



THE COURT OF APPEAL

[Appeal No. 07/2015]

**Birmingham J.
Sheehan J.
Edwards J.**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

TOMMY HUGHES

APPELLANT

JUDGMENT of the Court delivered by Birmingham J. on the 21st day of December 2015

1. This is an appeal against severity of sentence. The sentence appealed is one of six years imprisonment with the final two years suspended for a period of three years, on condition that the appellant remains under Probation Service supervision for 12 months and complies with all directions given to him and keeps the peace for three years, imposed on 11th December, 2014.

2. The sentence was imposed in a situation where the appellant had pleaded guilty to one count of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990, committed on 13th August, 2013.

Background Facts

3. On the afternoon of Sunday 13th August, 2013, the injured party, a young Spanish woman who had been living in Ireland for some five years at the time, was sitting alone in an isolated area of the Galway coast when she was subjected to a sexual assault by the appellant. In the course of the incident, she was knocked to the ground as she tried to flee the area, though she succeeded in biting her assailant three times. The appellant grabbed this young woman's breasts and vaginal area numerous times on the outside of her clothing. He gyrated, as it was described, against the back of her tracksuit bottoms and jacket with his penis exposed and semi-erect. During this incident, the appellant sought to keep his face hidden from his victim by partially pulling a T-shirt up over his head. The appellant then left the area. The injured party has made the point that while the actual assault was over her clothes, the appellant had in fact tried to take her trousers down many times, but she had prevented this.

4. The injured party made her way to the nearby Salthill garda station, and while she was reporting the incident, the appellant called to another garda station in the Galway area where he reported that he had tried to rob a female in the Salthill area. He maintained that his intention had been to rob his victim, and indeed he continuously denied sexually assaulting her, though he did admit that his penis may have been exposed at some time during the attack.

Victim Impact

5. A victim impact report was read to the court by the injured party, notwithstanding that English was not her first language. She told the court that the events of 13th August, 2013, had changed her life. As regards her working life, she had reduced her hours because she was not able to cope with the stress of full time work. She had been engaged in the retail sector. Also, she had to take time off to attend counselling at the Rape Crisis Centre and this was disruptive of her working life. In addition, prior to the incident, she had taught Spanish, but after the incident she felt unable to take on any new male students.

6. The judge responded to the victim impact statement by commenting that if anybody was in any doubt as to how a sexual assault can impact on a victim, then the statement that had been read to the court had made it clear. He said that the effect was devastating in this case and that he did not believe there was a scintilla of exaggeration in what the victim had said in this case.

Personal Circumstances of the Appellant

7. In terms of the personal circumstances of the appellant, he was 32 years of age at the time of the sentence hearing and was described as being of no fixed abode. He was originally from the east Galway area. At the time of sentencing he was unemployed and had been for some time. The court was told that he had previously held a number of unskilled jobs, varying from welding to labouring with plasterers and bricklayers.

8. The court was told by the investigating garda, Garda Mark Cuniffe, that Mr. Hughes appeared to have a problem with alcohol which had led to him not being welcome to reside with either of his parents in their homes. This problem with alcohol appeared to be a factor in him being unemployed and having no fixed abode. Significantly, he had no previous convictions.

9. An initial sentencing hearing took place on 9th July, 2014, following on from which the appellant was remanded in custody, and sentence was eventually imposed on 11th December, 2014. In the course of the July hearing, the sentencing judge commented that he was dealing with a sudden, serious and sustained sexual assault at the very top of the scale of gravity for offences of a similar nature, referring to the fact that the victim did not know the attacker and that the circumstances of the attack made it even more terrifying and invasive. The judge commented that before considering mitigating and aggravating factors, he had to place the case on the scale of gravity, and accordingly he felt that the offence warranted a sentence of eight years imprisonment.

10. In the course of the cross-examination of Garda Cuniffe at the original sentencing hearing, it was put to him, and he accepted, that the appellant had a history of depression; that alcohol had played a significant factor; that he was unemployed and homeless; and that he had slept rough the night before the incident. The investigating garda indicated that he was aware of the fact that the appellant had experienced a brain haemorrhage back in 1998. The garda also confirmed that he was aware of the fact that since the incident, the appellant had sought the assistance of the counselling services of Cuan Mhuire, which was a 12-week residential

programme. The court was told that arrangements had been made by the solicitor for the appellant for his client to see Dr. Bogue, a consultant psychiatrist.

