THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

85/2016

147/2017

The People (at the suit of the Director of Public Prosecutions)

Respondent

V

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Appellant

JUDGMENT of the Court delivered on the 5th day of June 2018 by

Mr. Justice Hedigan

1. There are two appeals brought by the appellant in this application. Both are against the severity of sentence. The first of these is in respect of the sentence imposed by Kennedy J. on 29th February 2016 (the first sentence). This sentence was in respect of the following offences committed on 4th January 2014 against one GM:

> (i) rape contrary to s. 48 of the Offences Against the Person Act 1861 and s. 2 of the Criminal Law (Rape) Act as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990,
>
> (ii) rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990,
>
> (iii) rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990,
>
> (iv) aggravated sexual assault contrary to s. 3 of the Criminal Law (Rape) (amendment) Act 1990,
>
> (v) sexual assault contrary to common law and as provided for in s. 2 of the Criminal Law (Rape) (Amendment) Act 1990,
>
> (vi) assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997.

The applicant was sentenced on 29th February 2016 as follows:

> counts 1, 2 and 3: a sentence of 14 years reduced after consideration of mitigating factors to a sentence of 12 years imprisonment,
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> count 4: a sentence of 12 years after consideration of mitigating factors to a sentence of 10 years imprisonment,
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> count 5: a sentence of five years after consideration of mitigating factors to a sentence of four years imprisonment,
>
> count 6: a sentence of two years after consideration of mitigating factors to a sentence of 18 months imprisonment.
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> All sentences to run concurrently.

2. The second appeal is in respect of the sentence imposed by Coffey J. on 19th May 2017 (the second sentence). This sentence was in respect of the following offences committed on the 10th July 2013 and 8th September 2013 against RK the onetime partner of the appellant:

> (i) rape committed on the 8th of September 2013 contrary to s. 48 of the Offences Against the Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990,
>
> (ii) Rape committed on the 10th of July 2013 contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990,
>
> (iii) assault committed on the 10th of July 2013 causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997.

The first sentence

3. The grounds of appeal against the first sentence involving the offences committed against GM on the 4th of January 2014 are as follows:

> (a) the learned trial judge did not give sufficient weight to the contents of the psychiatric report of Professor Patricia Casey dated 19th January 2016,
>
> (b) the learned trial judge erred in law in her sentence in that she did not take into account the remorse albeit that the applicant had pleaded not guilty,
>
> (c) the learned trial judge erred in law and in fact in her sentence in that she did not take any notice of the letter given in apology by the applicant,

(d) the learned trial judge did not give sufficient weight to the applicant's age in that at the time of the sentence the applicant was 29 years of age,

(e) the learned trial judge erred in that the severity of the sentence overall was disproportionate in all the circumstances,

(f) further or other grounds.

Submissions of the appellant
4. Brian Leahy, B.L., on behalf of the appellant submitted that the overall sentence of 12 years was, as he put it, "a little on the heavy side". He conceded that it was really upon the overall sentence including the ten years imposed in the second sentence that he was focusing his argument. He conceded quite properly that if there was an error in the first sentence, it was a small one.

Submissions of the respondent
5. Tom Creed, S.C., on behalf of the Director of Public Prosecutions submitted that the sentence was appropriate and justified. In relation to the appellant's dysfunctional background, he submitted that while it could constitute a factor to be properly taken into account in the sentencing process, those matters that are contained in the psychiatric report of Professor Patricia Casey in relation to the appellant, whilst regrettable, are not so unusual, severe or grave as to afford significant mitigation. The applicant, whilst undoubtedly having experienced an unfortunate upbringing, was not the victim of so traumatic an upbringing as to bring his circumstances within the principles identified in *DPP v. Fitzgibbon* [2014] IECCA 12. Mr Creed further submitted that those aspects of the appellant's circumstances which were dealt with in the report of Professor Casey were carefully and appropriately considered by the learned sentencing judge. He noted that at p. 8 of the transcript of proceedings on 29th February 2016, lines 1 – 4, the learned sentencing judge stated as follows:

> *"I take into account such mitigating factors as have been identified to me; being the accused's dysfunctional background, that he is a man who has been in gainful employment and his contention that he himself was the victim of a sexual assault albeit an unreported sexual assault."*

