THE COURT OF APPEAL

[250 CJA/17]

[259/17]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECTUIONS

RESPONDENT

AND

KAMIL LUKASZEWICZ

APPELLANT

JUDGMENT of the Court delivered on the 1st day of March 2019 by Birmingham P.

1. On 14th July 2017, after a contested trial in the Central Criminal Court, the accused was found guilty by a majority verdict of the offence of rape. On 23rd October 2017, he was sentenced to a term of five years imprisonment with the final two years of that sentence suspended on certain terms and conditions. The Court also provided for a post-release supervision order.

2. The accused lodged an appeal against conviction and sentence, and in turn, the Director of Public Prosecutions has sought to review the sentence imposed on grounds of undue leniency. All matters were listed before the Court, but at that stage, it was indicated on behalf of the appellant that he was withdrawing the appeal against conviction. Thus, this Court has been faced with what are, in effect, cross-appeals, the accused contending that the sentence imposed was too severe and the Director contending that the sentence was unduly lenient. It is in these circumstances that for convenience, Mr. Lukaszewicz is referred to as the accused throughout this judgment.

3. The accused in this case was born on 16th May 1998, and so was sixteen years and two months on the date of the rape. The injured party was born in May 1999, and so was just a year younger than the accused.

4. On 24th July 2014, the accused invited the injured party to go to a 'session' that was being held that evening at a house of a friend of his. The accused and injured party had been in contact over Facebook Messenger over a number of weeks starting in May 2014. Following Facebook contact, they made arrangements to meet up at a local supermarket early on the evening of 24th July 2014 with a view to going on from there to the house where the 'session' was to be held. The parents of the young person who lived in the house where the session was to take place were away on holidays. The house party was attended by a number of teenagers and young adults and it appears that the injured party was one of the youngest in attendance. When she first arrived at the party, she took three shorts of vodka in quick succession and was then given a glass of vodka with some Coke in it. She was not used to drinking alcohol and she felt unwell after these drinks.

5. There was evidence that she was seen out in the garden of the house, that she was very drunk and that her head was wobbling. She was observed to have vomited outside. There was evidence that after this, she was brought back into the house by the accused and that she lay down on a couch, lying against him. According to observers, she was cuddling and some said that she kissed him. There was evidence that when she got up to go upstairs to lie down, that she vomited again as she got up off the couch. She was observed vomiting again on the stairs and there was evidence that she was unable to walk up the stairs unaided as she was wobbling, vomiting, and had to be supported by the accused. The accused said that he brought her upstairs to lie her down in an effort to assist her. He brought her, initially, to a box bedroom where she was put lying on a single or camp bed. There was evidence that other young people at the party became concerned as to her whereabouts and went upstairs. They found the door to the box room closed. They banged on the door and the accused replied that he was looking after her and that he would be down later. There was evidence that she was sick again in that room also. Subsequently, however, the accused brought her to the main bedroom in the house where there was a double bed. This was the en suite bedroom of the absent householders.

6. The evidence of the complainant was that she remembered being in the room, that she remembers being drunk, that she remembers feeling weak and unable to move, that she fell asleep because she was so drunk and that the accused was on the bed with her. Her next recollection was that when she woke up, she was face down on the bed, the appellant was on top of her and was penetrating her vagina with his penis. The injured party said that she was crying and asked him to stop, but that he continued with sexual intercourse.

7. There was evidence that some of the young men who had been downstairs became concerned about her as they had heard footsteps when she moved from the box room to the main bedroom. They came back up the stairs looking for her and banged on the door of the main bedroom to gain entry. There was also evidence, some of it conflicting, that a number of the young people went out onto a roof with a view to gaining entry through a window, but in any event, ultimately, some of them got into the bedroom and the accused left the room. The complainant was described as being in a comatose state.

8. When the matter was reported to the Gardaí and the accused was interviewed, he contended that the sexual activity with the complainant was consensual. The defence case mounted at trial was to the same effect.

9. At the sentence hearing, senior counsel on behalf of the accused, who, at that stage, was not the senior counsel who appeared at trial, canvassed the possibility of a non-custodial disposal. Having reviewed the facts of the case, the sentencing Judge commented that the circumstances in which the offence occurred were significant because both parties were minors in the eyes of the law at the time the offence was committed. The accused, if prosecuted at the time, would have been dealt with under the Children Act 2001. In a situation where the sentence hearing was taking place more than three years after the offence had been committed, the Judge referred to the decision of the Supreme Court in the case of *DPP v. Donoghue* [2014] 2 I.R 762, where Dunne J. had spoken about the special need for expedition in cases involving minors. The Judge referred, too, to the decision of this Court in the case of *DPP v. JH* [2017] IECA 206. He felt that had the appellant been sentenced at a point in time close to when the offence was committed, that he would have been sentenced to a period of detention. Had the offence been committed by an adult, he would have seen it as a mid-range offence likely to attract a sentence in the region of seven years imprisonment. The Judge then proceeded to impose the sentence that he did which is now the subject of challenge from both sides.

10. In contending that the sentence was too severe, counsel on behalf of the accused draws attention to the provisions of the Children's Act and says that the sentence imposed, and in particular, the net sentence of three years to be served, interfered with the educational progress of his client to an extent that was greater than necessary. By the time the matter came before the sentencing Court, the appellant was pursuing a third-level degree at Maynooth University. Counsel on behalf of the Director acknowledges that particular considerations arise when a Court is sentencing a minor, or in this case, sentencing in respect of an offence committed by a child. However, she says that the Judge over-focused on the age of the offender and failed to have regard to the gravity of the offence. She stresses the fact that there were significant aggravating factors present, instancing the very vulnerable and drunken state that the injured party was in, something which was obvious to many of those at the house party. She points out that there was an element of planning involved from an early stage in the evening and that this was not a case of an adolescent losing control to passion, as passion took hold. She points out that given that the case was contested on the basis that the complainant had consented, and indeed initiated the sexual activity, that the mitigation which a plea of guilty would have provided is wholly lacking.

11. Counsel on behalf of the Director in the course of her submissions, told the sentencing Court that this was undoubtedly a very difficult case. This Court would agree with that observation. Had there been a plea of guilty at an early stage, counsel might well have been in a position to minimise the disruption of the accused's education which a significant custodial sentence would cause, though a custodial sentence of some length was always likely. If, on the other hand, the accused had been some years older, then a much more severe sentence would have been inevitable. However, in the circumstances that prevailed, in the Court's view, the task of sentencing was approached by the High Court Judge with conspicuous care and attention.

12. In the view of the Court, the significant aggravating factors that were present in what was by any standards a very serious case, meant that there was no scope for a less severe sentence. For that reason, the Court has no hesitation in dismissing the appeal against severity.

13. In the case of the undue leniency aspect, a somewhat more severe sentence might well have been considered in this case. On an assessment of the gravity of this offence; the appellant's moral culpability was high in light of the element of planning, the injured party's vulnerable condition, his persistence in engaging with her sexually notwithstanding her condition and continuing to so despite confrontation by others. However, it is necessary to take into account in this assessment not only the general circumstances of the offence but also the particular circumstances bearing on moral culpability which are particular to an offender. In the instant case, the accused's age is an extenuating factor where the Court was being called on to sentence a 19-year-old pursuing a third-level degree course for an offence committed as a sixteen-year-old, we do not believe that the balance struck by the sentencing Court was an impermissible one.

14. Accordingly, we will also dismiss the undue leniency application.

15. In summary, then, both applications before the Court are refused.