THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

Record No: 2016/99

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

V

O. R.

Respondent

JUDGMENT of the Court delivered 2nd March 2017 by Mr. Justice Edwards.

Introduction
1. The appellant was convicted on the 25th of February by a majority jury decision (11/1) in respect of an offence of sexual assault of contrary to s.2 of the Criminal Law (Rape)(Amendment) Act 1990 as amended by s.37 of the Sex Offenders Act, 2001.

2. He was sentenced to four years imprisonment to date from the 25/02/2016, with the last eighteen months of the said sentence suspended upon conditions.

3. The appellant now appeals against the severity of his sentence.

The Relevant Facts
4. On the evening of the 30th of April 2015 the appellant O.R., a male, and the injured party L.D., a female, had been drinking in a local pub and playing pool. They later returned to the injured party's house and continued drinking a large quantity of alcohol with a third party into the early hours of the 1st of May. At some stage during the night, the third party went upstairs to bed. The appellant made sexual advances on the injured party, putting his foot on her chair, pulling it over and attempting to kiss her. The injured party declined these advances, telling him that she had a boyfriend. She left bedding downstairs on the couch for the appellant to sleep on before going upstairs to bed herself.

5. Some period of time later, the injured party woke to feel fingers in her vagina. Initially thinking it was her boyfriend, she momentarily encouraged this behaviour, before realising it was the appellant. She asked the appellant to leave and called her parents. The appellant had gone downstairs but didn't leave the house until the injured party's parents arrived. The injured party attended at a Garda Station in the morning where she was attended to by Garda Fiona O'Keefe who arranged a medical examination with a Sexual Assault Treatment Unit. A clinical nurse conducted a full examination and noted an abrasion on the right labia minora at the 9 o'clock position consistent with the history given. On the 20th of June the appellant was arrested and interviewed. He was co-operative to a degree. However, his account was exculpatory to the extent that he maintained that the injured party had been agreeable to his advances, and had in effect had consented to them.

The Impact on the Victim
6. In a victim impact statement read to the Court by Garda O'Keefe, the injured party told the Court of the consequences the assault had had on her. She told the Court that she no longer felt at ease in her own home. She moved to her parents' house for a number of days after the incident, but moved back to keep her six year old daughter in a consistent routine. For four months afterwards, she slept on a mattress in her daughter's room with a knife under her pillow. She applied to the local authorities to move house and rarely left the house alone. She was prescribed anti anxiety medication and antidepressants by her GP and began drinking heavily. Mr R has family in her estate and she fears meeting him. She avoids leaving the house unnecessarily and cannot visit her housebound mother any longer. The impact of the assault was further compounded by the fact that many in her circle of friends disbelieved her, and this is all the more difficult because she lives in a small town. The prospect of a trial was also deeply upsetting to her. She attends counselling and continues to suffer flashbacks and nightmares and suffers mental health difficulties.

The Appellant's Personal Circumstances
7. The appellant had, at the time of sentencing, 28 previous convictions. Of these, 11 related to public order, five to offences under section 3 of the Misuse of Drugs Act 1977, one to section 15 of the Misuse of Drugs Act 1977, seven to road traffic offences, one to litter and two to criminal damage. These various convictions dated back as far as 2002 and until as recently as March 2015 when he was convicted of the drugs offences. The appellant's family circumstances are relatively normal. At the time of sentencing, his parents and sister were all employed and living in north of the same county as the appellant lives in. Though at the time of trial he was unemployed, he has some work history, having worked as a plasterer from time to time after leaving school at age 14 to pursue an apprenticeship. Testimonials from previous employers indicated that they would be happy to employ him again.

The Sentence Imposed
8. In sentencing the appellant, the sentencing judge was keen to emphasise that alcohol consumption did not excuse the incident. He accepted the serious and traumatic impact on the victim. However, he noted that while the injured party had stated that she had been called a liar by certain persons as she walked down the street, the appellant could not be blamed for the actions of others. The sentencing judge rejected any contention that the injured party had indicated any form of consent, accepting that she was not in a position to do so as she was asleep and believed the appellant was her partner. As soon as she realised who it was, she told him to stop and get out. The sentencing judge described the assault in the following terms:

> *"He embarked on a stealthy sexual assault on a sleeping woman. It is a sneaky, it is a despicable crime and he knew full well when he went into her room and she was asleep that there was not the slightest shred of consent or encouragement or anything of that nature."*

9. The sentencing judge laid emphasis on the appellant's previous convictions, stating that "*when you encounter the criminal law you encounter it in all its awfulness"*. He went on to say he was unimpressed at the appellant's having given himself in for interview given his tone during that interview and the fact in the course of it he had made a *"gratuitous"* and *"demeaning"* reference in relation to the injured party. This was taken as exhibiting a poor attitude on the part of the appellant, and that he *"just simply didn't care."* The sentencing judge observed there had been a total lack of remorse.

