AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No. 2022/009

[2023] IESC 04

Dunne J.

Charleton J.

O'Malley J.

Baker J.

Woulfe J.

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

-and-

M.J.

Appellant

(No. 2)

<u>Judgment of the Court delivered electronically on 10th of February 2023</u>

Introduction

1. The first judgment in this appeal against severity of sentence was delivered on the 1st December 2022 – see *People (DPP) v. M.J.* [2022] IESC 50. The Court, having considered the circumstances of the case, came to the conclusion that both the trial court and the Court of Appeal had erred in principle in imposing sentence. Accordingly, the Court received further submissions and on the 2nd February 2023 held a second hearing for the purpose of resentencing the appellant. The Court informed the parties on that date that the appeal was allowed. It outlined its reasoning and imposed sentences reflecting its analysis. This judgment sets out that analysis.

2. In very brief summary, the appellant was convicted after trial in the Circuit Court on foot of five counts of indecent assault. The charges on the indictment were sample counts in circumstances where the offending at issue was alleged to be committed on a frequent basis over a period of some 6 weeks in the course of 1978. The victim of the offending was a young boy of approximately 11 years of age who was staying for a few months with the appellant's family in a rural area. During that time, he was groomed and then abused by the appellant in the appellant's family home in ways that developed from fondling to making him masturbate the appellant and give oral sex.

3. At sentencing, the trial judge was told that the appellant continued to maintain his innocence. At that stage he was 61 years old and had no other criminal convictions. Evidence was given as to his conduct in the meantime, his marital status, his family background, his work record and his health conditions. The maximum sentence available in respect of each count was two years. The trial judge, who stated that he saw no mitigation in the case, set a headline and imposed a sentence of 21 months in respect of each offence. All of the sentences were made consecutive. However, he suspended the final 21 months for the purpose of deterrence.

4. On appeal, the Court of Appeal considered that the trial judge had been correct in making the sentences consecutive, and in selecting a headline figure of 21 months. However, it accepted the submission that the trial judge had erred in not finding a mitigatory factor in the fact that the appellant had not offended during the forty years prior to the matter coming to court. The Court of Appeal concluded that only a limited intervention was required to rectify this error, and so suspended a further 12 months from the cumulative total of 105 months. Thus, the sentence was, in effect, eight years and nine months with the final two years and nine months suspended.

The first judgment

5. The principal findings of the Court may be summarised as follows:

   - Where an appellate court finds that a trial court has erred in principle in respect of one aspect of the sentencing process, such a finding does not

necessarily require the appellate court to reassess the sentence in its entirety. The question will be whether there is a logical connection between the identified error and any other error in the process. Therefore, an erroneous finding that there was no mitigation did not, of itself, "contaminate" the headline sentence set by the trial judge. (Paragraph 32)

- The assessment of the nature of the crimes in this case had to include as aggravating factors the youth of the victim, his position in the family and home of the appellant, the fact that the offending followed a classic pattern of grooming that culminated in serious incidents of abuse involving degradation of the victim, and the disastrous and long-lasting effects of the offending on the victim. (Paragraph 33)

- The absence of other criminal convictions is always a very significant relevant personal circumstance, particularly in the case of an older offender. (Paragraphs 35 and 36)

- Where a judge today is imposing sentence in respect of a case of sequential sexual offending against a child that dates from a time when the maximum sentence was two years only, it is possible that the judge will consider that even the less serious offences may warrant a headline sentence of close to the maximum. Subject to what may be required by the totality principle, it is not necessary to artificially reduce the headline in respect of any individual offence. (Paragraph 38)

- The principle that consecutive sentences should be utilised "sparingly" does not mean that they must be rare or exceptional. In a case of historical sequential offending, the court may legitimately feel that concurrent sentences within the maximum parameters of the available sentences will not adequately reflect both the gravity of the accused's behaviour and his culpability. (Paragraph 39)

- The imposition of consecutive sentences carries with it the need to ensure that the totality principle is observed. There was no indication in this case that either the trial judge or the Court of Appeal had taken this principle into account, in circumstances where the result was a sentence that equated to many rape or buggery sentences after trial in the Central Criminal Court. (Paragraphs 40 to 43)

The sentence of this Court

6. As noted above, the Court has had the benefit of further written and oral submissions. It has received an up-to-date medical report in relation to the appellant. It has also received a further victim impact report from the victim in this case, setting out the current situation in relation to the trauma suffered by him as a result of the abuse. It should be borne in mind that the court has also had the benefit of considering the materials that were before the trial judge at the original sentencing hearing, including the then victim impact report and other matters in relation to the appellant. All of this material has been taken into consideration.

