THE COURT OF APPEAL

Record Number: 33CJA/22

Edwards J.
McCarthy J.
Kennedy J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

C.C.

RESPONDENT

JUDGMENT of the Court delivered on the 30th day of July 2024 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency of a sentence of 9 years imposed for offences of sexual exploitation and sentences of 4 years and 5 years imposed for sexual assault offences.

2. The respondent, who we refer to as CC, is the mother of the complainants and was convicted and sentenced in respect of 8 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, 4 counts of sexual exploitation contrary to s. 3 of the Child Trafficking and Pornography Act, 1998, as amended, and 13 counts of child cruelty contrary to s. 246 of the Children Act, 2001.

3. We have not used the respondent's or the victims' real initials in the interests of protecting the identity of the children. The Director contends that the headline sentence nominated on the sexual exploitation counts should have been within the top range and that the ultimate sentence of 9 years' imprisonment does not reflect the gravity of the overall offending.

Background

4. CC met her husband, her co-accused DD, the father of her children, when she was 17 years of age. She has six children by her marriage. The indictment concerns five of the children. This review concerns the sentences imposed for the sexual offending.

5. The respondent was tried with six co-accused, two of whom were the subject of a directed acquittal by the trial judge. The offences occurred between the 18th August 2014 and the 28th April 2016. Between those dates, A was aged between 7 years and 9 years, B was aged between 6

years and 7 years, C was aged between 5 years and 6 years, D was aged between 3 years and 4 years and E was aged between 1 year and 3 years. The sexual offending concerned the children A, B and C.

6. The children were initially removed from the care of their parents on the basis of neglect. Subsequently, the children made disclosures of sexual abuse against their parents and other family members.

7. The respondent made admissions concerning certain allegations which formed the sole evidence on those counts. She later resiled from those admissions.

8. The Director seeks limitations on the expression of the details of the nature of the offending and so we do not intend to detail the nature of the sexual activity, insofar as this is possible.

9. The respondent inappropriately touched A, B and C in a variety of depraved ways constituting the sexual assault offences. In respect of one child, the child was compelled to touch the respondent.

10. Insofar as the sexual exploitation is concerned, this respondent together with the children's father and uncle by marriage, (whom we shall call AA) instructed A to engage with others. Moreover, this respondent was present when AA demonstrated sexual acts to A.

11. The respondent also posted photographs online of B while being sexually assaulted by AA. The nature of the sexual assaults particularly concerning A were of a serious order.

12. The sexual exploitation counts were committed either on her own or with two of her co-accused. Those counts are particularly egregious and for which the judge nominated a headline sentence of 16 years in respect of the co-accused. The trial judge was satisfied that there were some elements in the evidence which suggested that the dynamic of the sexual offending was not primarily driven by this respondent. A headline sentence of 12 years was nominated for the sexual exploitation counts which was reduced to that of 9 years' imprisonment.

13. The counts concerning the two younger children were those of neglect.

Personal Circumstances of the Respondent

14. The respondent is said to have had a difficult upbringing in a home in which violence was commonplace. A report prepared prior to the offending becoming known places her at a low intellectual level. She achieved low scores in virtually all of the psychological assessments made of her when compared with most other persons. She has no previous convictions and had not come to adverse garda attention prior to these offences or while on bail.

Sentencing Remarks

15. The sentencing judge considered the aggravating features of the respondent's offending to include the prolonged nature of the child neglect, the form of the neglect, extending into every facet of each child's life, the manipulation involved, in that the abuse continued after involvement by Tusla and other agencies, the profound breach of trust by the respondent as a parent of these children and her failure in her duty to care for, nurture and protect her children, the repetition of the offences over time, the repeated access given by the respondent to others to commit sexual offences upon her children, her presence on some of these occasions, the young ages of the children and the appalling suffering and damage caused to them.

16. The judge considered that the number of closely related adults involved in the abuse within the family meant that the children had no adult figure within the family to whom they could turn

given that virtually all of the adults in their lives were the source of the abuse. He stated that the isolation, abuse and control of these children by the adults in the course of the neglect or sexual abuse is total.

