



THE COURT OF APPEAL

Record Number: 34CJA/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 -

D.D.

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 15 years imposed on the respondent for offences of rape, s. 4 rape, sexual exploitation, sexual assault and child cruelty. The sexual offending concerned three of his children, the child cruelty offending related to five of his children.

2. The respondent is the father of the complainants. Following conviction, he was sentenced in respect of 2 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, as amended, 4 counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, 3 counts of sexual exploitation contrary to s. 3 of the Child Trafficking and Pornography Act, 1998, as amended, 6 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act, 1990, as amended and 16 counts of child cruelty contrary to s. 246 of the Children Act, 2001. We have not used the respondent's or the victims' real initials in the interests of protecting the identity of the children.

Background

3. The respondent has six children with his wife, his co-accused who we will call CC. We will refer to the children, the subject of the indictment as A, B, C, D, and E. The sexual offending concerns the respondent's sons; A and C and his daughter B. The child cruelty counts are common to the five children.

4. The respondent was tried with six co-accused, two of whom were the subject of a directed acquittal. All of the offending 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.

5. Headline sentences of 16 years' imprisonment were nominated by the judge for the rape and sexual exploitation offences, 6 years for the sexual assault offences, 5 years for the child neglect/administration of medication child cruelty offences and 6½ years for the child cruelty offences with a sexual dimension.

6. The sentences were reduced to 15 years' imprisonment on the rape counts, the s. 4 rape counts and the sexual exploitation counts, 5 years' imprisonment on the sexual assault counts, 4 years' imprisonment on the counts concerning child cruelty by neglect/administration of medication and 5 years' imprisonment on the counts of child cruelty by allowing other persons to engage in sexual activity with the children. All sentences were imposed concurrently.

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

8. Given the breadth of abuse in these cases, an unusual application was made by the Director to limit the details of the offending to protect the children. We will refer to only as much of the detail as is necessary to interrogate the within application.

9. The sexual abuse concerned the inappropriate touching of the children by the respondent on numerous occasions, instructions to engage with others, for which he was present, the s. 2 rape of his daughter and the s. 4 rape of his sons. The respondent photographed his children in compromising positions. His daughter said that inappropriate photographs of her, the respondent and her uncle (to whom we have referred in a judgment on conviction as AA) were posted online.

10. Evidence was given at trial in respect of the respondent's use of medication which was not prescribed for A, B and C in an effort to get them to go to sleep.

11. The counts in respect of D and E relate to the neglect of those children.

Personal Circumstances of the Respondent

12. The respondent was assessed as having an intellectual functioning between the low average of intelligence and mild intellectual disability ranges. He has some health issues and suffers from epilepsy.

Sentencing Remarks

13. 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 and including the administration of medication to three of the children, the profound breach of trust by the respondent as a parent of these children and his failure in his duty to care for, nurture and protect his children, the repetition of the offences over time, the repeated access given by the respondent to others to commit sexual offences upon his children, his presence on some of these occasions, the young ages of the children and the appalling suffering and damage caused to them.

14. The judge considered that the number of closely related adults involved in the abuse within the family deprived the children of a trusted adult figure within the family to whom they could turn. He stated that the isolation, abuse and control of these children by the adults in the course of the neglect or sexual abuse was total.

15. He considered the mitigation to include the absence of previous convictions, that the respondent had not come to adverse garda notice while on bail or before these matters, his age, his health issues, his expression of concern and satisfaction that the children are now happy and receiving good care and his low intellectual functioning.

16. The judge noted that rehabilitation was not an option that the court could pursue in the respondent's case as he rejected the verdicts of the jury.

Grounds of Application

17. The Director relies, in essence, on two grounds; the appropriateness of the headline nominated for each count of sexual offending and that the sentence imposed does not reflect the overall gravity of the offending.

Submissions of the Applicant

18. The focus of the Director's submissions rests with the headline sentences nominated for the rape, s. 4 rape and sexual exploitation offending. It is submitted that while the sentencing judge was correct to identify the highest range, being 15 years to life, as the appropriate range in which to place the headline sentence, he erred in imposing a sentence at the lowest end of that range. It is asserted that in light of the egregious facts and the judgments of the Superior Courts, a headline figure at the upper end of the highest range should have been identified as the appropriate figure by the sentencing judge.

19. Reliance in this regard is placed on the sentencing guidance arising from the Supreme Court's judgment in *People (DPP) v FE* [2021] 1 IR 217 and on Prof. O'Malley on *Sentencing Law and Practice*, 3rd ed at para 13-35. It is submitted that in addition to the factors highlighted in *FE*, there is the feature of the number of child victims involved.

