



THE COURT OF APPEAL

**Ryan P.
Birmingham J.
Sheehan J.**

256/12

The People at the Suit of the Director of Public Prosecutions

V

K.S.

Appellant

Judgment of the Court (ex tempore) delivered on the 11th day of December 2014 by Mr. Justice Sheehan

1. This is an appeal against sentence.
2. On the 30th July, 2012, the appellant K.S. pleaded guilty to sexually assaulting and falsely imprisoning L in his own bedroom, at his home on the 23rd January, 2011 and also to producing a knife at that time.
3. The learned sentencing judge imposed the following sentences on the 31st July, 2012.
 - (1) Six years imprisonment on the sexual assault charge.
 - (2) Six years imprisonment on the false imprisonment charge.
 - (3) Four years imprisonment on the charge of producing an article.

All sentences to run concurrently.

4. In addition, the court placed K.S. on the Sex Offenders Register and further directed that he undergo eighteen months post release supervision by the Probation Service on terms that he comply with their directions.

5. On the 31st July, 2012, the appellant filed an appeal contending the sentence was in all the circumstances, excessive, stating that the learned trial judge failed to state adequately or at all his reasons for imposing the sentence which he did, and further that he failed to take properly into account the mitigating factors on the appellant's personal circumstances. Further and more detailed submissions were filed by the appellant and detailed replies to these submissions were filed on behalf of the Director of Public Prosecutions.

Background Facts

6. The back ground to the assault which occurred in January, 2011, lies in a friendship between the appellant and the victim which had commenced in October 2009. The parties had met through a social network site and following this, they had further communications through another social network site and then met towards the end of that month.

7. The meetings took place in the appellant's bedroom, in his parent's home on a Dublin estate and the victim who was a childcare worker would visit him there. The appellant suffered from depression and the victim was of great assistance to him particularly one evening when he had self-harmed.

8. The relationship continued for a period of about twelve months during which time the appellant and the victim would play Sega in his bedroom and also watch DVDs.

9. The relationship appears to have tapered off towards the end of 2010 when the victim says she was reluctant to visit the appellant when he was on his own, the reason for this being that the appellant was drinking at the time and the victim said she did not like this because when he was drinking he would get very cuddly with her. The victim knew at that time that the appellant had a girlfriend.

10. Then on the 21st October, the appellant sent a text to the victim saying that he had broken up with his girlfriend, that he was upset and would she call over. At the time that the victim received the text, she was out with her parent's having a meal, but her father drove her over to the appellant's home and she arrived there at 11.30 pm.

11. This was a weekend night. The appellant's father was making tea when she arrived, but she did not speak to him and simply went straight to the appellant's bedroom. She saw that he was drinking. When he filled up another drink, she decided that it was time for her to go. He had told her that he was upset and asked her would she just let him do a trick with her before she went home.

12. She agreed to this, knowing at the time about his interest in magic, in tricks, horror movies, masks and associated matters. She was also aware at the time that K. and his girlfriend were into whips and handcuffs.

13. She agreed to put on handcuffs as she thought that would please him and she then said she wanted to go home. However, she then later agreed to being handcuffed behind her back.

14. The appellant then tried to blindfold her, but she managed to get it off, saying she did not want to do this anymore.

15. She then noticed that the appellant was wearing a mask which she had seen on his Facebook page and that he was also wearing latex gloves and had a hunting knife in his possession. He pushed her back on the bed, put the knife to her neck and said don't make a sound or I will kill you. He tied a scarf around her mouth and removed it. He got her to ring her father saying she would not be home that evening, which she did. He then turned the mobile phone off.

16. The victim was sitting on the bed and managed to get the blindfold off. She knew that he had purchased the hunting knife on the internet, and she had previously told him that she did not like knives. The appellant grabbed her by the shoulders, pushed her back on the bed and she was crying saying please K. do not do this.

17. He pretended to stab her with the knife and left a mark on her abdomen. He ran the knife over her body and then put liquid on the latex gloves he was wearing. He got her to spread her legs. He forced her to assist in removing her trousers. He inserted two fingers into her vagina and then put them on her clitoris asking her was she enjoying this. When she said that nothing he did turned her on, he immediately stopped and said he was sorry. He told her he could never hurt her and was only messing. He went downstairs to throw the knife away, but brought it back upstairs during which time L had put on her clothes. He again asked her if she could forgive him and she said she did not know. He told her that she meant so much to him and that the reason he got her to phone her father was that he was hoping that she would stay the night with him. She left and got a taxi. He texted her at lunchtime that day, again apologising and she replied it is just fine "I don't ever want to be alone with you again".

18. K.S. made some further attempts to contact her on social network sites, but she blocked him off and subsequently made a complaint to the gardaí on the 17th April, some three months after the incident had occurred.

The facts emerging from the sentencing hearing

19. Garda Ciara O'Sullivan confirmed at the sentence hearing that K.S. was a retiring type of person who had an interest in horror films and related paraphernalia, including masks which were all obvious on an inspection of his bedroom. She agreed K.S. had been profuse in his apologies to L that he was ashamed for what he had done and that it was correct to describe him as a fragile introverted young man. She said that there was no suggestion that he had ever offended anyone else. She also told the court that L. did not wish to give evidence, but simply required that the impact statement that she had made be noted. Garda O'Sullivan also read to the court the detailed admissions made by K.S. during the course of his garda interviews and the comprehensive answers that he gave to the questions he was asked.