17. The judge nominated headline sentences of 6 years in respect of the sexual assault offences, 12 years in respect of the sexual exploitation offences, 6 years in respect of the child cruelty offences with a sexual dimension and 5 years in respect of the child cruelty by neglect offences.

18. He considered the mitigation to include *inter alia* the respondent's lack of previous convictions, her difficult early family life and that she became pregnant at 17. He emphasised, in respect of her admissions, that the credit available for such assistance to gardaí was hugely undermined by her resiling from those admissions.

19. He also noted that male sexual offenders benefit from segregation from non-sexual offenders whereas that is not available to the respondent in a women's prison but that the operation and good order and security of prisons is a matter for the governor of each prison.

20. He further considered that it would be more difficult for a person with the respondent's intellectual challenges and limitations to serve a lengthy custodial sentence than for a person without such challenges and limitations.

21. The judge imposed sentences of 5 years' imprisonment on certain sexual assault counts and 4 years' imprisonment on others. He imposed 9 years' imprisonment on the sexual exploitation counts, 5 years' imprisonment on the child cruelty counts where the respondent allowed other persons to engage in sexual activity with the children and 4 years' imprisonment on the remaining neglect counts. All sentences were imposed concurrently leading to an ultimate sentence of 9 years' imprisonment.

Grounds of Application

22. The grounds concern the headline sentences nominated for the sexual exploitation and sexual assault counts, being 12 years and 6 years respectively; and a said failure to have regard to the totality principle in respect of the ultimate sentence in that it is said that a sentence of 9 years does not reflect the gravity of the overall offending.

Submissions of the Parties

Headline Sentence

The Applicant

23. It is the Director's position that the range identified by the sentencing judge of 10-15 years was entirely insufficient given the breadth of the aggravating factors. She references the scale set out by the Supreme Court in *People (DPP) v FE* [2021] 1 IR 217. It is submitted that although applicable to rape cases, the *FE* scale was applied by the sentencing judge in sentencing this respondent and that an application of the *FE* scale to the offending in this respondent's case should have resulted in the case being in the top category of 15 years to life.

24. It is outlined that the *FE* case referred back to the earlier decision of *People (DPP) v WD* [2008] 1 IR 308. It is accepted that *WD* was a rape case, but it is nonetheless submitted that many of the additional aggravating factors expressly set out in the analysis of *WD* of sentences requiring penalties of up to life imprisonment clearly apply to the respondent herein.

25. It is contended that the trial judge erred in his assessment of CC's moral culpability and in distinguishing between CC and DD's (the complainants' father) levels of moral culpability in

circumstances where they both occupied parental roles in respect of the complainants, and both had intellectual challenges.

26. This complaint is made in respect of the sexual exploitation counts, in particular, in circumstances where the court imposed sentences of 15 years' imprisonment on the sexual exploitation offences committed by DD and AA (uncle) but imposed sentences of 9 years' imprisonment on the sexual exploitation offences committed by this respondent. It should be noted that both those sentences are the subject of undue leniency reviews by this Court and that this Court has found the sentences to be unduly lenient.

27. It is submitted that the depravity of the sexual exploitation offending carried out by this respondent was of a very high degree involving the respondent instructing her son to engage in sexual acts with her.

28. Insofar as totality is concerned it is argued that where the trial judge decided against imposing consecutive sentences the sentences actually imposed in the respondent's case failed to reflect the totality of the criminal wrongdoing.

29. Reliance is placed on the dicta of Charleton J in *FE* at p. 236 and those of Edwards J in *People (DPP) v X* [2021] IECA 168 at para. 50.

30. In respect of the reduction for mitigation, the Director contends that the reduction was excessive and takes issue with the allowance for admissions which the respondent made to the gardaí, from which she later resiled.

31. However, we see from the transcript, that the judge referred to these admissions and observed properly, in our view, that while the admissions assisted in the prosecution of the offences and remained the sole evidence against her in respect of four counts of which she was convicted, the substantial credit for the admissions *was "**hugely undermined** by her resiling"* from them (our emphasis.)

32. It is submitted that the mitigation afforded to the respondent amounted to 25% which it is said might be of the order one might expect in cases where there has been a plea of guilty or some other serious acknowledgement of wrongdoing which was absent in the respondent's case.

