APPROVED

THE COURT OF APPEAL

Record Number: 237/2023

Birmingham P.
Kennedy J.
Burns J.

BETWEEN/

NF

APPELLANT

- AND -

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of the Court delivered on the 26th day of February, 2024 by Ms. Justice Tara Burns.

1. This is an appeal against severity of sentence. The appellant was charged with 10 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990. He entered a guilty plea in respect of counts 1, 5 and 10 on the indictment on a full facts basis.

2. On 6 July 2023, a sentencing hearing took place before Dublin Circuit Criminal Court. In respect of counts 1 and 10, the appellant was sentenced to an 18 month term of imprisonment on each count such sentences to run consecutively. Accordingly, a three year term of imprisonment was effectively imposed.

Background

3. The appellant is the step-father of the victim. He has been in the victim's life since she was 3 years old. The offending behaviour took place at the family home over a 7-year period between March 1991 and March 1998, when the victim was between the ages of 6 and 13.

4. When the victim was 11 years old, on an occasion when her mother was out, she was in bed attempting to go to sleep when the appellant entered her bedroom, removed her pyjamas and tried to move his hands up her legs. She resisted this assault resulting in the appellant leaving the room. However, he returned a number of times later that night, when he repeated this behaviour.

5. The victim informed her mother of what had occurred a number of weeks later. This resulted in the victim's mother reporting the allegation of sexual abuse to the Health Service Executive ('HSE'), and on their instruction to An Garda Síochána. A written report of the incident was taken by the Gardaí in 2002, but a formal statement of complaint was not taken from the victim.

6. In 2004, the appellant left the family home and attended at the Granada Institute for counselling. Over the course of three assessments between April and May 2004, the appellant made numerous disclosures relating to the abuse he had committed against the victim. These admissions included that the abuse had started when the victim was 6 years of age; it had occurred for 2 to 3 years; he would touch her genital area over her clothes while she slept; and he would masturbate after he left the victim's room. The appellant returned to the family home after this counselling.

7. In 2017, the victim made a complaint to An Garda Síochána regarding the night she recalled. She did not complain of sexual assaults on other dates.

8. On 11 May 2020, the appellant attended a voluntary interview with An Garda Síochána. Prior to the interview, Gardaí had obtained a search warrant and seized the appellant's counselling notes from the Granada Institute. The contents of the notes were put to him during interview. The appellant made further admissions in the course of the voluntary interview to include that the abuse had happened on approximately 10 occasions; and touching occurred both over and under the victim's clothes. During the course of the interview the appellant stated *"I admit to whatever you have there. I admit what I did was wrong"* and *"I'm sorry that I done it. It's really my fault".*

9. A trial date was fixed for 7 February 2023. The appellant entered a guilty plea before the trial date was reached.

Grounds of Appeal

10. By notice of appeal dated 19 August 2023, the appellant appealed against his sentence on grounds of severity to include the consecutive element. He relied on the delay in reporting and investigating; the fact that the additional offences were as a result of his admissions; his co-operation with the various State agencies; and his good conduct and industry since the offending came to light.

Personal Circumstances of the Appellant

11. The appellant was 61 when sentenced. He is a qualified tradesman, has an excellent work history, and has no previous convictions. He was cooperative with the Gardaí, and had attended for counselling after the offences came to light.

Sentencing Determination

12. On the 6 July 2023, the sentencing judge pronounced judgment in the matter in the following terms:-

"The maximum sentence that is permissible in relation to the timeframe of this offending by the legislature in respect of sexual assault at that time is five years. I am of the view in relation to the matter that headline sentences of three years are warranted in respect of Counts 1 and Count 10, and I am going to impose sentences on those and I will come back to those in particular, that is the first in time and the last in time. Taking into account the fact that he did co operate in a significant way with the investigation and made admissions that went well beyond the injured party's recall and all of the mitigating and personal circumstances, this Court is going to impose sentences of 18 months on Counts 1 and Count 10, and I will take Count 5 into account. However, having regard to the seriousness of the matter and in light of the offending over a period of time, those sentences are to be served consecutively and are to date from today's date. So that is on Count 1, 18 months, and then on Count 10 a consecutive 18 months to be served from today's date."