7. There is no dispute between the parties in relation to the question of the sentencing principles to be applied at this stage. The court had regard to the submissions in relation to the personal circumstances of the appellant, the nature of the offending, the circumstances of sentencing in relation to a person who is sentenced as an elderly person convicted of historical offences (as described by Charleton J in the case of the *People (DPP) v. P.H.* [2007] IEHC 335). The Court has also had regard to the question of the imposition of consecutive sentences and the requirement to have regard to the totality principle where such sentences are imposed.

8. The appellant has set out detailed matters said to amount to mitigation. He is now 65 years old. He worked for 22 years before retiring, and was a carer for his parents. He has no other criminal convictions and a probation report before the trial court indicated that he was at low risk of offending. The prison governor's report indicates that he is an exemplary prisoner with enhanced status. He has certain health difficulties, although these are not of a particularly serious or urgent nature. The appellant does accept that the count involving oral sex is of such a serious character as to merit being made consecutive to concurrent sentences on the other four counts.

9. The respondent does not dispute that the matters relied upon by the appellant are mitigating features in the case. However, she points to the aggravating circumstances to be found. The victim was a young visitor to the appellant's home and was without parental support. There was evidence of grooming. The offending increased in frequency and severity over time until it reached the stage where the victim was being forced to perform oral sex on the appellant. It is part of the case made by the respondent that the offending is at the uppermost end of the scale of gravity.

Decision

10. One of the curiosities of this case is that it is difficult to identify from the transcript of the case a clear indication as to how many of the charges relate to the more serious end of the offending and how many relate to what might be described as the initiating offending. Obviously, the trial judge treated each of the counts as being equally serious, in that he did not differentiate in sentencing as between any of the counts.

11. On the facts of the case, it would appear to be appropriate to have regard to the overall pattern of offending. What is before the court are sample counts, culminating over a relatively short period of time in what can only be described as very serious offending. It is difficult to view the counts as representing a series of one-off offences culminating in a more serious offence. What occurred, and is established by the evidence, is a course of conduct in the form of grooming where an escalating form of sexual abuse took place culminating in serious offending.

12. In assessing the question of gravity, the court is mindful of the serious and long-lasting effect of the offending on the victim in this case. In an ideal world it would be possible to identify precisely what each count on the indictment involved in terms of offending behaviour. One could then tailor any sentence effectively having regard to the facts and circumstances of each individual count. As it is, the Court is left with a series of counts over a period of time culminating in very serious offending. For that reason, it is difficult to say with clarity that the offending in respect of each count can be differentiated by reference to the seriousness of the offending conduct at issue in in

respect of each count. For these reasons, it does not appear to be appropriate to make any distinction between the sample counts on the indictment.

13. Nevertheless, in attempting to deal with sentence in this case the question must arise as to whether it was appropriate having regard to all of the circumstances in the case to impose consecutive sentences in respect of each of the counts. As will be recalled, the trial judge in this case came to the view that the appropriate sentence on each of the counts was a sentence of 21 months. That was in the context that the maximum sentence could be imposed in respect of the charges was a two-year sentence. The final 21 months of the total sentences which were imposed to be served was suspended, on a deterrent as opposed to a rehabilitative basis. It will also be recalled that the Court of Appeal, having considered the sentences, reimposed a sentence of 21 months in respect of each of the counts on the indictment but increased the period of suspension from 21 months to 33 months. Of course, the Court of Appeal also provided that the sentences be served consecutively.

14. The Court would approach sentencing in this case somewhat differently. As already stated, it is legitimate to come to a view that, having regard to all the circumstances in a case, it is appropriate to impose consecutive sentences in relation to a series of offences committed against an individual over a period of time. However, in this case the sentences imposed were required to be served consecutively in respect of each count. That led to a situation where the sentence to be served was one of eight years and 9 months with 21 months suspended. As identified in the first judgement, there was no apparent consideration of the totality of the sentences imposed.

15. There is no dispute as to the mitigating factors that exist in this case, and no doubt as to aggravating factors that require to be taken into consideration, particularly the long lasting and serious effect that this offending has had on the victim.

16. Accordingly, the Court deals with sentence as follows:

(i) In respect of the first two counts on the indictment, the Court imposes a sentence of 21 months on each count, to run concurrently.

(ii) In respect of the second two counts, the Court imposes a sentence of 21 months on each count, to be served concurrently as between each other but consecutively to the sentences on the first two counts.

(iii) Finally, the Court imposes a sentence of 21 months on the last count, to be served consecutively to the sentences imposed on Counts 3 and 4.

17. Mindful of all of the circumstances of the case, and bearing in mind that an element of the sentence was previously suspended, the Court will suspend the last six months for a period of three years on the usual terms and conditions.