33. Issue is also taken with the fact that the sentencing judge referenced the difficulties which the respondent might face in a non-segregated prison environment. It is accepted that the judge noted that the operation and good order of prisons was a matter for the Prison Governor, however, it is submitted that the judge erred in placing any reliance on this factor.

34. In our view, it is quite clear from the transcript that while the judge referenced this issue, he considered the difficulties that intellectual challenges and limitations might present to an individual serving a lengthy sentence to be of more relevance in terms of mitigation.

35. However, issue is taken with any reduction in mitigation which may have been afforded to the respondent in connection with the sentencing judge's recognition that persons with intellectual challenges and limitations may find a prison sentence more difficult than a person without those same limitations. It is submitted that insofar as the judge referenced same, there was no evidence to support this assertion.

36. Reliance is placed on Prof. O'Malley's text on *Sentencing Law and Practice*, 3rd Ed. It is submitted by reference to the general mitigating and aggravating factors as summarised by Prof.

O'Malley that the only factor which appears applicable to this respondent is the absence of previous convictions.

The Respondent

37. It is submitted by the respondent that the sentencing judge did not explicitly state that *FE* was applicable to the respondent's case but that should that be the case, the court did not fall into error.

38. The respondent quotes the following from the sentencing judge's remarks:-

> *"In respect of [CC], the overall nature of the offences is somewhat different, given her gender, but they are very serious. I am satisfied however that her offences of sexual exploitation fall in the more serious range of penalty and should carry a sentence of between 10 and 15 years imprisonment. I'm satisfied that they bear a headline sentence of 12 years imprisonment before mitigation."*

39. While it is conceded that the respondent's case contains aggravating factors such as the depravity and nature of the abuse, the ages of the complainants and the respondent's breach of trust as their mother, it is submitted that these factors can equally be present in the category of "*more serious*" cases as referenced by the sentencing judge.

40. It is emphasised that the offence of sexual exploitation is separate and distinct from the offence of rape which is the most serious offence in the catalogue of sexual offences and that this respondent was not charged with rape. It is submitted that the absence of the offence of rape itself puts the proper headline sentence into that as categorised correctly by the sentencing judge: one involving a headline sentence of 10-15 years.

Totality

The Applicant

41. It is the Director's position that where the trial judge decided against imposing consecutive sentences, the sentences actually imposed failed to reflect the totality of the criminal wrongdoing.

42. Reliance is placed on Charleton J's remarks in *FE* at p. 236 as follows:-

> *"As the case law demonstrates, just because what might ordinarily be called a criminal event is split into two charges, that does not mean that the penalty for each offence should not influence the other. When crimes are proximate to each other, then just like events, it is appropriate to have regard to the overall event in sentencing."*

43. Further reliance is placed on Edwards J's consideration of this point in *People (DPP) v X* [2021] IECA 168 at para. 50:-

> *"The effect of the Supreme Court's judgment on this aspect of the matter is, as we understand it, that if, in a case where multiple offences have been committed as part of a single criminal event, a sentencing court elects not to avail of consecutive sentencing, and concurrent sentences are to be imposed, the sentence to be imposed for the most serious offence or offences (in FE's case the rape) must adequately take account of the interrelationship between that offence and the offences attracting lesser sentences and to be served concurrently and in that way reflect the totality of the offending behaviour."*

The Respondent

44. The respondent relies on the following from the sentencing judge's remarks:-

"In respect of all of these sentences, and offences, I have considered whether it's appropriate to impose consecutive sentences on each of the offenders because of the repeated and varied nature of their serious offending and the multiple child victims. I consider that to do so would result in a wholly disproportionate sentence on each of them. I consider that the length of the sentences imposed on each of them today reflect not only the individual counts but the overall serious nature of the offending of each offender, the number of offences and the consequences of the offending on each of the victims. And that's the path that I've chosen to go, rather than to impose consecutive sentences. This factor is therefore factored into the headline sentences and the ultimate sentences imposed after allowing for mitigation."

45. It is submitted that the sentencing judge clearly had regard to the possibility of the imposition of consecutive sentences in this case and that he comprehensively set out the factors relevant to his decision not to impose them. It is further submitted that it is equally clear that he considered the principle of totality and that having done so he was of the view that the imposition of consecutive sentences would have resulted in a "*wholly disproportionate sentence*."