13. In relation to the delay and passage of time the sentencing judge stated:-

"In terms of the passage of time, because this is a feature that the defence raised, the passage of time has caused significant distress to the injured party, that is the first thing to note. The matter was brought into the Circuit Court in January of 2021. This Court is advised that judicial review proceedings were contemplated, but it was listed for trial on the 9th of November 2022, ultimately adjourned to February of 2023 and then the guilty plea was entered on this later date, the 24th of May 2023.

…

In relation to this, a lot of matters have been put before me in relation to what is described as prosecutorial delay and a number of cases have been put before me; PM v. DPP, MM v. DPP in particular. These are all cases that are concerned with applications for judicial review to prohibit trials because of culpable prosecutorial delay. It's not just delay, it is blameworthy prosecutorial delay. Here the Court is being invited to look at the matter from 2002 onwards when the gardaí received their confirmation information from the complainant's mother in relation to the abuse. The complainant is the injured party here, not her mother. The complainant made her statement in 2017 when she was ready to do so. He was interviewed in May of 2020 and then the matter took its course in relation to that.

Clearly culpable delay may be treated as a mitigating factor at sentencing in the event of a conviction, that is in MM v. DPP. Of course, PM is authority for the proposition -- I think it is at page 185 of that where Mr Justice Geoghegan said that: "It is not to say that a sentencing judge may not have regard to a lengthy interval between the time the offender was first confronted with the offence of the eventual conviction and sentence," and I will take that into account in relation to this.

…

Much has been made of the delay in this case. The offending was between 1991 and 1998, and whilst it is a considerable amount of time ago, it is by no means the oldest case that has come before this Court. The cases that were opened to me were opened on the basis of

blameworthy prosecutorial delay and I am not of the view that they are particularly relevant save the quotation of Mr Justice Geoghegan in PM as previously cited. These matters have been openly known within the injured party's family for a long period of time. The accused did receive treatment since then and has not been offending in the interim. However, this Court is of the view that the very grave breaches of trust involved in repeatedly sexually assaulting his sleeping stepdaughter in her own home in her own bed over a period of seven years between the ages of six and 13 years on 10 occasions are such that the threshold for a custodial sentence has been surpassed."

14. In relation to the mitigating factors in the case the sentencing judge stated:-

"In mitigation in the first instance he made admissions, he made admissions that went beyond the recall of the injured party and that is a significant factor in relation to this. He had no previous convictions. He has had nothing since. He had treatment in 2004. I take into account the length of time since this first came to light, his age now at 62, his work history that he has been employed throughout his life, that he is remorseful and that he did plead guilty albeit not in early course in relation to it, but he did plead guilty in due course. It is an unusual case from all of those factors that are there. Ultimately, this is a case where there was a fundamental abuse of the trust that is placed on a person who has the privilege of being entrusted with bringing up children. He was in loco parentis, the father figure for this small girl and he absolutely abused that trust. From the age of six onwards he abused that trust by sexually assaulting her while she was asleep. She was vulnerable, she was trusting of him, it was in her bedroom, it was at night time and she was so very young, from six years onwards. Matters might never have come to light but for the fact that on that particular New Year's Eve she was awake and she knew that what was being done was wrong, and she had the courage thereafter having received the information in that programme to go to her mother and make her complaint about that, and her mother took that matter seriously at that point in time and reacted appropriately in taking the matter and confronting the accused, and then at some point in time the HSE becoming involved and her following the advice to go to An Garda Síochána which she did on the 12th of March 2002. No statement of complaint was made at that point by either her mother or the injured party. Instead he went for treatment in the Granada Institute and was then permitted back into the family home by the injured party's mother after a period of time. They still live together to this day."