20. In respect of when a life sentence is appropriate, the Director refers to the judgment of Clarke J in *People (DPP) v Z* [2014] 1 IR 613 at para 29:-

*"[W]hile, as the court has already noted, it will be always possible to point to certain distinctions, it seems clear to this court that those two cases and this case **all fall into an exceptional category which involves prolonged and depraved sexual and physical violence against persons who are entitled to place their trust in the perpetrator. There may, of course, be other exceptional circumstances which could arise on the facts of other cases. However, this court is of the view that offences of this type are such as (sic) entitle a sentencing judge to take the view, depending on the severity and nature of the abuse concerned, that exceptional circumstances exist which might justify, even in the presence of some mitigating circumstances, the maximum sentence of life imprisonment. The exceptional circumstances in such cases are to be found in the nature of the offences themselves.**"* (Emphasis added)

21. It is submitted that the facts of the present case are such that the trial judge ought to have considered the maximum sentence. Reliance is placed on the joint appeals in *People (DPP) v RMcC* and *People (DPP) v CD* [2008] 2 IR 92 in which the Supreme Court held that a life sentence for such offending is permissible even where there was a plea of guilty.

22. It is emphasised that there was no such plea in this case and that in fact, there has been no acceptance of responsibility or demonstration of remorse on the part of the respondent at any point.

23. In *RMcC* at para 47, the Supreme Court commented that, *"it is impossible to conceive of a greater breach of parental responsibility than occurred in these cases."* It is submitted that the respondent in the present case is guilty of a greater breach in that he allowed others to sexually abuse his children.

24. Issue is also taken with the headline sentences nominated for the sexual exploitation and sexual assault offences. In respect of the headline sentences for the sexual exploitation offences it is submitted that the same reasons already identified above in respect of the *FE* scale apply and that the sentences were unduly lenient. In respect of the headline sentences for the sexual assault offences, it is emphasised that the maximum sentence for this offence is 14 years' imprisonment and the headline sentences imposed were fixed at 6 years.

25. It is submitted 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.

26. 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."

27. Edwards J's consideration of this point in *People (DPP) v X* [2021] IECA 168 at para. 50 is also cited:-

*"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."*

28. In respect of the impact of the offending on the complainant, the judgment of Edwards J in *People (DPP) v DC* [2015] IECA 256 at para 18 is cited as follows:-

"It is well established in the jurisprudence of this court, and in that of the former Court of Criminal Appeal, that seriousness is to be weighed with reference to both culpability and harm done with due regard to the range of available penalties."

Submissions of the Respondent

29. The focus of the respondent's submissions rests with the weight to be afforded by this Court to a trial judge's reasons for the imposition of sentence, that the trial judge placed the offending in the highest range and the respondent's intellectual challenges.

30. The respondent emphasises the level of experience of this particular trial judge and the fact of his having presided over the entirety of the trial including a lengthy pre-trial process. It is submitted that he was extremely familiar with all aspects and nuances of the case and had the opportunity to observe witnesses and accused over a significant period of time.

31. It is submitted that any complaint of undue leniency levelled against the sentences imposed by the trial judge in respect of the rape, sexual assault and sexual exploitation offences must be

viewed in light of the fact that the judge placed such offending in the highest range. It is noted that the Director's focus lies with the manner in which the trial judge exercised his discretion within that range.

32. It is further submitted that the trial judge was cognisant of his obligation in sentencing to look not only to the offending behaviour but the offender himself, where he said as follows:-

"The overriding principles that apply to this case are that the sentencing to be imposed must be proportionate to the gravity of the offence and reflect the gravity of the offence, but also the personal circumstances of the offender."

33. In this regard, the mitigating factors applicable to the respondent are emphasised, in particular, his intellectual challenges as outlined in the reports before the sentencing court. It is noted that the trial judge did not consider these reports to have relevance to the respondent's moral culpability but that they could be taken into account in mitigation.

34. It is submitted that the reduction by the trial judge from a 16-year headline sentence to 15 years by reason of the mitigation is not excessive as same amounts to little over 6%.

35. The respondent says that an analysis of the trial judge's sentencing remarks reveals clear and measured sentencing by him and that he was conscious at all times of the important balance and interplay between the offences and the circumstances of the offender and the overarching principles of proportionality and totality.

