THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[128/20]

[129/20]

Neutral Citation Number: [2021] IECA 308

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

LS

RESPONDENT

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

PS

RESPONDENT

JUDGMENT of the Court delivered (electronically) on the 18th day of November 2021 by Birmingham P.

1. This is an application brought by the Director of Public Prosecutions ("the Director") pursuant to s. 34 of the Criminal Procedure Act 1967 (as amended), which provides:

"**34.** — (1) Where a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment) the Attorney General in any case or, if he or she is the prosecuting authority in the trial, the Director of Public Prosecutions may, without prejudice to the verdict or decision in favour of the accused person, refer a question of law arising during the trial to the Court of Appeal for determination or, in the case of a person who is tried on indictment in the Central Criminal Court, make application to the Supreme Court under Article 34.5.4° of the Constitution to refer a question of law arising during the trial to it for determination.

(2) Where a question of law is referred to the Court of Appeal or the Supreme Court, as the case may be, under subsection (1), the statement of the question shall be settled by the Attorney General or the Director of Public Prosecutions, as may be appropriate, after consultation with the trial judge concerned or, in the case of a Special Criminal Court, with the member of that Court who pronounced the decision of the Court in the trial concerned following consultation by that member with the other members of the Court concerned and shall include any observations which the judge or that member, as may be appropriate, may wish to add.

[. . .]

(5) The Court of Appeal or the Supreme Court, as the case may be, shall ensure, in so far as it is reasonably practicable to do so, that the identity of the acquitted person in proceedings referred to in this section is not disclosed in connection with the proceedings unless the person agrees to the use of his or her name in the proceedings."

Background Events

2. In March 2020, the respondents stood trial together in Kerry Circuit Court, charged with counts of sexual exploitation of a child contrary to s. 3(2) of the Child Trafficking and Pornography Act 1988, as substituted by s. 3(a) of the Criminal Law (Human Trafficking Act) 2008. LS faced eight charges, while PS faced three charges. All eleven counts involved allegations of inviting, inducing, or coercing the complainant to participate in various sexual acts at or near the farmhouse, farmyard, or farmlands of PS. The counts were laid as having occurred on various dates between 27th January and 7th April 2013.

3. In the course of the trial, the complainant gave evidence, and she was cross-examined on behalf of the accused men. Following the close of the prosecution case, an application for a directed verdict of not guilty was advanced on foot of a contention that sexual exploitation was not a standalone offence, but rather required proof that there had been not only sexual exploitation, but also that the child exploited had been trafficked. Arising from the acquittal, the Director referred a question of law to this Court. It should be noted that s. 34 of the Criminal Procedure Act 1967 (as amended) provides for a without prejudice referral.

4. The question of law referred to this Court is in the following terms:

> "Was the learned trial judge correct to rule as a matter of statutory interpretation that the offence of Sexual Exploitation of a child contrary to Section 3(2) of the Child Trafficking and Pornography Act, 1998 ('the 1998 Act') as substituted by Section 3(a) of the Criminal Law (Human Trafficking) Act, 2008, ('the 2008 Act') was not a standalone offence but rather required proof that the complainant had been trafficked within the meaning of the Act."

The Ruling of the Trial Judge

5. Ruling on the joint application for a direction on 11th March 2020, the trial judge pointed out that the application had been advanced on the basis that the charges of

exploitation were "ill-conceived". The judge referred to the fact that a statement of complaint had been made by the complainant on 29th October 2014, which alleged that she had been raped by the two accused, but that the charges directed by the Director were not charges of rape or sexual assault, but of sexual exploitation contrary to s. 3(2) of the 1998 Act, as substituted by s. 3(a) of the 2008 Act. The judge made reference to the fact that the defence had argued that these charges apply only in situations involving child trafficking, and that because there was no suggestion of child trafficking in this case, the charges were ill-founded. He pointed to the fact that the defence had, in support of the application, opened the case of *DPP v. NR and RN* [2016] IECCC 2, a decision of Eager J. which, the trial judge noted, has never been appealed or challenged by the State. Reference was also made to the defence's reliance on *obiter* remarks of Edwards J. in the case of *The Minister for Justice v. Adams* [2012] 1 IR 140.

