



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.
85/14**

The People at the Suit of the Director of Public Prosecutions

Respondent

V

M.S.

Appellant

Judgment of the Court (ex tempore) delivered on the 9th day of December, 2014, by Mr. Justice Sheehan

1. This is an appeal against sentence

2. On the 24th January, 2014, the appellant MS was convicted of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended, and was sentenced to three years imprisonment with the final six months of the said sentence suspended for a period of three years on condition that he remain under supervision of the Probation Service for that period of time.

Background

3. The factual background to this offence was helpfully agreed by the parties and is as follows.

The appellant visited the injured party's father at his home and brought with him two bottles of vodka. He consumed the vodka with the injured party's father who collapsed and as a result had to be helped to bed by the appellant and the injured party. The injured party got into bed beside her brother and later the appellant got into that bed and wrapped himself around her and touched her. She was wearing a black T shirt, string top and a bra. The appellant pulled himself close to her. He rubbed himself against her and kissed the back of her neck and touched her with his hands over her clothing on her breast and in her groin area. Soon after the commencement of this sexual assault the injured party left the bedroom, telephoned her mother and returned to her mother's home. That night the gardaí were called and the appellant was arrested and taken to Carlow garda station where he was interviewed. He denied committing any offence.

The conviction followed a three day trial in the course of which it was suggested that the victim had fabricated the allegations of sexual assault. The appellant gave evidence and denied the offence. However, following his conviction the appellant was remanded in custody for a period of three days prior to the sentence hearing and when he returned to court he accepted that he had done wrong and apologised to the victim. He also said that he accepted the verdict of the jury.

Effect on the victim

4. The victim was fifteen years old at the time of the offence and stated in the course of her victim impact report that the appellant had changed her life forever, that he had robbed her of her youth, that she had to grow up too quickly and that she has now in fear of older men. She hoped that the appellant now realised the effect of his assault on her relationships with others and on relationship with her own family. This report, it should be noted, was written prior to the appellant's return to court, when he stated that he accepted what he had done and also apologised.

Personal circumstances of the appellant

5. The appellant is 49 years old. He is in a stable long term relationship and is the father of four children from a previous relationship. He has a good work history having owned his own business for a period of ten years when he employed a number of people. He suffers from a chronic lung disease. He has a good history of community involvement. His reputation was destroyed when it became known that he had been accused of sexual assault. He has no previous convictions.

Submissions

6. The appellant submits that the sentence was wholly disproportionate and that the learned trial judge erred in principle in failing to adequately align the sentence to the particular circumstances of the accused and to the nature and circumstances of the assault itself. It is also submitted that the learned trial judge failed to give full and proper weight to all the relevant mitigating factors.

7. The respondent contends that the trial judge did not make any significant departure from what would be the appropriate sentence in a case such as this particularly in light of the age difference between the parties, the breach of trust involved the nature of the assault, the consumption of alcohol and the psychological effect on the victim. The respondent submits that in this case there is no error in principle.

8. It should also be pointed out that counsel for the appellant in this case rightly pointed out to counsel for the respondent prior to the hearing that there had been an error in the court below in that the learned trial judge had proceeded on the basis that the maximum penalty for the offence in this case was one of ten years imprisonment when in fact it is one of fourteen years imprisonment.

9. This Court accepts the point made by counsel for the respondent that the appellant by going to trial in the manner in which he did, forfeited what this Court always regards as a significant mitigating factor in this type of case, namely the plea of guilty. While the admission in this case came very late, it is not to be totally discounted.

10. The court has considered the submissions of both counsel and concludes that there was an error of principle made by the learned

trial judge in identifying three years as the appropriate sentence in this case. While the court acknowledges that all sexual offences are serious, it is nevertheless this Court's function and obligation to distinguish between different cases and different circumstances. The factor in this case which is of relevance to where the offence ought to lie is the fact that the offence was of very short duration and the appellant touched the victim on the outside of her clothes.

11. The court has considered the submissions in respect of sentence and identifies two years imprisonment as the appropriate starting point. In view of the mitigating factors acknowledged by the learned trial judge and with which this Court agrees, this Court will suspend the final six months of that sentence provided the appellant enters into a bond to keep the peace and be of good behaviour for a period of twelve months following his release from prison.

12. In considering whether or not to make a post release supervision order, this Court, apart from noting that the victim in this case was fifteen years old at the time, also notes that it was late in the day when the appellant admitted his involvement. Failure to do so at an earlier stage gives this Court concern about the appellant's insight into his own offending.

13. Accordingly, in addition, the court will direct that the appellant be subject of a one year post release supervision order on the usual terms.