20. K the girlfriend of the appellant told the court that she had met K.S. when they were both studying art, that he was extremely artistic, but had a lot of unhappiness in his background and suffered from depression. She also told the court that he was extremely remorseful and had attended both Stanhope Street in respect of his alcohol problem and psychologists in respect of other matters.

21. In the course of her victim impact statement of July 2012, which was handed into court, L spoke about attending the Rape Crisis Centre engaging with five counselling sessions there as a result of which, she said she had dealt with the incident and no longer has as many flashbacks.

22. However, she did say that since the incident, she did not like to go anywhere by herself, she found it difficult to interact with new people and felt obliged to tell her new boyfriend what had happened. A seventeen page psychological report prepared by consultant forensic psychologists following a number of meetings with K.S. was also handed in to court.

23. Further relevant circumstances in relation to the appellant are that he was 26 years old at the time of the offence, he had no previous convictions, was the youngest of ten children and grew up in what can only be described as extremely difficult circumstances, which included sexual abuse of himself, alcoholism and violence, all of which led to his developing severe anxiety, being expelled from school for truancy and developing drug and alcohol problems as he endeavoured to cope with his own personal suffering which arose from these circumstances. He worked for periods of time in a pet shop and a video rental outlet.

24. Following a suicide attempt in 2010 he was referred to St. Brendan's hospital and was under psychiatric care there for some time.

Submissions

25. While the respondent concedes that the sentencing judge's remarks were indeed brief, counsel on her behalf maintains that there was no error in principle.

26. The oral and written submissions of the appellant on the other hand say that the failure of the trial judge to provide a reasoned explanation for the sentence he was imposing amounts to an error in principle. In the course of her judgment in *DPP v. Garret Cooney*, McGuinness J. stated that the furnishing of reasons was a desirable practice because it enhanced public confidence in the criminal justice system when the reasons for a particular sentence were clearly expressed. She went on to state that in the event of an appeal this facilitated a review of sentence by an appellate court. An appeal court should be able to ascertain what matters the sentencing judge took into consideration when imposing sentence and the reasons for the approach taken should also be apparent.

27. In the present case, the learned trial judge recited that the facts were fully recorded in the transcript and did not require to be repeated by him. In the operative part of the sentence, he said he took into account the inherent gravity of the offence and went on to refer to the making of credible threats to kill.

28. This Court accepts that a sexual assault involving a knife is a serious offence and the facts of this case speak for themselves.

29. The learned trial judge referred to the early plea of guilty to substantial remorse and cooperation. No mention was made of the fact that the appellant had never before come to the notice of the gardaí.

30. This failure in itself might not have been fatal (and the court might have been persuaded that an experienced judge could not have failed to take this into account). However, the matter goes further. A detailed nineteen page psychological report was put before the court. This showed that the appellant was a particularly complex, troubled and vulnerable young man, with many disturbing issues arising in his childhood and adolescence which continued to affect his life. If the learned trial judge took the view that these issues were irrelevant, it was incumbent on him to explain how he came to that view. There was no mention of any of the troubling factors in the appellant's background, which were addressed in the report and this Court is unable to say whether the learned trial judge considered any of those factors to be relevant to sentence. This is an unsatisfactory situation and leads the court to hold that there was an error of principle in the learned trial judge's approach to sentence. This Court therefore, decided on this basis to quash the sentence and proceeded to consider the appropriate sentence to be imposed, having given the parties an opportunity to put

forward further material in accordance with *DPP v Cunningham*.

Conclusion

31. It is the view of this Court that a sexual assault involving the production and use of a knife is particularly serious. In this case the assault occurred in unusual and bizarre circumstances. The court accepts that there was no intention on the part of the appellant to cause harm. Nevertheless in the course of the sexual assault, the appellant marked "L" on her abdomen and the said mark remained for some weeks.

32. The element in this case that the learned trial judge does not appear to have taken sufficiently into account is the extensive psychological report that provided relevant background material on the appellant's circumstances.

33. Having regard to his troubled and difficult background, to the unlikelihood of his re-offending, and therefore to the real prospect of rehabilitation this was a case in which part of the sentence could and should have been suspended.

34. This Court has considered the submissions of both parties in relation to sentence. The court in particular notes that the appellant has been accepted for a sex offender's programme and also notes the Governor's report which states that the appellant has been well behaved. In all the circumstances, the court holds that it would be proper to suspend the final eighteen months of the said sentence on terms. The court therefore, will confirm the two sentences of six years imprisonment, but will suspend the final eighteen months of each of those sentences on condition that the appellant completes the sex offenders programme that he is about to embark on.

35. In furtherance of its obligation pursuant to s. 28 of the Sex Offenders Act 2001, this Court considers that this is an appropriate case in which to impose a sentence involving post release supervision. Accordingly, this Court directs that the appellant be subject to a twelve month post release supervision order.