6. The trial judge then referred to the submission advanced by the prosecution that it was appropriate to examine the definition of "trafficking" under the 2008 Act. At s. 3(5) of that Act, the definition of trafficking includes that a child was in the "custody, care or charge, or under the control of" another person and that the child was provided "with accommodation or employment". The prosecution submitted that the definition of trafficking was satisfied by the facts of the case. The trial judge went on to opine that the Director had directed the wrong charges in the case, and, as a result, stated that he was going to direct the jury to record a verdict of not guilty. He did so having referred to the fact that as far as LS was concerned, he was not the employer of the complainant at any stage, nor had he provided any accommodation. In respect of PS, the trial judge accepted that it could be argued that PS and his wife were in *loco parentis*, and indeed, it was accepted that they provided both accommodation and employment. However, in this case, all of the alleged events were said to

have taken place on a particular day, 4th April 2013, and there was no evidence to support the suggestion that there was any form of exploitation or trafficking.

The Submissions on Appeal

7. During the trial, the prosecution did not challenge the contention advanced on behalf of the defence that the ruling in *DPP v. NR and RN* was binding on the Court. Instead, it sought to argue that even if the prosecution did have to establish that the complainant had been trafficked, it only had to establish that within the definition of trafficking contained in s. 3(5) of the 2008 Act, and, in that regard, it maintained that they were in a position to do so. However, before this Court, the Director has been clear in her desire to argue that *DPP v. NR and RN* was incorrectly decided. It is contended that the offence of sexual exploitation ought to be interpreted as a standalone offence and ought not to be confined to cases where children have been trafficked.

8. On behalf of the Director, it is said that this is a case where the plain meaning of the words used in s. 3(2)(a) of the 1998 Act is to create an offence of child sexual exploitation. The Director acknowledges that the long title does not contain a reference to that, but says that the long title cannot be invoked to override the clear provisions of the statute. Reference is made to the decision of Lord Lane CJ. who, in *R v. Galvin* [1987] QB 862, said:

> "One can have regard to the title of a statute to help solve an ambiguity in the body of it, but it is not, we consider, open to a court to use the title to restrict what is otherwise the plain meaning of the words of the statute simply because they seem to be unduly wide."

9. The Director says that reference to the marginal note is impermissible. This point is made in response to the reliance placed by the respondent on the fact that the margin note for the section, as originally enacted, was "[c]hild trafficking and taking, etc., child for sexual

exploitation", and this had largely been replicated in the Criminal Law (Human Trafficking) Act 2008, which – at s. 3 – had amended s. 3 of the 1998 Act. The marginal note on this occasion reads "[t]rafficking, taking, etc., of child for purpose of sexual exploitation".

10. The Director has also drawn attention to two European Arrest Warrant cases where different judges had referred to the section in the context of consideration of the issue of correspondence. In *Adams*, Edwards J. commented:

> "[39] While it might perhaps be argued that the conduct complained of is now covered by the prohibition on sexual exploitation of a child contained in s. 3(2) of the Child Trafficking and Pornography Act 1998, as substituted by s. 3 of the Criminal Law (Human Trafficking) Act 2008, it could also be argued that this offence is restricted to situations where there is trafficking or other commercial exploitation (see Gillespie, *Sexual Exploitation of Children - Law and Punishment* (2008, Roundhall), at pp. 77 to 79). Be that as it may, the court does not need to take a position on this because all of the alleged offences with which we are concerned pre-date the enactment of that legislation."

The Director points out that while Edwards J. did not find it necessary to take a position on the issue, the specific issue was addressed by Donnelly J. in *Minister for Justice & Equality v. AM* [2016] IEHC 568, wherein she commented:

> "It is unnecessary to consider if the first of the two allegations of gross indecency amounts also to an assault because I am satisfied that the particular allegations of gross indecency set out in the EAW, correspond with other offences in this jurisdiction. I am quite satisfied that these allegations, if committed in the State on the date of issue of the EAW, would constitute an offence of sexual exploitation of a child contrary to s. 3(2)(a) of the Child Trafficking and Pornography Act, 1998 ('the Act of 1998'). Sexual exploitation means in relation to a child, *inter alia*, inviting, inducing

> or coercing the child to engage or participate in any sexual, indecent or obscene act or inviting, inducing or coercing the child to observe any sexual, indecent or obscene act for the purpose of corrupting or depraving the child. The details of the alleged offence, especially in light of the age of the child and the activity at issue, amount by necessary implication to sexual exploitation within the meaning of s. 3 of the Act of 1998."

