intercourse with the complainant.
5. The third meeting followed a similar pattern. The complainant made it clear that she did not want to have sex. It appears that despite this, the appellant plied the complainant with drugs and had sex with her. On the fourth meeting the complainant was brought back to the appellant's apartment where she was given d10s and four lines of cocaine and some hash. It appears that the complainant was completely out of it following the consumption of this cocktail of drugs and she created such a commotion that the appellant's housemates went to his bedroom to see what was going on. He made a statement to confirm that he was trying to calm the complainant who was extremely agitated.
6. On the fifth meeting the complainant recalls going to the appellant's apartment and being given some MDMA which caused her to stumble. She also recalls seeing pills in his bedroom and taking three or four of them. She recalls the appellant pushing her top up and she felt guilty and disgusted. She stated that the appellant had sexual intercourse with her on two occasions during this meeting.
7. In respect of Complainant B, she was sixteen years of age at the time of offending. The appellant was aware of her age. They had met through social media. Within 24 hours of making contact with the complainant on social media, the appellant had arrived at her residence and enticed her back to his apartment. This was done without the consent of the complainant's parents who did not know where she was. It appears that the complainant's whereabouts were unknown for a number of days and that during this period she was staying with the appellant in his apartment, engaging in drug-taking and sexual activity. It further appears that during this period the appellant tattooed the complainant and that she was ultimately discovered following a garda search of the appellant's residence. When the gardaí made initial inquiries about the whereabouts of the complainant from the appellant, he denied having knowledge of her whereabouts.

Personal circumstances of the appellant

8. At the time of sentencing the appellant was 30 years of age. The appellant is originally from Nicaragua and he came to Ireland through Los Angeles. While the appellant was in Los Angeles he was a member of an illegal gang. When he arrived into Ireland the appellant sought employment as a barber but this was short-lived and he then started becoming involved in the drugs trade in Athlone, and there he came to the attention of gardaí, he was arrested and charged, and he has four convictions for drug offences.

9. A forensic psychologist report characterised the appellant as a psychologically vulnerable man with a significant background of childhood insecurity including economic deprivation, displacement and sexual abuse.

The sentence imposed

10. In imposing sentence the sentencing judge listed the following aggravating factors: the nature of the offending that involved enticing the complainants to go with him, giving them drugs and sexually abusing them; the ages of the complainants and the use of drugs; the significant level of premeditation including going on the internet with the intention of enticing young girls back to his apartment so that he could drug them and have sex with them; that there were five incidents involving Complainant A and Complainant B stayed in his apartment for a number of days during which time he plied her with drugs, had sex with her, and tattooed her while her parents were looking for her; that Complainant A was covertly smuggled out of her parents' home by the appellant; and finally, the impact of the offending on the complainants.
11. In terms of mitigation the sentencing judge referred to the plea of guilty which was particularly valuable in a case of this nature; the level of cooperation with the gardaí; the expression of remorse offered to the complainants. The sentencing judge further referred to the probation report and the psychologist report prepared for sentencing which outlined the appellant's difficult upbringing.
12. The sentencing judge placed the offending at the mid to upper range and identified a headline sentence of fourteen years' imprisonment. Taking into account mitigation this was reduced to twelve years to be imposed on Count 1 to cover the totality of the offending. To foster and encourage the rehabilitation of the appellant the final three years were suspended for a period of ten years on terms.

Submissions of the appellant

13. The appellant submits that the headline sentence identified was too high. The appellant accepts that the sentencing judge correctly placed the offending in the mid to upper range but this did not correspond to a fourteen-year sentence. Rather a sentence of ten years would be more appropriate to that range.
14. The appellant refers to *The People (DPP) v. McD* [2021] IECA 31 where the Court offered informal guidance on sentencing for defilement offences at para. 56:-

