



THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.
Record No 283/15

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

V

K.M

Respondent

Appellant

Judgment of the Court (ex tempore) delivered 24th of October 2016 by Mr. Justice Edwards.

Introduction.

1. In this case the appellant was convicted by a jury at Cork Circuit Criminal Court on the 25th of November, 2015 following a two day trial of a single count of indecently assaulting one M.H., on the 23rd of December, 1989.

2. The appellant was sentenced to two years imprisonment, and now appeals against the severity of his sentence.

Grounds of Appeal

3. The appellant has advanced his appeal essentially on two grounds. First it is contended that the trial judge, in passing a sentence of two years imprisonment at a time when it was widely believed that the maximum possible sentence was two years imprisonment, placed the offending conduct at too high a point on the scale of seriousness. Secondly, it is suggested that the trial judge failed to give a sufficient discount to reflect the mitigating circumstances in the case.

Relevant evidence

4. The relevant facts of the case are fully set out in this Court's recent judgment in respect of the appellant's appeal against his conviction, which judgment was delivered on the 13th of October 2016. It is unnecessary in the circumstances to repeat them.

5. In addition, at the sentencing hearing the trial judge heard evidence that the appellant had no previous convictions, that he was a married man with four adult children, that he had lost his income and was likely to lose his profession as a consequence of his conviction, that he had a number of health difficulties, and that members of his family, including his wife, children and elderly parents had been greatly affected by the case. The court was also told that he was the sole carer of his elderly father who was in bad health.

6. The sentencing court also received and took account of a character reference from a Dr John Burke, General Practitioner, who had previously employed the appellant as a *locum tenens* from time to time, and who had been friendly with the appellant for many years, testifying as to the appellant's competence as a doctor, as to his professionalism in the discharge of his duties during the times that he had worked for Dr Burke, and as to his previous good character.

7. The court also received, and heard read into the record by MH, a lengthy victim impact statement outlining the many respects in which MH had been traumatised and affected in her life by the abuse perpetrated on her by the appellant.

The sentencing judge's remarks

8. In sentencing the appellant to two years imprisonment the trial judge stated:

"[T]his is a serious case in which a man in his 30s, then practising as a doctor, abused a teenager, a teenage patient, then of 15 years of age. The actual assault was external, in that it was a feeling of her vaginal area outside of her clothes, and it occurred in the overall context of the adult being a medical practitioner attending her mother and carrying out a medical examination of the teenager herself. The events took place in and around December of 1989, at a time when the girl's mother was terminally ill with cancer. The breach of trust is very fundamental and serious. The offence was, indeed, a one-off and the accused has been convicted by a jury and therefore is not entitled to any special discount in sentence. The victim in this case had to give evidence but the trial was a short one, lasting, in effect, one day. The accused and his witnesses gave evidence and were heard by the jury and the accused, to me, has little by way of insight into the harm and damage he did, and I am not aware of him showing any remorse. His defence to me throughout his own and his wife's evidence was, "Pity me. Look how difficult life is for me," variety. I accept the evidence of John Burke, another GP, that otherwise Dr Burke found the accused, K.M., to be professional and competent in all his other dealings with him. I accept, of course, that as a result of this conviction, the accused is professionally ruined and the career that he worked so hard to build up is in tatters. He hasn't worked since 2010 and he's socially isolated. And I accept what Mr Carroll says about the financial effects on him. He will never work again in the medical field and therefore, I take it, on the evidence, that the occasion of his reoffending is removed. He's now a middle-aged man with no previous convictions and he has not come under the notice of the Courts for any other matter. He's a family man and I accept that this conviction will have serious repercussions also for his family. A custodial sentence is, undoubtedly, necessary. The accused doesn't suffer from any addictions and I have no evidence that he needs to be supervised in the community. I classify the offence as in a midrange for this type of offence; even though the groping was external and not particularly prolonged, the breach of trust was very significant. In the circumstances, I will impose a sentence of two years, backdated to yesterday.

Discussion

9. It is clear from a close reading of the transcript that the trial judge did not consider that the maximum sentence was one of two years imprisonment. Although he had received a submission to that effect from counsel for the appellant, he had received a contrary submission from prosecuting counsel who had suggested the maximum available penalty was one of ten years imprisonment. The transcript reveals that there was ostensible acceptance by the trial judge of the prosecution's submission. This was in fact prescient because although the Court of Appeal subsequently ruled in *The People (DPP) v. Maher* that the maximum penalty was one of two years imprisonment, that ruling was later overturned by the Supreme Court who held that it was in fact one of ten years imprisonment.

