THE COURT OF APPEAL

[222/21]

Neutral Citation No: [2023] IECA 47

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

RL

APPELLANT

JUDGMENT of the Court delivered on the 2nd day of March 2023 by Birmingham P.

Introduction

1. The appellant, an 19-year-old man, who is at present detained in Wheatfield Prison, has appealed to this Court against the severity of a sentence imposed on him in the Circuit Court. The sentence the subject of appeal is one of three years and two months detention that was imposed on 8th November 2021. When the severity appeal came before this Court, an issue was raised by members of the Court as to whether there were any constraints applicable by reason of the appellant's age. This question was raised in circumstances where the appellant's date of birth is 18th November 2003, thus, he was 17 years of age at the date of sentence but was 18 years of age when his appeal was listed for hearing. Members of the Court were prompted to raise the question of whether there was any significance to be attached to the fact that the appellant had attained his majority in the period between

imposition of sentence and the hearing of the appeal, in circumstances where members of the Court had been dealing with what, on one view, might be seen as similar issues, though in a different statutory context in the case of *DPP v. Cian O'Leary* (Record No. 89 of 2022). By the time this case was first listed, the *O'Leary* case had been before the Court and judgment had been reserved.

2. The issue was raised by members of the Court in circumstances where they were aware that s. 3(2) of the Criminal Procedure Act 1993, the section that governs appeals against severity of sentence, provides:

> "On the hearing of an appeal against sentence for an offence the Court may quash the sentence and in place of it impose such sentence or make such order as it considers appropriate, being a sentence or order which **could have been imposed on the convicted person for the offence at the court of trial**." [our emphasis added]

3. In raising the issue, members of the Court also had in mind the decision of this Court in the case of *DPP v. PMcC* [2018] IECA 309, where the Court was concerned with an application to review a sentence of detention as unduly lenient and where difficulties were perceived as arising by reason of the fact the respondent to the application to review was sentenced as a juvenile to a term of detention, but came before the Court on foot of the application to review as an adult.

4. Having canvassed the issue, members of the Court put the matter back and afforded both sides an opportunity to make submissions. On the resumed hearing, counsel on behalf of the appellant made clear that he did not wish the Court to embark on a consideration as to whether the sentence imposed was appropriate or unduly severe until the question of the extent of the Court's jurisdiction had been determined.

5. Upon the resumed hearing, the parties were in agreement that the Court was not constrained by reason of the fact that RL, post-sentence, had attained his majority. Both sides

were in agreement that if the Court felt that the sentence imposed in the Circuit Court was too severe, it could intervene by quashing the sentence and imposing in lieu an appropriate sentence which could be a sentence of imprisonment of appropriate duration.

6. In the course of the appeal hearing, the appellant has indicated that while the language of legislation dealing with severity appeals and undue leniency reviews is similar, that *PMcC* did not deal with severity appeals. Instead, the appellant draws attention to the case of *DPP v. DMcD* [2020] IECA 149 which was a severity appeal brought by an appellant who had been sentenced by the Circuit Court as a juvenile, but who had reached his majority by the time of his appeal. The question of what constraints, if any, to which the Court was subject, was not the subject of argument or submissions. The issue was not considered by the Court, and at this stage, we do not regard it as a significant precedent. It was certainly not a case which, to use the words of Finlay CJ. in *Finucane v. McMahon* [1990] 1 IR 165, quoted by Hogan J. in *ACC Loan Management v. Connolly* [2017] IECA 119, was "reached after the most comprehensive and detailed consideration of all relevant factors."

7. At the oral hearing, counsel on behalf of the Director was very clear in asking the Court to depart from the earlier decision in *PMcC* and to take the view that it was wrongly decided and to decline to follow it. Thus, it is necessary to consider the *PMcC* case in greater detail.

8. In *PMcC*, the statutory provision in issue was s. 2(3) of the Criminal Justice Act 1993, which provides:

> "On such an application, the Court may either—
>
> (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence **which could have been imposed on him by the sentencing court concerned**, or
>
> (b) refuse the application." [our emphasis added]

The similarity in language between the two statutes will be noted, but so, too, will be noted what is, on one view, a more direct and specific reference to "the sentencing court concerned".

9. In *PMcC*, this Court pointed out that so far as the Circuit Court was concerned, imprisonment was not an option, as s. 156 of the Children Act 2001 prohibited imprisonment of a child, that section stating in unequivocal terms:

> "No court shall pass a sentence of imprisonment on a child or commit a child to prison."

In those circumstances, this Court took as its starting position that, on a literal reading of the section, the Court could not impose a sentence of imprisonment on the respondent if the sentence imposed in the Circuit Court was regarded as unduly lenient because imprisonment is not "a sentence which could have been imposed" by the sentencing Court.