"In respect of certain other offences, cardinally scaled by the legislature to provide for a range of penalties running from non-custodial dispositions up to imprisonment for life we have suggested that the majority of such offences are capable of being sentenced on the basis that they fall to be located for punishment purposes at some point on an effective fifteen year spectrum, with a low range attracting a sentence ranging from a non-carceral sentence to imprisonment for five years, a mid-range involving imprisonment from five to ten years, and an upper range involving imprisonment from ten to fifteen years. To suggest this is not to ignore the fact that the legislature has provided for up to life imprisonment. Individualisation in sentencing means there will always be outliers so that for truly

egregious cases a sentence above fifteen years and indeed up to life imprisonment remains possible, but such cases are anticipated to be rare. We have suggested this approach in respect of robbery offences and aggravated burglary in *The People (Director of Public Prosecutions) v Byrne* [2018] IECA 120 and we venture to suggest that it accords broadly (although not exactly) with the approach of the Supreme Court in *The People (Director of Public Prosecutions) v F.E.* [2019] IESC 219 where three categories were selected as covering most cases, i.e., a low range attracting sentences “below the norm” (the examples provided suggest typical headline sentences of 5 years or below), a mid-range involving what are described as “ordinary headline sentences” (built around a suggested starting point of a headline sentence of 7 years for a rape “where coercion or force or other aggravating circumstances were not at a level that would require a more serious sentence”), an upper range involving “more serious cases” meriting a headline sentence of 10 to 15 years, while finally acknowledging that “very serious examples” might require sentences above 15 years and up to life imprisonment.”

15. The appellant further takes issue with the sentencing judge’s remark as follows:-

“He has totally and utterly abused his **position of authority** and has plied two young girls with illicit drugs, taken advantage of them while they were in a drug-induced state.” (emphasis added)

16. The appellant was neither a person of authority as defined in the 2006 Act, nor was he in a position of authority with respect to either of the complainants in any other more colloquial sense. To consider this an aggravating factor was an error in principle.
17. In terms of the use of drugs to lure and groom the complainants, while the appellant accepts that this was a significant aggravating factor, the appellant argues that the sentencing judge double counted in this regard as he repeatedly referred to the use of drugs. Furthermore, the sentencing judge failed to take into account that there was no evidence that it was the appellant who introduced either of the complainants herein to drug taking, either at all or in respect to any of the drugs involved in the case. The appellant refers to *The People (DPP) v. Vickers* [2020] IECA 66 which was an undue leniency appeal involving *inter alia* multiple counts of defilement in respect of two complainants who were fourteen and sixteen years old. Significantly, the appellant had introduced the complainants to heroin and supplied them both with heroin. The sentence imposed was one of eleven years with the final two years suspended. While the Court accepted that this was a lenient sentence, it was not found to be unduly so.
18. The appellant submits that this indicates that the sentence imposed in the instant case is “off beam” in comparison with the sentence in the *Vickers* case, given the significantly graver nature of the offending in that case.
19. The appellant argues that the sentencing judge did not take adequate account of the appellant’s personal circumstances and mitigating factors including the fact that he is a non-national. The most significant mitigation was the early plea of guilty and the

reduction from fourteen years to twelve years amounted to only 15% for all of the mitigation present.

Submissions of the respondent

20. The respondent notes that the sentencing judge did not have the benefit of *The People (DPP) v. McD* [2021] IECA 31 at the time of sentence but nevertheless it was clear that the sentencing judge had regard to several factors which underlined the severity of the offending. In light of the premeditated, predatory targeting of vulnerable young girls the pre-mitigation sentence was within the sentencing judge's discretion.
21. In relation to the appellant's submission on the reference to "position of authority" the respondent argues that while not coming within the statutory definition laid out in the Act, the appellant was in a position of influence and power given the disparity of age, and the vulnerability of the young girls and therefore the sentencing judge did not err in holding that the appellant was in a position of authority.
22. In respect of the use of drugs as an aggravating factor, it is submitted that this was an aid to his premeditated actions and indicative of a level of planning present in his offending behaviour. *The People (DPP) v. Vickers* [2020] IECA 66 can be distinguished due to a number of factors in the present case and further, it must be borne in mind that the Court in *Vickers* did consider the sentence to be very lenient.
23. Adequate and sufficient weight was afforded to the appellant in respect of all mitigating circumstances including the guilty plea. The benefit of the guilty plea was clearly accepted by the trial judge but had to be weighed against other factors such as his initial denials to the Gardaí when he was confronted at his residence, followed by initial interview denials of any knowledge about Complainant A and denial of all offending behaviour. The plea must be viewed in light of the available evidence which existed and in particular the phone of the appellant and the incriminating materials contained thereon.
24. The discount of 15%, was merited by a close consideration of all mitigating circumstances and did not fall outside of the available discretion to the trial judge. Further, the suspension of part of the sentence, did provide for rehabilitation and must also be considered by the Court in the overall context of the question as to whether the sentence imposed constituted an error of principle on the part of the sentencing judge.

