THE COURT OF APPEAL

[228/CJA23]

The President

Kennedy J.

Burns 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 (DPP)

APPELLANT

AND

J.M.

RESPONDENT

JUDGMENT of the Court delivered on the 26th day of February 2024 delivered by Birmingham P

Introduction

1. Before the Court is an application brought by the Director pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review a sentence on grounds of undue leniency. The sentence sought to be reviewed is one that was imposed on 21st July 2023 at Wicklow Circuit Criminal Court. It was an effective sentence of three years imprisonment, with the final two years of the sentence suspended, that was imposed in respect of a count of sexual exploitation of a child, contrary to s. 3 of the Child Trafficking and Pornography Act 1998, as amended. A lesser concurrent sentence was imposed in respect of another count, a count of possession of child pornography and certain counts which had appeared on the indictment were taken into consideration.

2. At the outset, it may be said that the legal principles applicable to undue leniency reviews such as these were not in dispute between the parties, and, in reality, there has been little dispute in relation to the principles to be applied since the first such case, that of *DPP v. Byrne* [1995] 1 ILRM 279.

Background

3. The background to the case is to be found in the fact that the mother of the complainant had discovered inappropriate communications on the Instagram app on her daughter's phone between her daughter, aged 15/16 at the relevant time, and the respondent, who was approximately 36 years when their interaction by telephone commenced.

4. The "conversation" between the respondent to this application and the injured party took place on the Instagram app. It was not retained on the complainant's phone, so it was therefore

necessary for the investigating Garda, Detective Garda Suzanne Forde, to pursue the mutual legal assistance route. The stage was reached in the investigation where Gardaí obtained a warrant and searched the respondent's home. In the course of that search, Gardaí seized certain computer devices on which pornographic material was found. A Samsung external hard drive and a Toshiba laptop on which two child pornography videos and nine chat logs, amounting to child pornography, were located. The Garda witness stated that the videos were classified as category one, which was defined as: "[c]hild under 17 years engaged in explicit sexual activity or witnessing explicit sexual activity". In the course of her evidence, when asked to clarify where on the spectrum category one was placed, the Detective Garda Forde responded, "…the high end, the very highest". Some further information on the videos/movies emerges from the probation report, which refers to the fact that the two video files depicted male and female children, aged approximately ten years, engaged in sexual activity which included masturbation and sexual intercourse.

5. The child pornography in issue dated from 2007/2008. The material on the Toshiba device was last accessed in 2008, and that on the Samsung device was last accessed in 2010. The interaction with the complainant on Instagram, dealt with by way of the sexual exploitation count, occurred between June 2017 and June 2018.

6. The respondent to this application and the complainant were first in contact with each other in an online group chatroom called 'Whisper' where the respondent asked the complainant for her Instagram handle. They then proceeded to chat privately on Instagram. Hundreds of messages were exchanged and much of these might be described as general conversation. The complainant discussed her life and issues she had in her life, but an amount of the conversations was of an explicitly sexual nature. The respondent expressed a desire to take the complainant's virginity, she had told him in response to a direct question that she was a virgin. There are multiple references on the part of the respondent to a desire to meet with the complainant, but no specific arrangements to meet were ever put in place.

7. A lengthy and detailed victim impact statement was presented to the Court, which outlined the adverse consequences that the offending had caused the injured party. That this was the case was specifically acknowledged by the trial judge in the course of sentencing remarks, when he said, "[b]ut it's clear from the victim impact report that the victim has been severely affected by the offences". In the course of cross-examination of the Detective Garda, it was established that the injured party had, at one stage, indicated that she was older than she was. She had first said that she was aged 17, and when the respondent commented on this in the context of the age of consent, she said was not in fact 17, but 16 years of age. In fact, it seems she had not turned 16 at that point.

Personal Circumstances of the Respondent

8. In terms of the respondent's background and personal circumstances, he is originally from the west of Ireland, he is married and the father of a child. The Court heard that his wife was a foreign national and that English was not her first language, and it was suggested that there might, as a result, be difficulties, depending on what the Court decided, in terms of her capacity to

deal with living in Ireland. The respondent was a teacher, holding a Master's degree, and had taught for many years at a particular school in Tallaght in Dublin. When this issue emerged, he resigned as a teacher, and it was submitted on his behalf that he will not be employable as a teacher in a school anywhere in the country, and in reality, anywhere else.

The Sentence

9. The judge's approach to sentencing was to identify a headline or pre-mitigation sentence of six years in respect of the sexual exploitation count. He put the offending at the lower end of the midrange. The Director takes no issue with the headline or pre-mitigation sentence identified, and it is said that where the judge fell into error was in discounting the original headline sentence from six years to three years, and then compounding that by suspending the final two years of the three-year sentence, leaving the respondent with just 12 months to serve. In the course of oral argument, it emerged that the real issue, from the Director's perspective, is with the suspension of two years of the mitigated sentence of three years. It is said that, in effect, the judge allowed the respondent a double discount. In relation to the possession of child pornography count, where the judge had set a headline or pre-mitigation sentence of two years, the Director says that this headline sentence did not adequately reflect the nature of the offending, in particular, the nature of the material involved. While questioning the headline sentence for the offences of child pornography, as we understand it, the Director's appeal does not really challenge the actual sentence imposed.

10. Insofar as the judge had come from an initial headline or pre-mitigation sentence of six years to three to one year to be actually served, as two of the three years of the sentence were being suspended, it is said that this involved giving excessive weight to such mitigating factors as were present, including the guilty plea.