Thus the learned sentencing judge did have adequate and appropriate regard to those matters concerning the appellant's upbringing as were brought to her attention. Appropriate and sufficient weight was given to the psychiatric report of Professor Casey. In relation to the remorse expressed by the appellant, Mr Creed submitted that the learned sentencing judge who had presided over the trial of the appellant was best placed to gauge the level of remorse of the appellant. He noted that at p. 8 of the transcript of the proceedings of 29th February 2016 at lines 1 – 11 she stated as follows:

> *"I also take into account that he now expresses remorse and accepts the jury verdict. However, this expression of remorse and acceptance comes at a very late stage indeed and after the victim has undergone the trauma of a long trial, to include of course, cross examination. The fact that his expression of remorse is made just prior to sentence makes it difficult to assess its sincerity. He is, in those circumstances, only in my opinion entitled to very limited credit for this expression and acceptance of the jury verdict at this very late stage but nonetheless I will take it into account."*

It was further submitted on behalf of the respondent that in light of the violence, ferocity, duration and cruelty of the offending, the associated threats to the victim regarding her son, the appellant's contesting of the case, thereby subjecting his victim to cross examination, the sentence imposed was proportionate, measured and appropriate. Mr Creed submitted to the Court that the offence was a very serious one which occurred over a number of hours during the night. Unspeakable acts were perpetrated upon the victim and there were threats made that she would not see her son again. The Court should take note of the fact that it was a contested trial, that leave was sought and granted to cross examine the complainant on her previous sexual history. It is to be noted Mr Creed submitted that the two years allowed for mitigation represented approximately a 14 per cent discount. In the light of the very limited mitigation that was available this was more than adequate.

The second sentence
6. The grounds of appeal against the second sentence involving RK the onetime partner of the appellant are as follows:

(a) the learned trial judge did not give sufficient weight and balance to the evidence adduced in mitigation of sentence, specifically the difficult background of the applicant and his traumatic childhood,

(b) the judge did not give sufficient weight to the fact that this event was first in time and therefore should be treated as a first offence and the sentence did not reflect this,

(c) the judge erred in law in that he did not take into account the remorse expressed by the applicant,

(d) the judge erred in law and in fact in that the sentence imposed is in effect a 22 year sentence and does not take into account the totality principle,

(e) the judge did not give sufficient weight to the applicant's age which was 30 years at the time of sentence ,

(f) the judge did not give sufficient weight to the applicant's family situation in that he is the father of two minor children,

(g) the overall sentence of 22 years is disproportionate in all the circumstances,

(h) further and other grounds.

The submissions of the appellant
7. Counsel for the appellant submitted that the real thrust of the appeal against the second sentence was on the basis of the totality principle. The learned sentencing judge should have taken account of the fact that the cumulative sentences amounted to a sentence of 22 years. This, it was argued, was disproportionately high. In this regard the Court was referred to *Director of Public Prosecutions v. N.C.* [2013] IECCA 13 and to Professor O'Malley's *"Sentencing Law and Practice"* at para. 5.07. Both of which dealt with the principle of totality and proportionality.

Submissions of the respondent
8. The respondent summarises the grounds of appeal into three headings. These are as follows:

> (i) the learned trial judge did not give adequate weight to the mitigating factors present in the case, in particular; the appellant's background, his age, children, remorse, plea;
>
> (ii) the learned trial judge did not give sufficient weight to the fact that the offences before the Court occurred first in time, before the later rape for which the appellant was sentenced to a total of 12 years imprisonment; and,
>
> (iii) the sentence imposed was in its totality disproportionate.

The respondent submits the sentence was appropriate and proportionate in the circumstances. The Court is referred to the details of the two rapes in respectively July and September 2013 as outlined in detail by the learned sentencing judge. All appropriate mitigation was allowed. He fixed a headline of 12 and allowed two years for the mitigation. In the light of the very limited mitigation available this it is submitted was generous. The factors of age and the fact the appellant has two children have little weight. It is noted that one of these children was present in the apartment during the sustained assault and rape of the victim. The expression of remorse must be limited by the fact the respondent pleaded guilty to two counts on the indictment on the morning of the trial involving rape in July but fully contested the September rape charge.

