



THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

122CJA/16

IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

The People at the Suit of the Director of Public Prosecutions

Appellant

V

Viktors Zimants

Respondent

JUDGMENT of the Court (ex tempore) delivered on the 24th day of February 2017 by Mr. Justice Birmingham

1. This matter sees the Director of Public Prosecution seek to review sentences imposed on Mr. Zimants, the respondent, on grounds of undue leniency. The sentences sought to be reviewed were imposed on 25th April, 2016 and were imposed in respect of counts of aggravated sexual assault, s. 4 rape (2 counts: one oral; one anal) and false imprisonment. The sentence sought to be reviewed is one of 7 years imprisonment.

Background

2. The background to this case arises from a very serious incident that occurred on 17th November, 2014. On that occasion the victim, referred to as Ms. D.B. in this judgment, left her apartment at Abbey Street, Cahir, Co. Tipperary, conducted some business around the town and then returned there, where she found her male flat mate there drinking with another man that she did not know whom she has referred to as "the Russian". Mr. Zimants, the respondent in this application is "the Russian". The injured party in this case, Ms. D.B. is a 40 year old Lithuanian lady. On this occasion, when she returned to her flat she went to her bedroom which she was unable to lock, not having a key though she did make some effort to block the door. The accused entered her room and proceeded to attack her. She told her attacker that she had a boyfriend in the hope that this would cause him to desist because of the possibility that the boyfriend might arrive on the scene but this did not work. Instead, her attacker hit her on the left side of the head. When she shouted for help, he struck her on the right side of the head. He tore off the leggings she was wearing, and then tore off her top. He then proceeded to sexually assault her in various ways, first digitally penetrating her anus. She asked him to stop, she was crying but he persisted. In the statement of evidence of the injured party which was opened to the Court on the sentence hearing she describes her attacker as having attempted to have sexual intercourse and that he was at this stage licking her face, lips and body. He then attempted anal penetration and then followed that with oral penetration. He again had anal sex involving digital and penile penetration. It appears that, in all, the incident lasted some 25 minutes.

3. The injured party, understandably, felt very unwell and asked her attacker to let her leave the room and let her go and see a doctor but he said that he would assist her like a doctor would. The injured party then asked to be allowed to go out of the room as she needed to go to the toilet but she was told by her attacker to use the mattress as her toilet. Eventually the respondent got dressed and threatened his victim "not to tell anyone or ask for help and not to go to the Garda station". He told her that if she did that he would "get her out from the Earth" and that she would "see what would happen". He then told her "If I want to have sex with you I will, I will fuck you if I want."

4. After this incident the injured party ran to a friend's house where contact was made with the Gardaí. When the Gardaí arrived she was in a very distressed state. There were marks and bruises all over her face from the beating she took in the course of the rape and sexual assault. She was brought to the Sexual Assault Treatment Unit in Waterford Regional Hospital. Dr. Sliney from that unit reported as follows:-

"This is the examination of a vicious physical and sexual assault on this lady, who is in a country where she is not fluent in language and has no family members. She is intimidated by a flat mate first, goes on to suffer at the hands of his colleague while he apparently stands by. This lady was gravely assaulted. She was repeatedly beaten on the face, head and neck area. She was held by the throat to the point of fearing that she would lose consciousness. Bruise marks on face, forehead and nasal bridge area are consistent with ferocious beating. Scalp was so tender that it was very difficult to get combing samples. She had significant bruising to the left hand side, lower back and abrasions to the right side of her lower back, consistent with forced holding and severe repeated blunt hitting. She had a tear to perianal area and swollen lower anal canal. I attempted digital examination but had to stop due to discomfort. I then was able to pass proctoscope to 1.52 cm as tissues of swollen, bruised and superficial tears were visible. She was unable to stand or walk after the admission and was extremely stiff. I arranged for admission to Gynaecology Unit for observation and I arranged for our team to look after her after 8 a.m. Thursday on 18th November, 2014. This lady was severely beaten and traumatised by the events of the day and also had been rectally violated. The findings at the time of examination were consistent with the history of recent alleged physical and sexual assault."

5. There was evidence at the sentencing hearing that the victim was at a particularly vulnerable stage in her life. Her boyfriend had committed suicide and she had discovered the body. Following the death of her boyfriend, Ms. D.B. experienced financial hardship and it was for this reason that she ended up renting a room in the apartment where she did as she was unable to afford an apartment of her own.