10. In the circumstances of this case we are not disposed to uphold the first ground of appeal. There were significant aggravating circumstances in this case, including the context in which the offence was perpetrated, the breach of trust involved and the age of the victim. Although the nature of the touching involved, it being a single incident outside of clothing and one that was not penetrative in nature, was at the lower end of the range of gravity, the overall culpability of the appellant was nonetheless significant having regard to the aggravating circumstances already mentioned, and also the psychological and emotional harm done to the victim. The trial judge was therefore correct in suggesting that the offence fell in to the mid range.

11. If a headline sentence of four years, which is at the low end of the mid range, is taken as having been the starting point, the appellant, who received a final sentence of two years imprisonment, would have received a discount of 50% to reflect mitigation. If an even higher starting point is taken then the final sentence imposed would imply that the appellant received an even higher discount to reflect mitigation. Accordingly, counsel for the respondent contends that mitigation was in fact adequately reflected particularly in circumstances where the appellant had not been in a position to benefit from the substantial mitigation that usually attaches to a plea of guilty. While the appellant was not to be penalised for having fought the case, he was not entitled to the substantial mitigation that usually accompanies a plea.

12. Notwithstanding recognition that there is some force to this argument, we consider that insufficient discount was in fact given for mitigation in circumstances where the appellant was a first time offender, was of significant previous good character and was liable to suffer the additional consequences of losing both his income and profession as a consequence of his conviction.

13. In the case of the *People (Director of Public Prosecutions) v. Aoife Maguire*, a decision of this Court delivered *ex tempore* on the 21st December, 2015, we cited with approval the case of *DPP v. Doherty* (Unreported, Court of Criminal Appeal, April 29, 2003), a decision of the Court of Criminal Appeal which is the predecessor of this Court. In that case the Court of Criminal Appeal was dealing with a garda who had been convicted of an offence of corruption. In passing a sentence following a successful undue leniency application, the court per Hardiman J. commented as follows:-

"We also bear in mind the factors which were recited on several occasions yesterday and acknowledged in the case of *DPP v. Egan* that is to say that in dealing with a person without previous convictions and indeed of positive previous good character, if the court considers as we do, that a custodial sentence is required in the public interest, such a sentence need not be unduly prolonged because it is the fact of the sentence rather than its duration which is the principal effect."

14. We also approved of the case of *DPP v. Egan* [2001] 2 ILRM 299 referred to in the quotation from Hardiman J. That was also a decision of the former Court of Criminal Appeal and one in which they approved of certain remarks by Lord Justice Lawton in the English case of *R. v. Sergeant* [1975] 60 Crim App R 74 where he had commented:-

"For men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time."

15. We consider that those remarks are apposite in the circumstances of this case. Having regard to its particular circumstances we consider that insufficient discount was in fact given for mitigation. The important consideration in this case, it seems to us, was that a custodial sentence should have been imposed; but we do not consider that it required to be unduly prolonged having regard to the significant factor that he was a first time offender, having regard to his age, previous good character, and the fact that this was a one off incident, and having regard to the very significant additional consequences that he will suffer, admittedly through his own fault, but will nonetheless suffer and that is the fact that he will lose both his income and his profession as a consequence of his conviction.

16. In the circumstances, therefore, we are disposed to quash the sentence of two years imprisonment imposed by the Circuit Court judge and we will now proceed to re-sentence the appellant afresh. In accordance with our usual practice, we have invited counsel for the appellant to submit to us on a contingent basis any materials that he would wish us to take into account in the event of re-sentencing. He has furnished us with, once again, the letter from Dr. Bourke which is dated the 15th April, 2015 and we will take that into account. In addition he has furnished us with a letter of a Ms. Margaret O'Keeffe, dated the 14th December, 2015, concerning the situation with respect to his son David. We have also been furnished with a short report from a Dr. Claire McCarthy, concerning the situation with respect to the health of his elderly parents. We will take all of those matters into account as well as all of the other matters in mitigation urged by counsel for the appellant on the court below.

17. Taking all of those matters into account we will, in substitution for the sentence of two years imprisonment imposed by the court below, now sentence the accused to twelve months imprisonment to date from today's date, but with credit to be given for any time served heretofore.