



THE COURT OF APPEAL

Record Number: 31CJA/21

**The President
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 -

MICHAEL O'REGAN

RESPONDENT

JUDGMENT of the Court delivered (ex tempore) on the 15th day of November 2021 by Ms. Justice Kennedy.

1. This is an application by the Director of Public Prosecutions seeking a review of sentence on grounds of undue leniency which sentence was imposed on the 9th February 2021. The respondent was sent forward on a signed plea of guilty to the offence of sexual exploitation of a child contrary to s. 3(2) of the Child Trafficking and Pornography Act 1998 between the period 25th December 2016 and 15th April 2017. A sentence of seven months' imprisonment consecutive to a 6 year sentence with the final 3 years suspended was imposed.

Background

2. On the 25th of April 2017, the victim's father attended at a garda station and reported that his teenage daughter, who has Down Syndrome, had been in contact with a number of adult males through a social media app. He said that he had become aware that his daughter was exchanging photographs of a sexual nature with these men. He gave his

daughter's mobile phone and laptop to the gardaí, along with the telephone number for the man he believed to be most regularly in contact with her. This phone number was later identified as that of the respondent herein. Following a search of the respondent's property, a laptop was seized. The respondent made admissions which included that he had requested the victim to send topless photographs to him. He also indicated that he was aware that the victim is a vulnerable person.

3. The injured party was later interviewed by child specialist interviewers and made a number of disclosures in relation to her conversations with the respondent. No evidence was given in the sentencing hearing as to the content of these interactions other than to describe it as sexual content. The injured party also referred to a topless photograph which the respondent had requested of her and which she sent to him. The respondent accepted receiving a topless photograph from the injured party but the precise photograph was not identifiable.
4. The respondent attended at a garda station voluntarily, was interviewed and again made full admissions.
5. When the respondent came before the Circuit Court on this offence, he had 35 convictions for the offence of sexual exploitation. It seems that this offence was committed in and around the same time period as the 35 offences which were dealt with in two tranches; of 17 counts and 18 counts for which he received sentences of six years with the final three years suspended and six years with the final four years suspended. These sentences were imposed on the 4th July 2019. This sentence was imposed on a consecutive basis, but it appears that credit was allowed for a period of some three months, so in real terms, the respondent's incarceration was extended by four months.
6. The Director takes issue with the headline sentence nominated by the judge of two years and argues that this is insufficient to properly reflect the gravity of this offence. Moreover, that the sentence actually imposed inadequately addresses the principle of general deterrence.
7. In the court below, in mitigation, counsel for the respondent, Ms. Gorey BL relied on a probation report prepared in respect of the respondent's previous offending in which it is noted that he presented as a man who was very isolated in his family home and rarely left his house. He had minimal interaction with his siblings and no friends. The respondent has a good education and work history but was rendered unable to work due to a back injury sustained during a suicide attempt. The report also mentioned the respondent's mental health difficulties, the details of which are unknown. It was said that he had been engaging well with mental health services since being incarcerated and had expressed remorse. The respondent had said that he initially went online to find a partner of similar age, but developed a sexual interest in girls of a younger age. The Probation Officer noted that he said he did not want to experience attraction towards younger girls and that he believed he required assistance to manage his deviant sexual interests. He had made an effort to seek psychotherapy but was not able to engage due to a long waiting list for same.

8. The respondent put forward several factors as mitigating the offending, to include that the respondent made early admissions when his home was searched, was co-operative with the Garda investigation, was sent forward on a signed plea of guilty together with his personal circumstances. It is accepted that the plea of guilty and early admissions were of assistance to the Gardaí in circumstances where no image of the injured party was found in the respondent's possession. Reliance was also placed on a medical report, a Prison Governor's report and a letter of apology written by the respondent. In his letter of apology, the respondent referred to being bullied and assaulted in primary school, struggling with self-worth and confidence, suffering from depression and work-related stress.

The Sentence

The judge noted that the aggravating factors included the exploitation of a young child with Down Syndrome and the respondent's awareness that the victim was particularly vulnerable. A headline sentence of two years was identified, which was reduced to a sentence of seven months' imprisonment by virtue of the mitigating factors, which sentence was imposed on a consecutive basis to a six year sentence with the final four years suspended imposed by Cork Circuit Court on the 4th July 2019. Credit was given for the three months already spent in custody before sentencing. He was declared a Sex Offender, making him subject to the provisions of Part Two of the Sex Offenders Act, 2001.

Submissions of the Director

9. The Director submits that the sentencing judge erred in failing to consider sufficiently the need for an element of general deterrence in respect of the sexual exploitation of children, and that a sentence assessed in months rather than years was simply too low on the facts of the case. It is said that by assessing the headline sentence at two years, it might be assumed that he felt it fell at or near to the bottom of the lowest range of such offending. The appellant argues that the identified headline sentence of two years was an error by the sentencing judge.
10. The appellant's submissions emphasise the particular vulnerability of the injured party in this case. It is submitted that the respondent's apparent awareness of this vulnerability was itself an aggravating feature of the case. The respondent argues that although the sentencing judge acknowledged the interference with the innocence of the injured party in this case, he failed to pass a sentence commensurate with this.

Submissions of the Respondent

11. In oral submissions, Ms. Gorey contends that the sentence imposed cannot be examined in a vacuum but was one which was imposed in the context of the other offences which were committed in the same time frame.
12. The respondent relies on the decision in *The People (DPP) v McCormack* [2000] 4 I.R. 356, in which it was held that the identification of an appropriate sentence must depend not only on the specific facts of the case, but with consideration to the specific personal circumstances of the accused. It is submitted that in the instant case, when one considers the nature of the offence, its effect on the injured party and the circumstances of the

convicted person, the sentence imposed by the sentencing judge could not be considered unduly lenient nor could it be considered a substantial departure from what would be regarded as an appropriate sentence.

13. As regards the age and vulnerability of the victim and the impact of the offence on her, it is said that these matters were given adequate and careful consideration by the sentencing judge when passing sentence. The respondent maintains that the sentencing judge remained cognisant of, and expressly referred to, the fact that the matter must have been extremely upsetting for the injured party and her family. It is submitted that the sentencing judge was mindful of the injured party's young age and particular vulnerabilities, and that this is reflected in the sentence imposed.

Discussion

14. We cannot ignore the reality that if the respondent had been sentenced for all 36 offences before the same judge, that the sentence would have remained as that imposed by the judge before Cork Circuit Criminal Court; that is a sentence of six years with the final three years suspended on terms. We accept the respondent's submission that the fact that this offence was committed in the same time frame as the 35 other offences is a relevant consideration.
15. There is no argument but that this is a squalid offence exploiting a vulnerable young girl in this manner and we are very much cognisant of this factor. It is our view that while a seven month sentence, when viewed in isolation, may be insufficient to satisfy the principle of general deterrence, when viewed in the context of the other offences, all of which occurred during the same time frame, an additional sentence of 7 months is within the margin of appreciation afforded to a trial judge. We cannot remove ourselves from the reality of the situation; that if all matters had been dealt with together, it is unlikely that an additional sentence would have been imposed for this offence.
16. Having said that, it is true that the headline sentence is low, and if we had been dealing with this matter in the first instance, a higher headline sentence may well have been appropriate to reflect the squalid nature of this offending, however, when viewed, as we have said, in the context of the other offending in the same time frame, we are not satisfied that the Director has reached the threshold required in the present case.
17. Accordingly, the appeal is dismissed.