11. The Director contends that the judge had insufficient regard to aggravating factors which she says were present and which she identifies in her written submissions and are paraphrased as follows:

- The duration over which the offending occurred (one year).
- The explicit nature of the ongoing sexual conversations initiated by the respondent, and which were of a nature amounting to grooming and escalating in terms of content.
- The significant age gap between the respondent and the victim, she being 15/16 years and he 36 years of age at the date of commencement of the interaction.
- The fact that the injured party was a vulnerable young girl, and the respondent was aware of her vulnerabilities, including her mental health difficulties and self-harm issues.
- The respondent was a teacher of secondary school children and held a position of trust *vis a vis* young teenagers at the time of the offending.
- The profound impact the offending had on the victim as evidenced in the victim impact statement.
- The fact that the explicit conversations escalated over time, particularly so when, during the currency of that escalation, the respondent became aware that the victim was in fact younger than she had initially stated.

- The probation report disclosed that the respondent had demonstrated a limited understanding of the harm caused by his offending, and further, showed a limited appreciation of how he exploited the victim's vulnerability for his own sexual gratification. His emotional disconnection from the reality of his offending was of particular concern.
- The fact that he was assessed as presenting a medium risk of reoffending.

12. In the course of his sentencing remarks, the judge referred to the position of the child pornography count on which a plea had been entered and referred to the fact that the videos were in category one, the highest category. He said in relation to the sexual exploitation count, that this went on for approximately one year. He noted that the injured party was aged between 15 and 16 years, adding "[n]ow, the accused believed she was 16 after a certain stage". The judge was correct in saying that the accused believed the complainant was 16 after a certain stage, certainly the accused had been told that by the complainant, but there was a stage when the accused believed the complainant was aged 17, having been told by her that was the case. The judge referred to the difference in ages, the fact that the accused was 36 years of age at the time of the commencement of the exploitation. The judge referred to the victim impact report, which he said he had read in light of the evidence and the cross-examination, and then observed:

> "… But it's clear from the victim impact report that the victim has been severely affected by the offences. Now, in relation to aggravating factors, while the accused may not have known of the specific vulnerabilities of the injured party, he knew well from being a teacher that a child of that age who was vulnerable, and he knew the injured party was at a vulnerable age, and he preyed upon that."

Discussion and Decision

13. The judge's assessment that the accused might not have been aware of the specific vulnerabilities of the injured party might seem generous. A probation report records the accused as acknowledging his awareness of the victim's mental health difficulties and his eagerness to affirm that these difficulties predated his contact with her. In the course of exchanges, the complainant had referred to self-harm and to the fact that three years earlier, she had been diagnosed as clinically depressed. The judge then turned to mitigating circumstances and referred to the personal circumstances of the accused before the Court, he was 42 years, married with one young child, from a good family and enjoying family support. The judge said he was treating the matter as an early plea of guilty, in that the pleas had relieved the injured party of having to give evidence. Addressing the value of the plea, he made the point, echoing a submission that had been made by counsel on behalf of the accused, that had the matter gone for trial, an issue might have been raised as to the validity of the search warrant which had been issued and which had resulted in Gardaí accessing computer devices on which the child pornography was located. Again, on the child exploitation side, the judge referred to the fact that it had been necessary to go down the mutual assistance route as the messages had been deleted. The judge commented he had recently dealt with such a case and that there were a lot of technicalities that the prosecution had to go through, and the plea had saved the necessity for this. The judge then proceeded to impose the sentences, referred to earlier in the course of this judgment, and which are now the subject of

this application to review on grounds of undue leniency. The matter at issue is his decision to suspend two years of the adjusted three-year sentence. He dealt with this issue in these terms:

> "Bearing in mind the issues set out in the probation report and to incentivise and to ensure rehabilitation, I'm going to suspend the final two years of that sentence."

It is not clear to which aspect of the probation report the judge was referring. If the decision was to suspend two years of the three-year sentence in order to incentivise and ensure rehabilitation, it would seem a somewhat surprising result. The Director has pointed out there were a number of aggravating factors present in this case. Without again rehearsing all of them, we would refer to the duration of the inappropriate contact with the complainant, we would identify the fact that respondent knew, or certainly ought to have known, that he was dealing with a vulnerable complainant, and even if he did not have specific knowledge of the complainant's individual vulnerabilities, and we think he did, as a teacher, he must, as the judge observed, have known that a child of that age was vulnerable.

14. So far as the child pornography aspect is concerned, the material was placed in category one. We acknowledge that the quantity was significantly less than is often seen in these cases, but nonetheless, it was a serious matter. The Director suggests that it is a case where consecutive sentences could and should have been considered. For our part, we would not see this as a case for consecutive sentences. Accessing the material had taken place in 2007 to 2010, and a consecutive sentence, though technically available, would seem harsh. On the other hand, the possession of such material should not be ignored. If the judge was sentencing on the sexual exploitation count, then there was scope for regarding the possession of child pornography as an aggravating factor, leading to an upping of the sentence.

15. Having regard to all these factors, it seems to us that the judge, having correctly identified a headline or pre-mitigation sentence, and having appropriately discounted for the mitigation that was undoubtedly present, had arrived at an appropriate sentence of three years imprisonment. If he had left matters there, it seems to us that the sentence would have been a not inappropriate one, and not one with which we would have been minded to interfere with.

We are prepared to accept that there was some scope for suspension in order to incentivise rehabilitation. However, we are of the view that suspending two years of the three-year sentence was excessive and amounted to an error. For our part, resentencing as of today's date, as we are required to do, we are prepared to suspend the final 12 months of the adjusted sentence of three years.

Resentencing

16. Accordingly, we will quash the sentence imposed in the Circuit Court and impose a sentence of three years imprisonment, with the final 12 months of the sentence suspended. The sentence we are imposing will date from the same day as did the sentence in the Circuit Court.