



THE COURT OF APPEAL

Birmingham J.  
Mahon J.  
Edwards J.

Appeal No.: 45/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

D. O'D (No. 2)

Appellant

**Judgment (ex tempore) of the Court delivered on the 10th day of December 2015 by Mr. Justice Mahon**

1. The appellant was convicted on 27th April 2012 at Dublin Circuit Criminal Court of eight counts of sexual intercourse with a mentally impaired person, Miss A, on dates between July 1998 and July 2003 contrary to s. 5 of the Criminal Law (Sexual Offences) Act 1993. The appellant's appeal against his conviction was dismissed by this court in a judgment delivered on 19th November 2015.

2. This judgment relates to the appellant's appeal against his sentence of five years imprisonment on each count. The appellant was granted bail on conditions by the Court of Criminal Appeal having served over five months of his five year sentence. Following the dismissal by this Court of the appellant's conviction appeal, the appellant was returned to custody on 24th October 2015 and remains in custody since then.

3. The background facts of the case are set out in this Court's judgment of 19th November 2015. In very brief summary, the appellant engaged in sexual intercourse with Miss A, his cousin, on dates between July 1998 and July 2013 in various locations including two separate addresses in Dublin, in a wooded area in Co. Dublin, and in the Imperial hotel in Cork. The conviction of the appellant was on the basis that at the time of these events, Miss A was mentally impaired. She was then in her late twenties/early thirties while the appellant was in his late thirties/early forties. The appellant was at all times married and has one daughter.

4. It is submitted on behalf of the appellant that the learned sentencing judge fell into error by:-

- (i) treating the mental impairment of the victim in itself as an aggravating factor rather than simply a requisite ingredient of any offence where a person is convicted under s. 5 of the Criminal Law (Sexual Offences) Act 1993.
- (ii) treating the level of mental impairment as an aggravating factor.
- (iii) failing to consider the range of penalties applicable, then ascertaining the location within that range of the case including aggravating factors, and after such examination has been completed, considering the relevant mitigating circumstances and discounting for them.
- (iv) failing to sufficiently credit the appellant with the fact of, and the extent of, his admissions, his remorse, the absence of any prior convictions, the manner in which the trial was conducted, and the effect on the appellant of a custodial sentence having regard to his age and family circumstances.
- (v) failing to attach sufficient to the fact that the appellant carried a low range of risk of future offending..

5. In the course of her sentencing judgment, the learned sentencing judge identified, as she saw them, the following aggravating factors:-

- The fact *"that the injured party, obviously, was mentally impaired, and the level of mental impairment, and the level of support that she needed, and her particular circumstances and particular way that the mental impairment impinged on her ability to form any relationship"*,
- the fact that the incidents were planned and pre-mediated over a period of five years,
- the appellant's position of trust, and
- the fact that on a number of occasions Miss A was given alcohol prior to the assaults.

6. The learned sentencing judge went on to identify the relevant mitigating factors, including:-

- *The fact that the appellant has no previous convictions,*
- *the appellant's early admissions and plea of guilty,*
- *the manner in which the trial was conducted, including the limited extent to which the victim was subjected to cross examination,*
- *the appellant's expression of remorse,*
- *the appellant's level of family and professional support, and*
- *the appellant's personal circumstances and the testimonials submitted to court on his behalf.*

7. The court has had the opportunity to view the entire video recording of Miss A's evidence to the trial court, including her cross examination by Mr. Farrell (for the appellant). It is quite clear that Miss A's examination and cross examination was conducted in a

particularly humane and considerate manner, and well befitting her vulnerable status. Counsel for both the respondent and the appellant are to be complimented in this regard. It is very clear from the manner in which Miss A was questioned by Miss Biggs (for the respondent) and by Mr. Farrell that the appellant was forthright in his acknowledgement that the incidences of sexual relations with Miss A, (and which are the subject of these proceedings) had indeed occurred, and that, in general terms, Miss A's account of those events was not being challenged by the appellant.

8. The benefit to the court in viewing the entire of Miss A's evidence was considerable. Its understanding and appreciation of the extent of Miss A's mental impairment has been rendered considerably clearer than if it had not done so. Miss A came across as an individual who, although possessed of a vulnerable personality, is nevertheless quite articulate, able to give clear and precise answers to questions put to her, and has a recollection of what had occurred with the appellant. Her recall and memory going back over a number of years was good. It was evident that she had a good work history, albeit in sheltered type employment, that her work was important to her, that she had undertaken an important role in caring for her elderly parents until their death in recent times, and that she was trusted by her siblings to do so. It was also apparent that Miss A was capable of a significant degree of independent living, including the ability to travel by bus and train on her own. She also maintained that she had had a number of boyfriends over the years, and was currently in a five year long relationship with her current boyfriend. She struck the court as a person with a mild mental impairment. It is of course the case that Miss A, and her mental capacity and personal circumstances were well known to the appellant who was her cousin. It is therefore not the case that the appellant was in any way mistaken in his understanding of her mental capacity, and indeed no such case is made by him. He was in a position of trust towards her, and the fact that he abused that trust in the manner outlined, and in respect of which he has been convicted makes this a serious case.

9. The court is however satisfied that there was an error of principle in the learned sentencing judge's decision to treat Miss A's mental impairment as an aggravating factor *per se* as she appears to have done. Mental impairment constitutes an ingredient in the offences in respect of which the appellant has been convicted. Mental impairment must, by definition, be present in every manifestation of the offence. The mere fact that she was mentally impaired should not therefore be treated as an aggravating factor in and of itself.

10. However, in assessing where, on the range the offending behaviour in the particular case lies in terms of its seriousness, the sentencing judge would have been entitled to have regard, not to the fact of mental impairment *per se*, but to the degree to which the victim was mentally impaired as that could bear on culpability, although it is capable of cutting both ways. In general, the more mentally impaired a victim is, and consequently the more vulnerable he or she is, the greater will be the culpability of the offender. Conversely, the milder the victim's mental impairment, the lesser the offender's culpability will generally be. The fact that Miss A was functioning at a relatively high level notwithstanding her mental impairment was something that required to be properly taken into account in assessing the seriousness of the offence, and it is unclear that it was properly taken into account.

11. A further criticism advanced on behalf of the appellant is that the learned sentencing judge did not locate the offence on the spectrum of gravity, before indicating what allowance was being made for the mitigating factors. This court agrees with that observation, and repeats its previously expressed view that to do so represents best practice.

12. If having allowed for these mitigating factors the learned sentencing judge arrived at a sentence of five years, it must reasonably follow that her starting point, before providing for such mitigating factors, was considerably higher.

13. The court is also concerned that the learned sentencing judge did not attach sufficient weight to the manner in which the appellant participated in his trial, and particularly, the extent to which counsel for the respondent was permitted to examine Miss A without interruption or objection from the appellant's counsel, and the relatively low key cross examination of Miss A by the appellant's counsel. Undoubtedly, these are matters which could reasonably be expected to have significantly reduced the stress of the proceedings for Miss A, and which deserved specific recognition in the sentencing of the appellant.

14. Having found there to be the errors of principle outlined above it is now necessary for this Court to sentence the appellant afresh. The appellant received a sentence of five years imprisonment. It is the view of this court, having regard in particular to the matters outlined above and having considered also the letters submitted this morning and the very positive Governors Report, that the appropriate sentence is one of 3 years imprisonment but with the final eighteen months of that term suspended for a period of two years and the Court will therefore now impose that sentence in substitution for the sentence imposed in the Circuit Criminal Court, and will direct that he be given credit for time already spent in custody, and which it determines to be eight months.