Discussion

36. Unsurprisingly, there is no dispute between the parties on the hearing of this appeal about the principles applicable in an application to review sentences on grounds of undue leniency. Those principles have not really been in dispute since the first such case of *People (DPP) v Byrne* [1995] 1 ILRM 279 and synthesised in *People (DPP) v Stronge* [2011] IECCA 79. This Court will not intervene in the sentence imposed unless the Director demonstrates that there is a clear divergence between the sentence imposed and that which ought to have been imposed which amounts to an error in principle.

37. The essence of the Director's argument concerns the pre-mitigation sentence identified for the offences of sexual exploitation, rape and s. 4 rape, that being a notional sentence of 16 years' imprisonment. She argues that while the judge properly placed the offending within the top range, he erred in placing the gravity at the low end of the top range. It is said that, in this way, the Director has discharged the burden required for the within application. Moreover, it is submitted that when one considers that the sentence was, in effect, a global one, the ultimate sentence of 15 years does not reflect the overall gravity of the offending.

38. We are persuaded in the present case that there is a clear divergence between the sentence imposed and that which ought to have been imposed. The learned trial judge properly identified that these offences fell within the top range, but we believe he erred in placing the notional figure at the bottom end of that range, in light of the egregious nature of the respondent's offending.

39. The respondent's offending was of a most serious kind; if we look to the nature of the sexual exploitation, without referring to specifics; he directed his children to engage with other persons. This was under his instruction and while he was present. Foremost in our consideration is that he was the father of these children. He abused three of the children in many different sexual ways against a background of appalling neglect. The children were all very young and therefore,

vulnerable. The abuse continued over a prolonged period, and while it has been argued on behalf of the respondent that in some cases, the abuse continues for a much greater period, and that is true, many cases do not have the same depth of depravity as the present case.

40. Many of the aggravating factors pointing in the direction of a sentence up to life imprisonment are present. It is important also to note, as observed in *FE*, that an offence can be an event over time. Moreover, offences should not be viewed in isolation "*but inform the seriousness of the overall circumstances.*"

41. In this case, the respondent, a father of six children, through his actions and those of others, has undoubtedly enormously damaged the lives of three very young children. The reports concerning the children make for very sad reading. Their physical and emotional condition when taken into care is deeply disturbing.

42. The consequences for these children have been what one would unfortunately expect. They are emotionally, physically, and psychologically traumatised. It is fortunate indeed that there are very good people in our society who are caring for these damaged children and seeking to repair the damage done to them by the respondent and others; persons whom the children should have been able to rely upon for all their needs.

43. Instead, the respondent neglected his children, the sexual offending of three of them cannot be viewed in isolation, but must be viewed in context. He raped, violated and subjected his children to abuse as orchestrated by him. He humiliated them, degraded them, subjected them to acts of depravity and all for his own sexual gratification. He photographed one child in compromising positions. The abuse of trust is gross in the extreme, his position of dominance within the family cannot be ignored, the children were of course very young and vulnerable and all of this took place against a background of appalling neglect. These children had nowhere to turn.

44. Taking all those factors into account and bearing in mind that consecutive sentences were not imposed, we are of the view that the headline sentence imposed was a substantial departure from the norm and that the ultimate sentence did not reflect the overall gravity of the offending and so we will proceed to quash the sentences imposed for the rape and sexual exploitation offences and sentence *de novo*.

Re-Sentence

45. Life sentences are used sparingly in these types of cases, but the factors to which we have adverted; the grave, systematic, prolonged and depraved abuse of three young and vulnerable children against the background of terrible neglect lead us to believe that the only appropriate and just sentence in this case is one of life imprisonment. A sentence must fairly reflect the overall offending as committed by the offender.

46. We are satisfied that this case falls into the exceptional category justifying life imprisonment. The offending was at the top of the scale of gravity as identified by the trial judge, abusing three children over a prolonged period and involving egregious acts of depravity. These children placed their trust in their father, and he abused that trust in the most egregious manner. The judge properly observed that these children had nowhere to turn, no one to trust within the family dynamic. This man was central to all of that.

47. In considering that option, we are cognisant of the mitigation present, the respondent's lack of previous convictions, to which very limited weight must be given due to the multiplicity of offences

over a prolonged period. Additional mitigation includes the reports furnished indicating a low level of intellectual functioning which it is said serves to make a sentence more difficult for him. He also has certain health issues in that he suffers from epilepsy. However, we are satisfied that the offending in this case merits a sentence of life imprisonment to reflect the gravity of the overall offending conduct.

48. Consequently, we impose a sentence of life imprisonment on the s. 2 rape offences, the s. 4 rape offences and the offences of sexual exploitation. We leave the sentences imposed on the balance of the offences as imposed by the trial judge. Post-release supervision remains as imposed by the trial judge.