It should be noted that the activity which was under consideration in *AM* was an allegation that the respondent had masturbated onto his niece, who was, at the time, a child.

11. The respondents say that it is well established that the terms and words used in the statute are required to be read in their context, and that the context here is the prohibition of the trafficking of children. If regard is had to the context, then the argument in favour of a free-standing offence falls away. The respondents say that there are a number of factors which all militate in favour of the interpretation arrived at by the trial judge, and earlier, by Eager J., and that resort to the preambles is permissible as an aide to construction. The respondents point to the decision of the Supreme Court in *Bridgeman v. Limerick Corporation* [2001] 2 IR 517 in that regard. Further, they say that this was a case where it was permissible to have regard to the margin note, drawing attention to the case of *Sulaimon (An Infant) v. The Minister for Justice* [2012] IESC 63. The respondents say that what the Director seeks to do in urging that an offence of general application has been created would involve a significant extension of the criminal law in the area of sexual offences.

Discussion

12. For our part, our first reaction was that the wording of the section is clear and unequivocal. However, the members of this Court had some concerns arising from certain comments made in Gillespie, *Sexual Exploitation of Children: Law and Punishment*

(Roundhall, 2008). For that reason, an opportunity was given to the parties to make further submissions post-hearing of the oral appeal.

13. The discussion in Gillespie arises in the context of addressing what is described as "a potential loophole". Gillespie comments:

> "**3–100** The Law Reform Commission, as far back as 1990, noted that one difficulty with relying on the law of assault is that the absence of touching creates the possibility where sexual conduct may escape liability, they cite Glanville Williams:
>
> > 'There is thus no assault if the defendant, without force or threats or touching with his own hands, induces a child to undress before him, or to touch him (the defendant) indecently.'" (footnotes omitted)

14. Gillespie the goes on to say:

> "*Closing the Loophole?*
>
> **3–103** Whilst the Oireachtas has not expressly closed this loophole it may have done so implicitly although the consequences of this may be surprising. The Criminal Law (Human Trafficking) Act 2008 amended s. 3 of the Child Trafficking and Pornography Act 1998 by substituting new subsections within it. The offence under s. 3 bears the marginal note of 'child trafficking and taking etc., child for sexual exploitation' but the 2008 Act appears to widen this by the provision of a new subs. (2) which states:
>
> > '(2) A person who –
> >
> > (a) sexually exploits a child or
> >
> > (b) takes, detains or restricts the personal liberty of a child for the purpose of his or her sexual exploitation shall be guilty of an offence and shall be liable upon conviction on indictment -
> >
> > (i) to imprisonment for life, or a lesser term and

(ii) at the discretion of the Court to a fine'.

3–104 It can be said that s. 3(2) creates an offence of sexual exploitation. It will be remembered that this was one of the recommendations of the *Law Reform Commission* but the 2008 Act has not expressly referenced this intent. The meaning of 'sexually exploits a child' is defined as:

(a) 'Inviting, inducing or coercing the child to engage in prostitution or the production of child pornography.

(b) The prostitution of the child or the use of the child for the production of child pornography.

(c) The commission of an offence specified in the Schedule to the Sex Offenders Act 2001 against the child; causing another person to commit such an offence against the child; or inviting, inducing or coercing the child to commit such an offence against another person.

(d) Inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act or

(e) Inviting inducing or coercing the child to observe any sexual, indecent or obscene act for the purpose of corrupting or depraving the child.'

3–105 Paragraph (d) would certainly seem to cover all of the situations that was [*sic*] suggested by Glanville Williams. Asking the child to undress or to touch [(the adult)] sexually must amount to invitation to engage in a sexual, indecent or obscene act. Nothing in the Act other than the marginal note suggests that this offence is restricted to situations where there is trafficking or other commercial exploitation. Obviously

marginal notes do not form part of the statute but it is something that can be taken into account by a court when deciding to interpret the legislation.