46. It is contended that in line with the view of Edwards J in *X,* the sentences imposed on the sexual exploitation counts reflected the "*interrelationship*" between those counts as the more serious offences and the other offences attracting lesser sentences. It is submitted that this resulted in a proportionate sentence that competently reflects the totality of the offending perpetrated by the respondent.

47. It is submitted that the sentencing judge correctly assessed the respondent's role in the offending as being one of high moral culpability and gave reasons for his assessment.

48. It is noted that it is clear that the judge, having had the benefit of presiding over a lengthy trial involving all of the firsthand observations of the evidence that that entails, formed the view that there was a distinction between this respondent's culpability and that of her husband and co-accused, DD, and the other male accused.

49. It is submitted that the sentencing court did not fall into error in failing to impose the same sentences on the respondent as her husband or the other male offenders considering the court's assessment of the evidence leading to the distinction between her level of culpability and the others.

50. In respect of the admissions made by the respondent, it is submitted that the sentencing judge did not afford undue mitigation for same but on the contrary, expressly stated that no mitigation was available to her having resiled from those admissions at trial.

51. The following portion of the sentencing remarks are relied upon in this regard:-

"There's no doubt that her admission made to gardaí assisted the garda in the prosecution of this case and remains the sole evidence against her in respect of four counts of which she was convicted. The substantial credit available for such assistance, however, is hugely undermined by her resiling from those admissions […] There is no mitigation available to her in respect of the admissions made as a recognition that the children are telling the truth, that she acknowledges her guilt or that she is in any way remorseful (sic) what she has done. This is because she is resiled from those admissions and denies that she is guilty of any of those offences. I cannot go behind that position or ignore it, she is perfectly entitled

to adopt it and she has a right to do so. But it creates difficulties in terms of affording significant mitigation in respect of them."

52. It is submitted that the applicant is incorrect in asserting that the sentencing court gave weight to the difficulties that might be faced by the respondent in a non-segregated prison environment as a mitigating factor.

53. In respect of the respondent's intellectual difficulties, it is submitted that there was clear evidence before the court of same contrary to the applicant's submissions and that the sentencing judge was entitled to have regard to this matter and to afford it such appropriate weight as he did.

Sexual Assault Sentences

The Applicant

54. It is submitted that the headline sentences of six years' imprisonment nominated in respect of the sexual assault offences were unduly lenient. It is submitted that these offences belong in the top category of any notional range which would attract sentences at or above 10 years before mitigation or failing that, at the top end of the mid-range, being sentences of eight or nine years' imprisonment.

The Respondent

55. The respondent sets out from the transcript of the sentencing hearing, the sentencing judge's reasoning for placing the sexual assault offences in the mid-range as follows:-

"In my view they merit starting points in the mid-range of penalty because of the repetitive nature of these offences, the age of the children, the length of time for which the abuse continued, the damage done to the children, the breach of parental duty and trust and other factors which I've already referenced as aggravating. I think the range appropriate to those offences (sic) between five and nine years imprisonment, and therefore the sentences appropriate in each of those counts before mitigation is one of six years imprisonment."

56. It is submitted that it is clear that the sentencing judge considered the heavier sentences imposed for the sexual exploitation offences to be an adequate reflection of the seriousness and depravity of the offending behaviour in its totality.

Discussion

57. The offences, the subject of this review cannot be viewed out of context or in isolation from the background to the offending. These offences occurred where the children were subject to the most appalling neglect, despite the interventions from the social services. The respondent herein sexually abused her children and permitted other adults to abuse them while at the same time engaging to some degree with the social services. There can be no doubt but that she was quite aware that what she was doing and permitting was utterly wrong. It is the position that reports obtained by the social services which pre-date knowledge of the sexual abuse, reported that the respondent functions at a low intellectual level. This does not absolve her from guilt but may serve to make lengthy incarceration more challenging for her.

58. The first issue raised concerns the headline sentence nominated for the sexual exploitation counts. These counts concern the respondent's exploitation of her son A, two of which involved her operating alone. We refer to counts 39 and 40 on the indictment. These are truly egregious offences. There are two further counts of sexual exploitation where she operated in conjunction with two of

her co-accused, her husband and an uncle of the children; whom we call DD and AA, respectively. These offences are also egregious.