Discussion

25. The pre-mitigation sentence nominated by the judge was that of fourteen years' imprisonment, the judge correctly identified the aggravating factors, of which there are many. To those we would add the videoing and photographing of Complainant B. The judge properly considered the appellant's conduct to be cunning, manipulative and offensive. Again he properly took account of the requirement for general deterrence in respect of activity of this type and to reflect society's abhorrence of this conduct.
26. There is not a doubt but that the appellant is guilty of very serious offences. Insofar as complaint is made that the judge erred in finding that the appellant abused his position of authority, we cannot agree with this submission, clearly the judge was pointing towards

the abuse of trust which applies in every case which involves the abuse of a child. As stated by Prof. O'Malley in *Sexual Offences*, 2nd edition at para. 23-94:-

“While adults may not owe any positive obligations to children for whose welfare they have no legal or moral responsibility, they are still morally obliged not to inflict harm on any child. To that extent they may be said to be in a position of trust towards children generally.”

27. The decision of this Court in *The People (DPP) v. McD* [2021] IECA 31 was obviously not available to the sentencing judge in 2019. While Mr Fitzgerald SC relies on this judgment, he properly emphasises that this Court offered informal guidance as opposed to formal guidance.
28. Moreover, and as observed by Edwards J. in *McD*, sentencing is very much individualistic and dependent on the circumstances of the offence and the offender.
29. In our view the judge properly identified the aggravating factors in the present case, the question for this Court is whether gravity was correctly assessed: was the offending in this case of a level of seriousness so as to require a pre-mitigation sentence of fourteen years and an ultimate sentence of twelve years with three years suspended, leading to nine years of incarceration?
30. The judge in assessing gravity placed the offending in the mid to upper range of sentence. In our view, given that the judge imposed a pre-mitigation sentence of fourteen years, when viewed in terms of *The People (DPP) v. McD* [2021] IECA 31, the judge may have assessed the gravity as falling within the mid to upper range of the upper range of available penalty.
31. Even if we are incorrect in that and that in fact the judge placed the offending between the upper end of the mid-range and the lower end of the upper range, which is the correct assessment of gravity in our view, in light of *McD*, and the aggravating factors in this case, we are persuaded that the pre-mitigation sentence nominated by the judge is excessive in the circumstances resulting in an overall post-mitigation sentence which is simply too high and thereby constitutes an error in principle.
32. We will therefore quash the sentence imposed and re-sentence the appellant as of today's date.

Re-sentence

33. As we have stated, the aggravating factors were correctly identified and are referred to in this judgment. We are of the view that on an assessment of gravity, the appropriate pre-mitigation sentence falls between the upper end of the mid-range and the lower end of the upper range. In those circumstances, in our view, the appropriate headline sentence is eleven years.
34. Having nominated a headline sentence of eleven years' imprisonment, we will reduce that sentence in light of the mitigation present to a sentence of nine years' imprisonment and

we will suspend the final two years of that sentence. The two years will be suspended for the same period and on the same terms imposed by the Circuit Court Judge. The appellant may enter into a bond before the Governor of the prison or the Assistant Governor.

35. He remains subject to the sex offender register for life as prescribed by statute.