10. In light of these circumstances, the sentencing judge declined to place the offence at the lower end of the scale as counsel for the appellant had encouraged him to do. Instead, he placed it in the middle of the scale, and sentenced the appellant to 48 months of imprisonment, with the final 18 months suspended for three years. On top of a condition that the appellant keep the peace and be of good behaviour for the three year period of his suspended sentence, the sentencing judge ordered that there be no contact whatsoever with the injured party, including sight.

Grounds of Appeal
11. The appellant appeals on the following grounds:

i. The sentencing judge erred in failing to take full account of evidence in mitigation.

ii. The sentencing judge erred in handing down a sentence which was disproportionate in all of the circumstances.

iii. The sentencing judge erred in placing an excessive emphasis on the previous convictions of the appellant in particular in circumstances in which the said convictions were for offences which were not of the same nature or type.

iv. The sentence did not take account of the retributive effect of the loss suffered by the appellant by reason of his conviction with particular reference to his loss of standing within his family and the community.

v. The Court did not have due regard to the good behaviour of the appellant in the period since the commission of the offence.

vi. The Court did not in structuring the sanction have adequate regard to the rehabilitation of the appellant.

The Appellant's Arguments
12. In relation to the first ground listed above, the appellant submits that the sentencing judge failed to consider a number of relevant mitigating factors. These were: that the assault involved no degree of violence or force and once asked to desist he left the room; the references from previous employers; the retributive effect of a conviction for sexual offences and the notification requirements under the Sex Offenders Act 2001; the fact that the appellant is capable of working productively and has a trade; and the fact that he attended the Garda Station without compulsion.

13. In relation to the second ground, in arguing that the sentencing judge erred in setting the headline sentence at too high a place along the scale, the appellant relies on the judgment of Finnegan J in *The People (Director of Public Prosecutions) v Sean Canniffe* [2012] IECCA 2. In that case, the respondent had pleaded guilty to a sexual assault in similar circumstances and was sentenced to two years, the entirety of which was suspended. €20,000 was also proffered and accepted as a token of remorse and the respondent was of previous good character. On appeal against leniency, the Court of Criminal Appeal increased the sentence to one of four years, but suspended the sentence in its entirety. The appellant submits that *Canniffe* was arguably more serious than the present case as the victim's partner had been present and there were not one but two assaults.

14. In support of the third ground of appeal, the appellant relies on a number of passages by Mr Thomas O'Malley in his well regarded textbook on "Sentencing Law and Practice" (2nd Ed), to the effect that a Judge should place greater weight on previous convictions for similar offences, but should be less inclined to treat convictions for unrelated minor offences as particularly aggravating. The appellant asserts that the sentencing judge erred in placing excessive emphasis on the appellant's previous convictions, none of which pertained to sexual offences.

15. In relation to the remaining three grounds of appeal, the appellant submits that though rehabilitation is a well settled element in Irish sentencing law, the sentencing judge made no reference to the principle. He further submits that there was no evidence of any misbehaviour in the period subsequent to the offence pending trial. Additionally, the sentencing judge failed to consider the retributive effects of notification requirements under the Sex Offenders Act 2001 and the loss of standing he will suffer within the community.

The Respondent's Arguments
16. In response to the appellant's submission that the sentencing judge failed to take relevant mitigating and aggravating factors into account and also in response to the contention that the judge failed to consider the retributive effect of his sentence, the respondent contends that a sentencing judge is not obliged to go through each and every mitigating and aggravating factor, as recognised by this Court in *The People (Director of Public Prosecutions) v Walsh* [2014] IECA 10. Given that the appellant's counsel identified the relevant mitigating factors and a suspension of eighteen months was granted, the mitigating factors were in fact identified, considered and taken into account.

17. Responding to the appellant's reliance on *The People (Director of Public Prosecutions) v Canniffe* to demonstrate that the sentence imposed was disproportionate, the respondent submits that such reliance is misplaced. Significantly, in that case the defendant pleaded guilty; €20,000 was proffered and accepted as a token of remorse; and the defendant was of previous good character. None of these powerful mitigating circumstances were present here, it is submitted, and therefore *Caniffe* is legitimately distinguisable. In fact, the respondent contends that *Canniffe* supports the headline figure of four years on account of the similar type of assault.

