



THE COURT OF APPEAL

Record Number: 1/20
Neutral Citation Number: [2021] IECA 74

Birmingham P.
Kennedy J.
Donnelly J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

A.B.

APPELLANT

JUDGMENT of the Court delivered on the 18th day of March 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against sentence. On the 15th May 2019 the appellant was found guilty of ten counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by section 37 of the Sex Offenders Act 2001 and one count of cruelty to a child contrary to section 246 of the Children Act 2001. The appellant received a total sentence of six and a half years' imprisonment with the final six months suspended on terms. In order to protect the identity of the injured party, we have not referred to the appellant by the appellant's initials.

Background

2. The appellant is a natively assigned male who identifies as female. The appellant has been living in a female role for the past eight years and was granted a female gender recognition certificate in 2017 pursuant to the Gender Recognition Act 2015. The appellant changed name in 2017.
3. The offences were committed between 2011 and 2013. At the time of offending the victim was between five and six years old. At the time the appellant identified as male and was married to the victim's mother which relationship commenced in 2011. The relationship between the victim and the appellant was initially positive but it deteriorated over time. During the course of the trial several witnesses gave evidence of seeing the appellant behave in a physically and emotionally inappropriate manner towards the victim in public.
4. As a result of these concerns, social workers became involved and this eventually led to the victim disclosing that the appellant had sexually assaulted him. The offences included the touching and pulling of his penis, sometimes in a painful manner, which would result in bleeding. The victim also detailed being made to dress up in his sister's clothing. He also referred to several instances of being slapped which the victim found distressing.
5. The appellant was arrested and detained for questioning in October 2014. During questioning the appellant referred to the victim in somewhat pejorative terms. It was accepted by the appellant that a minor level of violence towards the victim had been displayed but the allegations relevant to the public conduct and the allegations of sexual assault were denied.
6. The first trial relating to this matter collapsed and the second trial proceeded on the 7th May 2019 and the appellant was convicted on the 15th May 2019. The sentence hearing was held on the 15th July 2019 and the appellant was sentenced on the 9th December 2019.

Personal circumstances of the appellant

7. At the time of sentencing the appellant was 31 years old. The appellant has had a difficult upbringing having been adopted from an overseas orphanage by an Irish family at the age of two, which adoption was unsuccessful. This resulted in the appellant being separated from a sibling. The remainder of the appellant's childhood was spent in various residential care homes and foster homes.

8. The sentencing court heard evidence from a witness who had known the appellant for over twenty years and he stated that the appellant's offending was out of character from his overall positive experience of the appellant and that he had observed an improvement in the appellant's behaviour since the commencement of the appellant's gender transition.

9. Several reports were prepared for the sentencing of the appellant including a probation report, a Prison Governor's report and a psychological report.

The sentence imposed

10. The sentencing judge iterated the aggravating circumstances of the offending carried out by the appellant who was in a position of trust and dominance over the victim. The sexual assaults took place in the family home. The assaults were frequent and took place over a prolonged period. They were often accompanied by intimidatory and menacing comments. The appellant physically chastised the victim in an excessive and abusive manner to the extent that it gave onlookers serious concern and led to complaints to social workers.

11. The judge placed the sexual offending in the upper mid-range of offending and nominated a headline sentence of eight years' imprisonment.

12. The judge accepted that the appellant would not be penalised for contesting the charges but there was an absence of mitigation in that regard. In a similar vein, the sentencing judge noted that there was an absence of mitigation as the appellant did not accept the jury verdict at the time of sentencing.

13. In terms of mitigating factors, the judge referred to the appellant's difficult upbringing and the absence of previous convictions. She accepted that it was an unusual situation in that the appellant has psychological issues and stress resulting from the gender transition process. The judge referred to previous adverse reporting on the case and acknowledged that custody would be difficult for the appellant.

14. In relation to the ten counts of sexual assault the sentencing judge imposed a sentence of six and a half years with the final six months suspended on terms. In respect of the count of child cruelty, having placed the offending within the mid-range of offending, the sentencing judge imposed a concurrent sentence of three years' imprisonment, with all sentences to be backdated to the date the appellant went into custody.

Submissions of the appellant

15. The appellant submits that the trial judge treated the appellant unfairly during the sentencing process and this ultimately impacted the sentence handed down which the appellant characterises as unduly severe.

16. In oral hearing, Mr O'Hanlon SC for the appellant contends that the judge erred in the headline sentence nominated and failed to give adequate weight to the mitigating factors.

17. Mr O'Hanlon says that the judge failed to have sufficient regard to the evidence adduced on behalf of the appellant at the sentence hearing which was indicative of an unlikelihood of re-offending.

18. It is said that there was a continued emphasis on the nature of the offending without placing adequate weight on the circumstances of the appellant, including the significant vulnerabilities arising from the appellant's difficult upbringing. The appellant refers to *The People (DPP) v. Alexiou* 3 IR 513 where the Court accepted that a person's vulnerability could be raised as a mitigating factor:-

“Vulnerability can take many forms and it is also a question of degree but mere vulnerability can never be an alibi exonerating a person convicted of a criminal offence from culpability. It is simply a descriptive term of a very general nature relating to whole range of discrete facts or circumstances said to have influenced an accused in deciding to commit an offence which he may not otherwise have been inclined to do. Financial difficulties, family circumstances, poor circumstances, lack of education, low intelligence to name but a few are matters which may be raised to mitigate the wilfulness of an Accused or to suggest that he or she is not a person who is deliberately pursuing a career in crime.”