11. The matter was then put back to the 11th December, 2014. On that occasion, there were a large number of reports before the court. The documentation before the court included a report of Dr. Alberto Blanco, a clinical neuropsychologist; a report from Dr. Mary McGuire, a consultant psychiatrist attached to Castlereagh Prison; and Dr. John Bogue, consultant forensic clinical psychologist. There was also a letter from Ms. Michelle Molloy relating to his participation in the residential treatment programme in Cuan Mhuire.

12. There are clearly differences of emphasis between the various reports that were submitted. So, Dr. Blanco, in his opinion, comments:

"The persisting neurocognitive and neurobehavioural deficits that Mr. Hughes exhibits are most certainly attributable to the combined effects of the subarachnoid haemorrhage and the anterior communicating aneurysm which he suffered in 1998."

In contrast, Dr. Bogue observes:

"In my opinion, while Mr. Hughes has had a significant neurological event in his adolescence, there is no evidence to support the view that this could have any direct bearing upon his recent offending behaviour. Mr. Hughes is fully culpable for his actions, but has elected to minimise the sexual aspect of his assaultive behaviour which is actually not uncommon for such offenders."

Dr. Blanco had taken a somewhat different position:

"It is my opinion that these personality changes are very substantial and they have had and continue to have a very significant effect on Mr. Hughes's ability to modulate his social behaviour and they have had an irreversible impact on his ability to fulfil his potential in terms of vocational and personal ambitions."

Dr. Blanco's opinion was based on the clinical presentation at interview, but also a collateral history that he obtained from the appellant's brother, Sean, as well as a history provided to Dr. Niall Pender, principal clinical neuropsychologist.

13. The judge began his sentencing remarks by commenting that he had read the report of Dr. Blanco carefully, he described it as a very comprehensive report. The judge then continued by quoting extensively from the report of Dr. Blanco, but also the report of Dr. Bogue as well as the 2009 report of Dr. Pender which had fed into the report of Dr. Blanco. The judge then referred back to his comment on the previous occasion that this was an offence that merited eight years imprisonment before considering mitigating and aggravating factors. Having regard to the mitigating factors which he identified as the plea of guilty and the behavioural implication of the brain injury that the accused had sustained, the judge concluded that the appropriate sentence was one of six years. The judge then quoted further from the medical reports and concluded his review of the reports by saying:

"On that basis, it seems to me that as rehabilitation, as well as punishment and deterrence, is one of the functions of proper sentencing, that I will suspend the final two years of the sentence."

14. Counsel for the appellant was critical of the judge's decision to place the offence "at the very top of the scale of gravity", and to identify a sentence of eight years imprisonment as the appropriate starting point. Further, counsel says that the judge, having failed to place the offence on the correct point on the scale, then failed to place sufficient weight on the mitigating factors, including the very early guilty plea, the admissions made to gardaí as well as the medical and psychological reports on the appellant in the aftermath of the brain injury which he experienced as a teenager.

15. Counsel for the prosecution, in contrast, submitted that the sentencing judge had approached his task with great care, which saw him reducing the starting sentence of eight years to one of six years and then reducing the sentence further by the suspension of the final two years, having regard to the objective of rehabilitation.

Comment

16. Clearly, this was a serious offence. It was, as the sentencing judge described it, a sustained assault committed on a lone female in an isolated location. It has had a profound impact on the victim. However, the Court would not be disposed to place the offence at the "very top end of the scale of gravity". Rather, the Court would see the offence as falling in the mid-range/upper mid-range. In those circumstances, the Court would see the starting sentence, before mitigation, as being one of six years imprisonment. The Court is of the view that full regard will be had to all the mitigating factors identified and to the objective of rehabilitation if the final three years of that six-year sentence is suspended.

17. Accordingly, the Court will set aside the sentence imposed in the Circuit Court and substitute a sentence of six years with three years suspended on the same terms and conditions that had been stipulated by the Circuit Court.