18. Regarding the appellant's previous offences, the respondent notes that half of his previous convictions came from within the five year period preceding the offence, and there was no significant period free of criminality as the appellant asserts. Secondly, while all his previous convictions were dealt with in the District Court, it cannot be contended either that the previous offences were minor. Notwithstanding a lack of similar type convictions, there is no rule of law that mandates a sentencing judge to completely disregard previous convictions. In relation to the lack of offending or misbehaviour in the period between the time of the offence and the sentencing date, the respondent notes that this is a relatively short period of less than a year, and the appellant should not be given credit for any lack of offending behaviour in that time.

19. In response to the appellant's assertion that the sentencing judge erred in failing to provide for the appellant's rehabilitation, the respondent points to the fact that by suspending a portion of the sentence, the judge in fact did make provision for the appellant's rehabilitation. Though no express reference was made to rehabilitation, the sentencing judge nonetheless gave concrete effect to the principle that a portion of the sentence may be suspended to encourage or incentivise a defendant's rehabilitation.

Analysis and Decision
20. At the oral hearing in this matter counsel for the appellant indicated at the outset that his client was content to confine his appeal to grounds (i) to (iii).

21. In relation to the first of those grounds, namely that the sentencing judge erred in failing to take full account of evidence in mitigation, we do not consider that the transcript bears this out. The sentencing judge having determined upon a four year headline sentence, then proceeded to suspend eighteen months of it. This was generous having regard to the limited mitigation that was in fact available. There had been no plea of guilty in the case which would, if it had been proffered, have provided substantial mitigation. Equally, the appellant had a significant previous criminal record. While none of the previous convictions were for the same or similar type of offending, and therefore the record was not an aggravating circumstance, its existence still meant that the appellant was not entitled to the substantial mitigation that is normally afforded to a person of previous good character. Moreover while there had been some co-operation it had been limited, and as the judge commented the tone of some of the remarks made at interview, which tended to disparage the complainant, were not indicative of remorse.

22. As counsel for the appellant conceded when pressed on the matter by a member of this Court, the sentencing judge did in fact allude to such matters as were available as mitigation including the appellant's age, his trade and his work record, his family circumstances, his skill as a boxer and the adversity of a hand injury that had caused him to have to give that up, and such co-operation as he afforded.

23. We reiterate that the eighteen month effective discount, which represented a 37.5% discount, was generous in the circumstances of the case and we find no error of principle in regard to the discount for mitigation.

24. The second ground suggested that the overall sentence was disproportionate. In circumstances where we are satisfied that mitigation was correctly reflected, the only basis on which that might still be so would be if the headline sentence of four years was too high. We consider that while it was possibly at the severe end of the range of the sentencing judge's legitimate margin of discretion it did not exceed it. This was after all a sexual assault that involved more than mere indecent touching. It involved digital penetration of the injured party while she slept. The Court was referred to only one comparator, namely *The People (Director of Public Prosecutions) v Sean Canniffe*, a case from 2012. In that case, which also involved digital penetration of a victim while she slept, the Court of Criminal Appeal determined on a headline sentence of four years. While that headline sentence was ultimately wholly suspended after application of mitigating factors, and the cases are significantly distinguishable in terms of mitigation, the *Canniffe* decision actually provides support for the headline sentence determined upon by the sentencing judge in this case. In addition, since its establishment in 2014 this Court is regularly called upon to review sentences involving sexual assaults, and we are satisfied that a headline sentence of four years imprisonment for the digital penetration of a woman while she slept is not out of kilter with the type of sentences imposed in other broadly similar sexual assault cases. We are therefore satisfied that the sentence was a proportionate one.

25. Finally in relation to the third complaint, namely that sentencing judge erred in placing an excessive emphasis on the previous convictions of the appellant we have, in effect, already dealt with that. There was no question of the appellant's previous record being held against him as an aggravating circumstance in this case. The transcript does not establish that it was so held against him. However, a previous record, even if not aggravating, and depending on how bad it is will result in the progressive loss of the substantial mitigation that would otherwise be available to an accused who was of previous good character. That was the point the trial judge was making in saying that the appellant was no stranger to the criminal law. This appellant had twenty eight previous convictions and therefore had well and truly lost any possible mitigation for being of good character. It was a point well made, and one the sentencing judge was fully entitled to make. We would therefore dismiss this ground of appeal also.

Conclusion.
26. In circumstances where no error of principle has been demonstrated the Court will dismiss the appeal.