59. The sentencing judge was of the view that the respondent's moral culpability for these offences fell into the upper range, between 10 and 15 years. The Director contends that we may look to the ranges and the rationale in *FE* and says the correct range is that of the category of cases meriting up to life imprisonment, and she may be correct in this assessment.

60. Notwithstanding that *FE* concerns rape offences, we are satisfied to examine the aggravating factors and to determine on foot of those whether the Director has discharged the onus of demonstrating that the sentence is a substantial departure from that which ought to have been imposed, and thus, constitutes an error in principle.

61. The aggravating factors are very clear, this was the mother of these children, the offences occurred against a background of terrible emotional and physical neglect, the total and absolute abuse of trust, the person whom the children should be able to trust most, perhaps in their young lives, abused them in unimaginable ways, the young ages of the children and their vulnerability, continuing to abuse them notwithstanding the social services' intervention on the issue of neglect, and the terrible and long-lasting emotional and psychological impact on the children.

62. The sentencing judge was of the view that her culpability fell into the range of 10 -15 years' imprisonment and nominated a notional sentence of 12 years' imprisonment. He was satisfied that her offending was very serious. While the judge considered that the most serious offences were those of rape and s. 4 rape committed by others, he was of the view that this respondent bore a high level of culpability as she continued the neglect, participated in sexual abuse and knew of the terrible offences under her roof, but witnessed, encouraged and tolerated those. He was of the view that the dynamic of the offending was not primarily driven by her, however, he did not consider this a factor relevant to her culpability but to mitigation. He said that when allied with the assessments of her, this factor served to give her some degree of mitigation.

63. We consider that the judge was correct in identifying the range of sentence for the sexual exploitation offending as between 10 and 15 years' imprisonment. However, we depart from his view thereafter, when he considered that 12 years was the appropriate place on the scale for these counts. In our view, the conduct of the respondent, whether acting alone or with others was, as the judge indicated, very serious, but we believe that the culpability of the respondent placed her at the very top end of this range.

64. Indeed, were it not for the view of the judge that the dynamic of the offending was not primarily driven by the respondent, (albeit that he considered this in the context of mitigation), when we view it in terms of her moral culpability, we would consider, absent this extenuation of her culpability, that the Director is correct and that her culpability would merit a sentence in the very top range. However, given that the judge, who was in the best position after a lengthy trial to determine her role, found that it was somewhat less than her co-offenders, we are of the view that the range *is* that of 10-15 years, but the very top end of that range.

65. In those circumstances, we believe there to be an error in principle, and we will quash the sentence imposed and proceed to sentence *de novo* on a consideration of all the evidence and materials.

Re-Sentence

66. As we have said, this offending was of a very serious order. The aggravating factors are many and obvious. We have considered the aggravating factors and her somewhat lesser role and are of the view that the appropriate headline sentence for the sexual exploitation counts is that of 15 years' imprisonment.

67. We now look to mitigation; those factors are clearly identified by the trial judge. He took into account the absence of previous convictions, although it is the position that very limited weight may be attached to that factor given that these offences involve multiple sexual offending over a protracted period, her difficult early family life in a home where violence was commonplace and her intellectual functioning and how that might impact on her serving her sentence.

68. The judge considered that any credit to be given for her admissions to the gardaí was hugely undermined by her resiling from those admissions at trial. There was no acknowledgment of guilt or expression of remorse or contrition and while the respondent was entitled to adopt the approach she adopted, in so doing, she deprived herself of those strong mitigating factors. Therefore, as identified by the trial judge, the inevitable consequence of the respondent's approach at trial in resiling from her admissions was that the substantial mitigation for a plea of guilty and genuine remorse and regret was simply not available. We do not believe the trial judge erred in this approach.

69. In the circumstances, and taking the permissible factors into account, we will reduce the sentence of 15 years on the sexual exploitation counts by 20% and so reduce the sentence to one of 12 years' imprisonment. This reflects the overall gravity of the offending.

70. The sentences imposed by the judge on the balance of the counts remain as imposed. Post-release supervision of 3 years remains also on the same conditions as imposed by the trial judge.