3–106 Speaking in the Dáil, Brian Lenihan TD, Minister of Justice, Equality & Law Reform, stated that it applies only to trafficked persons:

> 'The gist of the offence is the trafficking, not the exploitation. That is the essential proof in this matter. The definition of 'sexual exploitation' therefore only comes into play where a person has been trafficked for the purpose of sexual exploitation. The Act does not supply a general definition of sexual exploitation that can be used elsewhere in the law.'

3–107 It has been noted that this is not what the statute says, not least because the Act creates an offence of 'sexual exploitation' not necessarily a trafficked person is sexually exploited. However the courts may, albeit reluctantly, have to agree with this because the consequence of using it to close the loophole in sexual assault may be to widen criminal liability too far. 'Child' for the purposes of this part of the 1998 Act (as amended by the 2008 Act) is someone under the age of 18. If, therefore, a literal interpretation was given to the new provision it could criminalise matters that are not currently illegal. Let us take two examples:

Example A

A girl aged 17 is in a relationship with B, a boy aged 17. B asks A to have sexual intercourse with him.

Example B

A boy aged 16 consensually places his hand beneath B, his 16-year old girlfriend's bra and fondles her breast.

3–108 Both of these situations are currently perfectly lawful for the reasons set out in this chapter. However, in both situations surely A or B has invited or induced the other to participate in a sexual act? It would seem so and accordingly this would amount to an offence under the revised statute. Clearly that cannot have been the intention of the Oireachtas and it would seem therefore that the loophole probably remains open." (footnotes omitted)

15. Both parties to this appeal have taken up the Court's invitation to make further submissions regarding the discussion that took place during the course of the oral hearing in relation to the Gillespie passages. The approach and conclusions of both sides are very different.

16. The Director takes as her starting position the fact that Part 2 of the Criminal Law (Sexual Offences Act) 2017 now deals in very considerable detail with the sexual exploitation of children in general. She draws particular attention to s. 10 of the 2017 Act which amended s. 3(5) of the Criminal Law (Human Trafficking) Act 2008 by inserting a new definition of sexual exploitation. The essence of the change lies in separating out the concept of inducing or coercing the child to engage or participate in a sexual, indecent or obscene act from the concept of inviting the child to participate in such an act. The Director says that the effect of this is that while it remains an offence to induce or coerce a child to engage in such an act, an invitation to so engage is only criminalised if the act "would involve the commission of an offence against the child". She says that in respect of "Example A" from Gillespie, the mere invitation to engage in sexual intercourse would not be an offence in light of the fact that sexual intercourse between a boy and girl, both aged

seventeen, is not otherwise an offence. In respect of "Example B", the Director says that the act described does not amount to a "sexual act" for the purpose of the Criminal Law Sexual Offences Act 2006. There is nothing in that scenario which could be described as "inducing or coercing", and so no offence is involved.

17. On the other hand, the respondents say that if s. 3(2)(a) of the Child Trafficking and Pornography Act 1998 (as amended) has the wide interpretation contended for by the Director, both boys in the examples outlined in Gillespie would be liable to be convicted of an offence carrying a maximum sentence of life imprisonment. The respondents point out that, in their view, both boys would be subject to the rigours of the Sex Offenders Act 2001.

Decision

18. It is this Court's view that one could not, of course, be comfortable with any situation where radical changes in the criminal law, involving criminalisation for the first time of conduct that had not previously been illegal, had inadvertently taken place. However, we have scrutinised the amending legislation, and we find ourselves in agreement with the position held by the Director that this has not, in fact, occurred. Indeed, we regard the wording of the controversial provision, as amended, as being clear and unambiguous, and any residual doubts we may have harboured are dispelled by the expanded definition of sexual exploitation inserted in s. 3(5) of the Criminal Law (Human Trafficking) Act 2008 by s. 10 of the Criminal Law (Sexual Offences) Act 2017.

19. In those circumstances, we would answer the question of law referred to this Court by saying that the trial judge was incorrect in ruling as a matter of statutory interpretation that the offence of sexual exploitation is not a standalone offence, but rather requires proof that the complainant has been trafficked within the meaning of the Act.