19. It is said that the judge did not give sufficient weight to the appellant’s traumatic early start in life which had a significant impact. The appellant also refers to the struggles with gender identity issues and the impact the proceedings have had on the appellant being able to advance the gender transition process, of which, it is submitted, the sentencing judge did not take full account.

20. Linked with this submission is the appellant’s assertion that the sentencing judge did not adequately consider how difficult time in custody would be for the appellant. This is further compounded by the adverse media attention which the appellant’s case has received as the first prisoner who was a natally assigned male to be incarcerated in a female prison in this jurisdiction. It is submitted that this media attention would have made the appellant’s identity obvious to other inmates and it would render the appellant’s time in custody more difficult.

21. The appellant submits that the judge erred in treating the appellant’s non-acceptance of the guilty verdict as an absence of mitigation where the lack of guilty plea had already been taken into account. The appellant argues that these essentially amounted to the same issue and while the Court acknowledged that it was not an aggravating factor to plead not

guilty, the victim having to give evidence twice seemed to be a factor held against the appellant.

22. It was indicated on appeal that the appellant does not take issue with the sentence imposed on the count of cruelty to a child.

23. The appellant argues that the sentencing judge placed too much weight on the punitive aspect of sentencing and failed to structure the sentence to sufficiently encourage the appellant to continue rehabilitation.

Submissions of the respondent

24. In relation to the vulnerability of the appellant, the respondent argues that *The People (DPP) v. Alexiou* 3 IR 513 is of limited assistance as it dealt with a very different set of circumstances and in particular dealt with the vulnerability of those exploited by drug dealers. The respondent argues that there was no evidence that the appellant was vulnerable to being placed in the position of offending by some third party or through some undue influence. It is said that the judge appropriately measured the appellant's challenges alongside the suffering imposed on the victim who was vulnerable at the time of offending.

25. The respondent submits that there are several factors which justified the headline sentence imposed. These include the tender years of the victim, the position of trust, the violence imposed on the victim, the nature of the sexual assaults on the victim, the period of time during which the offending took place and the number of offences which the Court was sentencing on a concurrent basis, the effect of the offending on the victim and the absence of remorse and efforts at rehabilitation inherent in the rejection of the jury's verdict.

Discussion

26. These were serious offences, which involved the repeated sexual assault of a very young victim over a period of two years. The child was aged between five and six years at the time of offending and therefore the period of offending constituted a significant portion

of his life. The appellant was in a position of trust, influence and power and abused this position. The offence is further aggravated by the fact that the appellant sexually abused the victim to the extent of inflicting physical pain on the child and caused the victim to bleed on occasion. Moreover, the appellant physically, verbally and emotionally abused the child which acts are the subject of the child cruelty count. The sexual offending caused the victim significant distress and physical pain and discomfort and consequently, the impact on him was understandably very severe indeed. Whilst it is not clear from the transcript of the sentence hearing, the judge also referenced threats to the victim in the event of disclosure, which evidence was presumably given during the trial.

27. There is certainly mitigation present, which was referenced and acknowledged by the judge. The appellant was adopted by an Irish family which adoption was successful. The appellant was aged two and a half years when the adoption failed. This resulted in the appellant moving between residential homes and foster care, thus losing the society of a sibling with whom the appellant had been adopted. The appellant struggled with gender identity and, at the time of sentence was in the process of a gender reassignment programme. Reports in this respect were furnished to the Court. The appellant has no previous convictions and had not come to the adverse attention of the gardaí in the interim. Mr O’Hanlon contends that the judge failed to have regard to the latter matter.

28. Evidence was called on the part of the appellant in the sentence hearings which evidence disclosed that the appellant was more settled as a result of the gender reassignment process.

29. In terms of mitigation the judge adjusted the notional sentence downwards by 25%. Bearing in mind that the appellant did not have the mitigating factors of a plea of guilty and remorse, this represents a considerable discount. It is clear from the transcript that the judge assessed the evidence and reports furnished to her carefully and approached the case with

considerable sensitivity. She acknowledged that a custodial sentence would, in the circumstances, present challenges for the appellant, but this is clearly recognised in the reduction afforded for mitigation. Moreover, in suspending six months of the sentence for a period of twelve months on the condition that the appellant remain under probation service supervision, ensures that the appellant will be assisted in re-integrating into society on release and, notwithstanding the absence of a plea of guilty, serves to incentivise rehabilitation. Consequently, we are not persuaded that the judge erred in the discount afforded for mitigation.

30. The real issue for this Court is whether the headline sentence nominated was too high. That being one of eight years imprisonment, where the maximum sentence was one of fourteen years imprisonment.

31. The nature of the sexual assaults must be considered; these involved the touching of the child on the penis under and over the clothing. We acknowledge that there are more serious categories of sexual assault, however, what brings this case to the upper end of the mid-range is the forceful nature of the abuse, causing the child pain and suffering, and on occasion leading to the victim bleeding from his penis while urinating. Moreover, the child was extremely young, and his age undoubtedly magnified the duration of the abuse. These factors in our view in conjunction with the impact on the victim and the appellant's abuse of the position of trust and power, bring this sexual offending into the upper end of the mid-range.

32. Consequently, we are not persuaded that the judge erred in her nomination of the headline sentence of eight years.

33. Accordingly, the appeal is dismissed.