



THE COURT OF APPEAL

**Sheehan J.
Mahon J.
Edwards J.**

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Record No: CJA 217/2012

RESPONDENT

- V -

DILEESH SOMAN

APPELLANT

Judgment of the Court delivered on the 18th day of February, 2016 by Mr. Justice Edwards

Introduction

1. This is a case in which a term of four years imprisonment, with the last twelve months thereof suspended, was imposed on the appellant by Cork Circuit Criminal Court on the 20th of February 2015 following the appellant's plea of guilty to a count of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act, 1990. and a count of producing an article capable of inflicting serious injury in the course of a dispute or a fight and in a manner likely unlawfully to intimidate another person, contrary to s.11 of the Firearms and Offensive Weapons Act 1990.

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

The facts of the case

3. On Sunday the 10/11/2013 the injured party, a 30 year old female postgraduate student, advertised a room for rent in her apartment on the website daft.ie. She received a text message from a mobile phone number to arrange a viewing of the room. This number belonged to the appellant's mobile phone. On the 11/11 the injured party met the appellant at approximately 1930 hours at her apartment block, and let him in. He was using the alias of Aaron at the time. CCTV captured him entering the gated complex.

4. The injured party stated that the appellant showed a complete lack of interest on being shown around the apartment and that when shown to the bedroom the conversation became strange. They moved back to the living room. The accused told the injured party that the room had very bad energy and he asked her to show various parts of her body including her wrists, elbow, belly and her knees. She did this out of fear. She continually told him that she felt uncomfortable doing so. He stated that if he fell on her he would break her. He touched her breasts, opened her jeans and put his hand inside her underwear and finger into her vagina. He took his hand out and sent her to the bathroom to wash and when she returned he put her on the counter in the kitchen, spread her legs and stated, "I'm now going to touch you", as he gestured towards his penis. At times throughout the sexual assault he made various comments to her including, "Nothing bad is going on" and "It's okay, we're not going to have sex here." He also tried to kiss her on the lips and put his tongue in her mouth. He started kissing and squeezing her breasts. She told him that this hurt and he kept telling her to relax as it was all a bad energy coming out. The injured party shouted at him and he stopped.

5. The appellant left the apartment a few minutes later only to immediately start ringing the doorbell. He told the injured party that he was very disappointed that the flat wasn't ready to accept him and then demanded that she walk him to the gate. On the way down in the lift he took some hair from her head. He told her he was going to do it, pulled a hair from his head, put it into his wallet. She returned to the apartment crying and informed a friend of what had happened who in turn contacted the gardaí. Later that evening the appellant then sent the injured party two further text messages, the first at approximately 8.55pm asking her how she was and the second at 10.30pm asking her how she felt.

6. The appellant was identified as he had previously provided the phone number he used to contact the injured party to two separate gardaí and the physical description given by the injured party matched the appellant. On the 21st of November 2013 gardaí conducted a search of the appellant's home on foot of a search warrant, and located and took possession of a mobile phone found concealed under a bedside locker next to where the accused slept.

7. During the search of the house the appellant asked Detective Garda Coughlan to outline the allegation to him, which he did after cautioning the appellant. The appellant stated that, "I only touched her here, here and here", pointing to the palms of his hands, elbows and behind the ears. Detective Garda Coughlan informed the appellant that the allegation included touching of the breast and genital area and the appellant responded to this "She lifted herself with consent" while indicating pulling up his top.

8. The mobile phone that was seized was analysed and it was found to be the same telephone number that had contacted the injured party but the messages between them had been deleted.

9. The appellant was arrested and detained and interviewed. During the course of the interview he showed no remorse and stated that he was looking at the apartment for a friend in London who was considering moving to Cork. He acknowledged touching the injured party's wrists, elbows and knees and he also admitted asking the injured party to show him her cleavage, which he claims she did. He stated that he had told her there was nothing there and that she could put her top back on. He later admitted that he knew his behaviour was wrong because if his wife knew this she would send him back to India. He also claimed it was the injured party that started removing her clothing. He stated that he had asked her to stretch her navel and he said he didn't do it because a man must ask a woman before he can touch her, and he stated he didn't force her, not rape, not nothing. He confirmed that he had taken some of her hair and put it in his wallet and that he later threw it away. He also confirmed the majority of what the injured party had said in her statement to Gardai including making comments that she had attributed to him. He denied touching the injured party's genital area and he said he could prove it. He also denied kissing her or lifting her onto the kitchen counter and said there was nothing sexual in what he had done and that he had only touched her with his permission. He admitted that he had put the mobile phone under the locker and that he had used it, and again repeated the assertion that he was looking at the apartment on behalf of a friend who was relocating.