15. The sentencing judge referred to the victim impact report in the following manner:-

"It clearly caused significant distress and impacted right throughout her life. The Court was advised that there were times where she had complete despair and is suffering from UPD and PTSD. She outlined the number of days since the making of her complaint she has spent in hospital and that is a considerable period of time where she has had to get treatment. There is no doubt that this had a very severe impact upon this young woman,

this young woman who nonetheless has married and had children and done her very best to get on with her life."

Submissions of the Parties

16. The appellant's submission is that the sentence imposed on him is disproportionate and excessive. In particular, it is argued that the consecutive element imposed by the sentencing judge was not appropriate in the particular circumstances of this case having regard to the inordinate passage of time in bringing a prosecution from when the offences were first reported to An Garda Síochána; the fact that some charges were proffered against the appellant which emerged from admissions he had made in the course of counselling and during garda interview; the co-operation which the appellant had demonstrated towards the investigation; and that the appellant had already taken active steps towards his rehabilitation by attending counselling in relation to the offending behaviour.

17. The respondent submits that the sentencing judge did not err in law or principle in sentencing the appellant; that it was within her discretion to impose consecutive sentences, the reason for which she explained; that she gave appropriate consideration to all mitigating and aggravating factors in the case and arrived at an appropriate sentence considering the gravity of the offending and the appellant's personal circumstances. Further, the respondent submits that although the abuse was initially reported to Gardaí in 2002, no statement of complaint was taken from the victim at that time and as such no prosecutorial delay arises.

Discussion and Determination

Sentencing principles in consecutive sentences

18. In *DPP -v- McKenna* [2002] 2 IR 345 the Court of Criminal Appeal held:-

> *"The problems relating to concurrent and consecutive sentencing are highlighted in the excellent treatment of the subject by Professor Thomas O'Malley in his book Sentencing Law and Practice at p. 171ff. At p. 173 Professor O'Malley makes the following observations at para. 6-85:-*
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> > *"Irish courts have, for the most part, favoured concurrent sentencing for serial sexual offending. The Court of Criminal Appeal has recently said, in relation to an appellant given concurrent sentences in respect of a series of sexual assaults, that:*
> >
> > *'We agree that, strictly speaking, it was within the judge's power to impose a consecutive sentence but that is a very exceptional course in cases which bear a close resemblance to one another and happen within a reasonably short time scale. The invariable practice seems to be to impose concurrent sentences in such a situation, and so we do not fault the judge for taking the course that he did'."*
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> *That case, (The People (Director of Public Prosecutions) v. Coogan (Unreported, Court of Criminal Appeal, 29th July, 1997)), was decided ex tempore on its own facts*

which were altogether less serious than this case. It should be regarded merely as authority for the view that, on the facts of that case, the Circuit Court Judge was not in error in exercising his discretion in favour of concurrent sentences. A more useful case on this subject is The People (Director of Public Prosecutions) v. Z (Unreported, Court of Criminal Appeal, 14th March, 1995). In that case this court both reduced the length of the sentences imposed and altered them to be concurrent rather than consecutive sentences. It is implicit, however, in the judgment delivered by O'Flaherty J., that the court was in tune with the submissions made before it by counsel for the defendant. At p. 11 of the unreported judgment delivered on the 14th March, 1995, the following passage appears in relation to consecutive sentencing:-

> *"Mr. Haugh submits in regard to the imposition of a consecutive sentence that, as a matter of principle (aside from a statutory requirement to impose a consecutive sentence), the circumstances most likely to attract such a course in cases such as this would involve that the accused had engaged in sexual misconduct with different persons or over a much longer period of time than is the case here and that, perhaps too, the misconduct would have been attended with circumstances of depravity beyond the actual act of intercourse."*

19. In *DPP -v- G.McC* [2003] 3 IR 609 the Court of Criminal Appeal, considering *DPP v. McKenna* made the oft quoted comment:-

> *"It has long been the sentencing practice in this jurisdiction that a discretion in favour of consecutive sentences is exercised sparingly."*