The personal circumstances of the appellant
9. The appellant has a date of birth of 30th September 1986. At the time of the offences in July and September of 2013 he was a man of almost 28 years. He was just over that age at the time of the offences involved in January 2014. He is a native of Cork. He has had no relationship whatever with his father. He has a number of half-brothers and sisters. He was reared in a number of foster homes up to the age of five. Subsequently he moved to a foster family where he remained until he was 14 years old. He was removed from this house and resided at an HSE support unit. There were unsupported claims that he had himself been subjected to sexual abuse. He attended school until he was 16 years old. At that stage he began using drugs. By the time he was 18 he apparently had become drug free and was working as a security guard. He met his first real girlfriend when he was 20 years old and had a child with her in 2006. He is the father of another child who was born on 11th April 2012. This child's mother, R.K., is the complainant in respect of the second appeal involving the offences committed in July and September 2013. She was living with the appellant at the time of the July 2013 offences but left him six weeks later. The offences in September 2013 occurred when she visited the appellant to arrange for maintenance and access. The appellant has ten previous convictions. Five of these are Road Traffic Act offences, two involve the breaking of barring orders and two are for minor assault and another criminal damage. He received two months imprisonment in relation to the barring orders and two months for the s. 2 assault. In November 2013 he became acquainted with G.M. the complainant in relation to the first sentence. At that time he was working as a base operator with a cab company.

The decision of the Court
10. The principle that should guide this Court in appeals against severity of sentence is set out in *The People (DPP) v. Wall* [2011] IECCA 45 as follows:

> *"Sentencing judges, given their position at the front line of criminal cases will generally be best placed to adjudicate the appropriate sentence in light of the fundamental principles that the appropriate sentence should depend not only on the facts but also on the personal circumstances of the individual. It is for this reason that deference should be shown where possible to the decisions of sentencing judges unless there has been a substantial departure from adopted principles."*

The approach of the courts of appeal means that an appeal court should not vary a sentence merely because it disagrees with it. A specific error of principle, or a finding that the sentence is excessively lenient or severe must be shown. It is agreed that the main focus of this appeal is upon the totality of 22 years. In relation to the first sentence, it is conceded by the appellant that the sentence of 12 years, albeit somewhat severe, is only slightly in error if at all. The offences involved egregious violence upon a mother of one, a seven year old child at the time of the offence. The complainant was little more than an acquaintance of the appellant at the time. He was invited to a party in the complainant's house. At the end of the evening, having inveigled the complainant into allowing him stay in the house on a couch, later on in the night, he assaulted and raped her. He threatened she would not see her son again if she did not comply. She was subjected to an horrific assault throughout the night involving vaginal, anal and oral rape. As her victim statement recounts, this savage assault upended her life and that of her young son. The appellant denied the charges. The case was fully contested and the appellant had the complainant cross examined on her sexual history. The remorse that he claimed was expressed following his conviction unanimously. He was convicted of six counts being of rape, s. 4 rape (oral and anal), aggravated sexual assault, sexual assault and s. 3 assault causing harm. The learned sentencing judge in her sentence outlined the facts of the assault and considered the appellant's personal circumstances including his dysfunctional background. She considered the mitigating factors but gave little credit for his claimed remorse and late acceptance of the jury's verdict. She identified a headline sentence of 14 years and reduced it to 12 considering the mitigation. This Court can find no error of principle by the learned sentencing judge. Indeed none is seriously contended for. The appeal in relation to this sentence must be dismissed. The dreadful facts of the case must however be taken into account when considering the issue of totality and proportionality in relation to the overall sentence of 22 years.