The appellant's personal circumstances

10. The appellant had no previous convictions. He was 33 years of age at the time of the offence. He is an Indian national who at that point had been living in Ireland for approximately 6 years. He is married and his wife is also of Indian ethnicity, although she is a naturalised citizen and works in the public service in Ireland. The appellant had worked as a delivery driver for a number of food outlets. However, he was restricted in the type of work he could obtain due to injuries, including a hip injury which had necessitated a hip replacement, suffered by him in a road traffic accident, . The appellant speaks some, though far from perfect, English.

11. The sentencing judge was furnished with a medical report from the appellant's GP concerning the appellant's physical condition arising out of the aforementioned injuries, and was asked to take it into account. This report indicated that the appellant has some ongoing pain and discomfort, and particularly some restriction of movements rendering it more difficult for him to perform certain routine daily tasks such as putting on his socks in the course of dressing himself.

The impact on the victim

12. The sexual assault, which was a penetrative one, had a deep effect on the injured party who states in her victim impact statement that she was terrified of the appellant and that she had been completely paralysed with fear. She asked him to stop but had felt unable to physically resist him due to fear, and in circumstances where the appellant was much taller and bigger than her. Since the incident she has found it hard to sleep and she gets startled by every noise. The injured party states that she is afraid to stay in the flat alone, that she has lost faith in herself and began to blame herself even though she knows that she did nothing wrong. She states that she has lost trust in people. The injured party had to visit her doctor after trying unsuccessfully to use natural sleep remedies, and had to take prescribed sleeping tablets. She has found it very hard to function normally in college due to lack of sleep, and stress. This was her first experience ever of advertising for a person to share her apartment. She will now only consider female flatmates or else will simply absorb the extra financial burden of living alone. The injured party has said that she is glad that the appellant has pleaded guilty. However, she does not ever wish to see him again, and opted not to attend the sentencing hearing to avoid doing so. She is deeply resentful of all the insecurities and fears he has brought into her life, and for the trauma that she suffered. Since the incident she is constantly waiting for something bad to happen. The victim concludes her impact statement by stating poignantly "I did not deserve this".

The judge's sentencing remarks

13. In sentencing the appellant the sentencing judge stated:

"Very good. This man has pleaded guilty to a sexual assault in November of 2013 when he inveigled his way into the victim's flat on the pretext of looking at accommodation. What happened to her thereafter was undoubtedly very personally undermining and frightening: That this man came in on a pretext and then in a short period of time in a most bizarre way went about abusing her physically and trying to dominate her. So that was, in her own home, an extraordinarily frightening experience. There is no doubt about the frighteningness of the experience because she has told us about it in her victim impact statement, which I take to be entirely truthful as to what she suffered and how she had to undergo this experience. It has had an ongoing effect on her in relation to her ability to live without worry, and she had never experienced anything like this previously.

Now, what is worrying in this case, and I take it from Garda Coughlan's evidence, this man has but limited insight into the damage he did. His behaviour was quite bizarre and the lack of insight is a worrying thing. He has pleaded guilty and the plea in the circumstances of the manner in which he abused the victim and her not wanting really ever to see him again was of benefit to her in that she didn't have to come to Court and didn't have to face him. So that has to be taken into consideration, as does the fact that he has no previous convictions, he's 35 years of age and he's been settled here for a number of years without coming to attention. His admissions, limited and all as they were, were of benefit to the prosecution in that they put him at the scene of the offence and put him, even at his own admission, in a position of interfering with the victim. It is an offence that I would say was certainly on the mid-range of what one might expect as a sexual assault, because there was digital penetration of the victim's vagina. In relation to the possible maximum sentences, which of course is not available given the plea and the circumstances, they're what?

MR O'SULLIVAN: Ten years, Judge.

MS HYLAND: Ten years, Judge.

MR O'SULLIVAN: It's a sole count, Judge.

JUDGE: Very good. Had this man pleaded not guilty I would have no difficulty in sentencing him to six years imprisonment. Because of the manner of the plea, the lack of previous convictions, I think a sentence of four years is merited. I will suspend the final year on condition that on his release he will remain under the care of the Probation Service. I admit that there is a medical report which may indicate certain difficulties. I wouldn't be that convinced that they're grievous or serious but I will direct that the medical report be put on the file for the governor of the prison so that he can take such steps as may be necessary in the accommodation of the accused."