6. As far as the background and personal circumstances of the accused are concerned, he was a Latvian national, a Russian speaker and was born in 1969. He had been some 4 and a half years in Ireland and was the father of two children, an 18 year old girl from a previous relationship and a boy aged 4 years. At the sentencing hearing, a number of letters/testimonials from family members were produced. Although he was in the country some four and a half years, he had only limited English, a point to which the sentencing

judge referred.

7. At the time of the incidents the subject matter of this review application, the accused/respondent was on bail in respect of an offence of assault causing harm, a stabbing incident which occurred on 24th November, 2013. Following the present incident he fled Cahir and was arrested shortly thereafter in Limerick. The plea in mitigation stressed the fact that it was a case where there had been a plea of guilty. It was accepted that it was not at the earliest possible stage but it was pointed out that it was soon after the legal team that represented Mr. Zimants on the sentence hearing became involved. It was pointed out that he spoke limited English and would be serving his sentence which it was recognised was inevitable, away from his family. It was pointed out that the one significant previous conviction which was the matter that had been dealt with in Clonmel Circuit Court and was the matter that he was on bail in respect of at the time these offences were committed had been dealt with by way of a suspended sentence of three and a half years. So the question of consecutive sentences did not arise.

The judge's sentencing remarks

8. The judge approached the question of sentence with considerable care and thoroughness, putting the matter back to take time for consideration. In the course of the sentencing remarks, the judge referred to the plea of guilty and the circumstances in which it was entered, to the fact that the accused was a foreign national with very limited English, the judge referred too to the fact that there were some indications of some efforts at rehabilitation in prison. The judge then referred to a number of comparators that had been referred to by defence counsel in the course of her submissions. The judge then said that he took the view that the appropriate starting point for the sentence lay somewhere between 12 and 15 years. He indicated that the accused was, of course, entitled to a reduction having pleaded guilty. The judge indicated that were it not for the fact of the accused being a foreign national that he would have been looking at a sentence of 13 years which would be reduced to 8 but he would reduce it by a further year because of his status as a foreign national. The DPP takes issue with this approach and says that what has happened is that in a case where the plea of guilty was not at the earliest opportunity there was a reduction from 13 years to 7 years, a 46% reduction. The DPP submits that 13 years was a lenient starting point given the seriousness of the offence but that the reduction from 13 years to 7 years was clearly excessive.

9. This Court is in no doubt that this was an offence which was very much at the high end of the range. While opportunistic rather than premeditated, at the sentence hearing emphasis was placed, and this happened again today, on the absence of premeditation. It nonetheless involved very serious sexual offending committed in various different forms. The level of violence involved was shocking. The Court agrees with the observations made on behalf of the Director and moving party in relation to the attempts to humiliate, to degrade and to overwhelm. In these circumstances, the starting point of 13 years was a lenient one.

10. Now, it is the case that from any starting point identified there had to be a reduction. It could not be in dispute but that the plea, even if not at the first possible opportunity, was of real value and a value at a number of levels. The victim was saved having to testify which, had she been required to do so, might have involved her travelling back from Lithuania. The necessity for a trial was avoided. That meant there was a saving in terms of court time and a freeing up of scarce resources. However, it must also be said that, in considering just how much value is to be afforded the plea, it was necessary to have regard to the fact that the case was indeed a very strong one. There was coercive DNA evidence, there was CCTV footage showing the accused entering the apartment where the offences occurred, the extent of the obvious injuries experienced by the injured party precluded the possibility of any defence based on consent. It is also the case that the fact that the person before the Court was a non national with a poor command of the English language was a matter to which it was proper that regard should be had.

11. However, in the Court's view, taking all those matters into account and giving the maximum credit that is proper, that could not result in the sentence being reduced to one below 10 years and indeed a higher sentence than that might well have been considered. It is the Court's view that the minimum sentence that would meet the case would have been 10 years imprisonment. However, in a situation where Mr. Zimants is now being resentenced in a situation where his sentence is being increased, where the release date to which he would have been working is being withdrawn from him, the Court feels that some limited amelioration from that is possible. In taking that view about the possibility of amelioration, the Court has regard also to the fact that it was presented today with a report from the prison authorities indicating that he is doing well in custody. The combination of that report and the fact that this is a situation where the Court is resentencing causes the Court to believe that it is justified in reducing the sentence that it regards as appropriate, of 10 years to one of 9 years imprisonment.

12. In summary, then, what the Court will do is it will substitute for the sentence of 7 years imprisonment imposed in the Central Criminal Court a sentence of 9 years imprisonment. The sentence will obviously date from the same day as in the court below.