11. In relation to the second sentence, these offences involving RK, his onetime partner, occurred some six and four months respectively before the offences involved above. The appellant was charged with three counts; 1) rape contrary to s. 48 of the Offences Against the Person Act occurring on 8th September 2013, 2) rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 on 10th July 2013 and 3) assault contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 occurring on 10th July 2013. On the morning of the trial the appellant pleaded guilty to counts 2 and 3 and not guilty to count 1. He was subsequently unanimously convicted on count 1. The appellant and the complainant RK had a son together who was born on 11th April 2012. They commenced their relationship in November 2010. Following the complainant's pregnancy they moved in together at various addresses, latterly a flat in March 2013. In the early hours of the morning of 10th July 2013, the appellant suddenly attacked the complainant while they were in bed together. She was violently assaulted and subjected to oral rape. Having summoned two male friends by phone, the complainant left the apartment. After three nights she returned but slept in her son's room because she was afraid of the appellant. A number of efforts to resume normal sexual relations failed as she was afraid of the appellant. On 16th August 2013 following an argument the appellant told her to leave and she took the opportunity to do so. She took her son with her. On 10th September 2013 at 10 am she went back to the apartment by arrangement with the appellant. The purpose of this visit was to discuss maintenance and access issues in relation to their son. While there however she decided to leave after becoming uncomfortable with the appellant's attitude. He refused to allow her leave and forced her upstairs. There, despite her pleas he assaulted and then raped her. Subsequently he called her father who collected her 20 minutes later. She attended at the Rape Crisis Centre and after that made a complaint to the Gardaí. In his sentence the learned sentencing judge considered the conviction and

sentences imposed in February of 2016. He noted that he had to construct a proportionate sentence. He considered the range available to the court. He took account of the breach of trust involved, the degrading and humiliating language and the gratuitous violence visited upon her. He considered this to be vicious and chilling. He considered the effect this assault had upon the complainant. In this light the learned sentencing judge identified a headline sentence in respect of the oral rape and the assault to be one of eight years and three years respectively. Taking account of mitigation arising from his plea albeit a late but nonetheless valuable one, his dysfunctional background and his good employment record, he reduced the sentences to ones of five years and two years respectively. In relation to the rape offence the subject of count 1, the learned sentencing judge identified the headline sentence of 12 years. Applying the same mitigation as above, he reduced that to a ten-year term. The judge then considered the question of consecutivity and took account of the fact that the offences involved two separate and distinct incidents. He noted that the second rape offence occurred after the relationship had ended. Thus the learned sentencing judge considered that that which was the more serious offence i.e. the second rape should not be allowed to merge into the others. Moreover all of these offences with which he was dealing should not for the same reason also merge into the sentences imposed in February 2016. Thus he considered the sentence on count 1 should be consecutive to the sentences for counts 2 and 3 and that all the sentences should be consecutive to the sentence imposed in February 2016. Taking account of the principle under which the Court should approach an appeal such as this, it is not possible to identify any error in principle in the learned sentencing judge's fixing of sentences or in making them both consecutive *inter se* and also consecutive to the sentences imposed in February 2016.

12. The learned sentencing judge then considered the principle of totality. He felt constrained as he put it to "stand back" and examine the sentences cumulatively so as to avoid any disproportionality. In order to do this, he considered that the overall sentences he imposed should not increase the appellant's sentence by more than ten years. Thus he reduced further the sentences he was fixing to ones of four years in respect of the rape in count 2, two years in respect of the assault in count 3, both to run concurrently with each other and consecutively to the 12 year February 2016 sentences. He further reduced the 10 year sentence imposed in respect of count 1 to six years consecutive to the sentence imposed on count 2. Thus the learned sentencing judge imposed cumulative sentences totalling ten years to commence on the expiration of the sentences of 12 years imposed in February 2016. This amounts in all to sentences totalling 22 years. It is not possible to find any error of principle in the meticulous and balanced approach taken by the learned sentencing judge in structuring the sentences as he did.

13. The Court however is obliged to consider the over-arching principle of proportionality as described by Professor O'Malley in his second edition of *"Sentencing Law and Practice".* The learned author stated at para. 5.07 as follows:

> *"The dominant principle of Irish sentencing law is that a sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender."*

The learned sentencing judge was fully alert to this requirement. It cannot be ignored that in this case the appellant is a serial rapist. He raped and assaulted his partner in July 2013. After the breakup of the relationship with that partner, when she came to their former home in September by arrangement in order to finalise maintenance and access issues, he subjected her to a brutal and vicious assault coupled with degrading and humiliating language. Following this outrageous attack, a mere four months later, he assaulted and raped a woman who was barely more than an acquaintance. He threatened she would never see her son again in order to force her to comply. She was subjected to anal and oral rape. This further outrage was perpetrated by him in her own home. The effect upon her as her statement showed was to destroy her sense of safety and confidence. The gravity of these terrible offences cannot be underestimated and the Court considers that that gravity was indeed correctly measured by the judge as proportionate to the sentence that he imposed. The appeal in relation to the second sentence is therefore also dismissed.