The grounds of appeal

14. The appellant complains that:

- ☐ The sentencing judge erred in deciding that the assault attracted a sentence of 6 years before discounting for mitigation.
- ☐ The sentencing judge erred in principle in failing to adequately take into account the mitigating factors generally in relation to the appellant. In particular:

- o the additional hardship in serving his 4 year sentence of imprisonment, caused by his limited command of the English language, his limited social ties in Ireland, and his restricted mobility due to the weakness in his right leg and associated pain.

- o (b) his lack of previous convictions

☐ The sentencing judge erred in principle in that sufficient weight was not afforded to the public interest in the rehabilitation of the appellant.

Discussion

15. Although it is pleaded in the grounds of appeal that the headline sentence before discounting for mitigation was excessive, it was conceded at the hearing by counsel for the appellant that it was difficult for him to make that case in circumstances where the assault had involved, inter alia, digital penetration of the vagina, which was a significant violation of the injured party.

16. Moreover, it was clear from his remarks that the sentencing judge had discounted the headline sentence by a third to take account of the plea of guilty (which undoubtedly had spared the injured party the ordeal of giving evidence, and had also spared the state court time and expense), the appellant's previous good character and also his limited admissions. In addition, the sentencing judge went on to suspend the last year of the sentence, on condition that he remain under the supervision of the Probation Service.

17. However, while still making the case that there should have been a greater overall discount for mitigation, counsel for the appellant focused his arguments at the oral hearing on three specific factors which he claims received wholly inadequate attention. These were (i) the appellant's medical condition (ii) the fact that he is a person of foreign extraction, and (iii) the level of his English. It was argued any one of these three things would make prison harder for him to endure, but that cumulatively their combined effect should have entitled him to a significant further discount.

18. Counsel for the respondent has argued that the prison authorities may be presumed to be in a position to accommodate any physical disability that the appellant may have and that there are many people in prison with medical problems. It was further argued that the appellant has lived in Ireland for more than six years, and has been working here for some time, and so Irish society is no longer very culturally alien to him. Moreover, while his English may not be perfect, he does speak English and it is at a sufficient level to enable him to function in the workplace. Accordingly, counsel for the respondent submitted, the argument that prison would be very much harder for this individual did not stand up to critical analysis.

19. This Court has carefully considered the arguments on both sides. We consider that counsel for the appellant was right not to press the argument that in measuring the seriousness of the offence the sentencing judge had located the headline sentence too far along the spectrum of available penalties. This was undoubtedly a serious offence, in which the culpability of the offender was significant and substantial psychological harm was done to the victim. We find no error of principle in the fixing of six years as the headline sentence before discounting for mitigation.

20. The appellant in this case was entitled to a reasonable discount for mitigation for the reasons already identified. However, he was not wholly co-operative, exhibited no remorse before his change of plea, and indeed to some extent had sought to blame the victim and to suggest that she had consented to, or acquiesced in, some of what he had done. We are satisfied that in directly discounting by one third from the headline sentence the sentencing judge adequately reflected the available mitigation for the appellant's plea, limited co-operation and previous good character.

21. We also agree with counsel for the respondent that, notwithstanding the factors identified by counsel for the appellant, prison is unlikely to be very much harder for this individual in circumstances where he was well settled in Ireland for a number of years and has some command of the language. Indeed a Governor's report handed up to this Court confirms that he is in fact getting on well. Nevertheless, the sentencing judge would have been justified in taking some account of the cultural difference and the language issues, as well as the appellant's somewhat restricted mobility consequent upon his previous injury and hip replacement. In addition, it would have been desirable to incentivize rehabilitation if the appellant should become open to it. The sentencing judge suspended the final year but did not state in terms why he was doing so. The plaintiff's medical difficulties were briefly mentioned thereafter and it seems reasonable to infer that the suspension was partly to reflect those. The suspension was also made conditional on the appellant submitting to supervision by the Probation Service, so it may be inferred that the judge also had rehabilitation in mind. Although there is no express mention of the cultural or language issues highlighted by counsel, it seems to this Court that suspension of the final year would have been quite sufficient to address those issues, and the medical issues, and the objective of incentivising rehabilitation.

22. We find no errors of principle in the sentencing of this appellant and dismiss the appeal.