20. In *Sentencing Law and Practice;* 3rd Ed. 2016 Prof. O'Malley analyses concurrent and consecutive sentences and at 5-27 he states:-

> *"In the absence of any particular statutory rule or restriction, a court usually has considerable discretion as to the sequence in which multiple custodial sentences should be ordered to run. Many defendants are simultaneously convicted of several offences, while others may already be serving custodial sentences for unrelated offences. In so far as there is any guiding common law principle, it is that concurrent offences should ordinarily be imposed for offences arising from the same incident, while consecutive sentences should be imposed for offences arising from separate and unrelated incidents. But this, it should be stressed, is no more than a broad guiding principle. A court's fundamental duty is to impose a sentence that fairly reflects the totality of the offending conduct, while making due allowance for personal mitigation and other relevant factors. It is equally important to consider carefully the sentence merited by each offence of conviction. It is equally important to consider carefully the sentence merited by each offence of conviction. The "one transcation rule" was most famously expressed in Thomas's Principles of Sentencing:*

> *"[W]here two or more offences are committed in the course of a single transaction, all sentences in respect of those offences should be concurrent rather than consecutive. Difficulty lies in establishing a sufficiently precise definition of the concept of a single transaction… The essence of the one transaction rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest… The concept of 'single transaction' may be held to cover a sequence of offences involving a repetition of the same behaviour towards the same victim, such as a series of sexual offences with the same partner, a number of frauds on the same victim or several perjured statements made in the course of the same trial, provided the offences are committed within a relatively short space of time. The concept will not normally apply to a series of similar offences involving different victims, even thought the offences are of a similar nature."*

21. The instant case reflects sexual offending of a child by her step father over an extended period of 7 years when she was aged between 6 and 13. The offending occurred on ten occasions over this period to time. This reflects offending of a serious nature. While the offending related to a single victim, it occurred over a 7 year period which differentiates the offending from offending against a single victim within a relatively short space of time in respect of which a concurrent sentence would be appropriate.

22. The sentencing judge marked the seriousness of the offending against a child of such tender years over such an extended period of time by a person in loco parentis, with the imposition of a consecutive sentence. These were serious aggravating factors. Whilst the imposition of a consecutive sentence in these circumstances might be viewed as an unusual step to take, the law establishes that it was within the trial judge's discretion so to do. Furthermore, as she provided a reasonable explanation regarding what caused her to take this course, it cannot be established that this was of itself an error in principle.

23. With respect to the mitigating factors present in the case to include the guilty plea of the appellant; his co-operation with the investigation; the fact that some of the charges emanated from admissions made by the appellant rather than complaints made by the victim; the fact that the appellant had taken steps to rehabilitate himself and had attended counselling after the abuse had come to light; and the delay in the case (which the sentencing judge specifically indicated she would have regard to but did not accept that it could be categorised as prosecutorial delay) - the sentencing judge clearly took account of these factors and appropriately reduced a 3 year headline sentence to one of 18 months imprisonment, thereby marking a 50% reduction from the headline sentence.

24. The appellant does not in fact take issue with this reduction but rather argues that the error was imposing a consecutive sentence when these mitigatory factors were present.

25. The court does not agree. While the sentencing judge approached the sentence in the manner she did with respect to imposing a consecutive sentence, which she was entitled to do, it was equally open to her to sentence the appellant on the basis of imposing concurrent sentences but to find that these aggravating factors merited the nomination of a higher headline sentence as the offences were aggravated by each other, which when mitigatory factors were considered merited the imposition of a three year term of imprisonment.

26. Instead, the sentencing judge dealt with the offences on an individual basis but reflected the aggravating factors by imposing consecutive sentences. This was within her discretion to do and accordingly an error in principle does not arise.

Conclusion

27. The Court is of the opinion that an error in principle has not been established by the appellant in the sentence imposed upon him. Accordingly, his appeal against sentence is dismissed.