10. In *PMcC*, the Court then referred to s. 142 of the Children Act 2001, which provides for the making of detention orders by a sentencing Court. It is in these terms:

> "A court may, in accordance with this Part, by order (in this Part referred to as a 'children detention order') impose on a child a period of detention in a children detention school specified in the order."

Having referred to the statutory provision, the Court commented that there appeared to be no statutory power to impose a detention order on a person who is not a child and that therefore, on a literal interpretation, this Court could not impose a detention order on the respondent who was no longer a child.

11. This Court then went on to address arguments that had been advanced by the Director that s. 2(3)(a) of the Criminal Justice Act 1993 could and should be given a purposive construction, and if given such a construction, this would enable the Court to resentence the

respondent in that case to an appropriate term of imprisonment. Referring to the literal interpretation, this Court commented:

> "We do not consider that this is an absurd interpretation. It is an inconvenient interpretation, certainly, and has far reaching implications, but it is not absurd. Even if in principle it was possible to afford a provision such as s. 2(3) of the [Criminal Justice Act 1993] a purposive interpretation based upon inferring the true intention of the legislature, the circumstances of the case would preclude engagement in any such exercise."

12. In the course of the current appeal hearing, counsel on behalf of the appellant placed considerable significance on the decision of the Supreme Court in the case of *DPP v. Anthony Foley* [2014] IESC 2. That is a case where the issue related to identifying the appropriate court to deal with an application to revoke a suspended sentence. It had come before the court in circumstances where the Circuit Criminal Court had imposed an entirely suspended sentence of eight years. The prosecution sought a review under s. 2 of the Criminal Justice Act 1993, and in the Court of Appeal, the sentence was varied, in that while the eight-year sentence was left in place, instead of being suspended in full, only five of the eight years were suspended. The appellant points out that the Supreme Court had said in terms that the jurisdiction given to the Court of Criminal Appeal under s. 3 of the Criminal Procedure Act 1993, and s. 2 of the Criminal Justice Act 1993, was to quash the decision of the trial Court and impose a new sentence on the convicted person. For our part, we do not believe that the decision provides any real assistance to the appellant. If anything, the case might be said to present certain difficulties for the appellant because of the fact that the Supreme Court proceeded on the basis that the Court's powers under the Criminal Procedure Act 1993 and the Criminal Justice Act 1993 were effectively identical.

Discussion and decision

13. We begin our consideration of this issue by acknowledging that we must have considerable regard to the fact that both sides are in agreement. However, while fully cognisant of that, it does seem to us that the language of s. 3(2) of the Criminal Procedure Act 1993 represents a considerable obstacle to the shared desire of the parties. This Court, if minded to intervene in relation to sentence, would not be at large, but rather, would be confined to imposing a sentence or order which could have been imposed on the convicted person for the offence at the court of trial. A sentence of imprisonment could not have been imposed in the Circuit Criminal Court on 8th November 2021, because at that time, the appellant was a juvenile and there is a clear and unequivocal prohibition on any Court passing a sentence of imprisonment on a child or committing a child to prison. If the obstacle is to be overcome, that can only be achieved by adding or writing in words that are not there. That much is acknowledged by counsel on behalf of the Director, who suggests that the statute could be read as if the language contained extra words along these lines: "being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial *if it were dealing with the respondent as he now stands*" (emphasis added). The Director quotes, as the appellant has done, from Dodd, *Statutory Interpretation in Ireland* (2008 Bloomsbury, 1st ed). At para. 11.44 of that text, the author states:

> "Where the presumption [of constitutionality] applies, it is permissible to put an interpretation on a provision that deviates to a degree from the ordinary and plain meaning of the provision provided it does so within the limits permitted by the Constitution. This may involve the courts, to some degree, in effect straining the meaning of individual words or expressions, reading in certain expressions and disregarding others, where not to do so would fail to give effect to the constitutional intention of the legislature."

14. We recognise the force of the arguments advanced by the parties, but nonetheless, we must conclude that what is being urged on us is that we should rewrite the legislation. It seems to us that what both sides contend for is simply a step too far. A further fact to be considered is that following the course of action urged would necessarily involve overturning the decision of this Court in *PMcC*. If the stage had been reached where we had been convinced by the arguments we had heard, we would not have been deterred from overturning *PMcC*. However, that stage has not been reached. Another question that arises is what order the Court can or should make. In that regard, it seems that the choice is a binary one: the Court can quash the sentence imposed in the court below and make no further order; or the Court can decline to quash the sentence and reject the appeal. We fully recognise that is far from an ideal situation; it is certainly inconvenient, to use the language of Edwards J. in *PMcC*. However, we believe the language of the statute is clear and compels us to follow this course.

15. In the circumstances, we propose that, having given the parties an opportunity to consider this ruling, we would embark on a consideration of the merits of the appeal which will involve a determination of whether the sentence imposed on 8th November 2021 should be allowed stand or should be quashed.