



THE COURT OF APPEAL

**Birmingham J.
Mahon J.
Edwards J.**

Record No 86 CJA/16

Bill No CN 38/14

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN:

THE PEOPLE OF THE SUIT DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-AND-

EDMUND STEWART

RESPONDENT

Judgment of the Court (ex tempore) delivered the 21st day of November, 2016 by

Mr. Justice Edwards

Introduction:

1. In this case the respondent pleaded guilty before Cavan Circuit Criminal Court to one count of sexual assault, contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990.
2. The respondent was sentenced to three years imprisonment, the entirety of which was conditionally suspended for a period of four years on the respondent entering into a bond in the sum of €500 to keep the peace and be of good behaviour.
3. The applicant now seeks a review of the sentence pursuant to section 2 of the Criminal Justice Act 1993 (the Act of 1993) on the grounds that the said sentence was unduly lenient.

The Facts

4. The respondent, who is resident in Northern Ireland, is a member of a cycling club. On the 23rd of June 2012 he was part of a group of cyclists who had crossed the border on a sight seeing trip and who were booked in to stay the night at the Farnham Arms Hotel in Cavan. They arrived at approximately 4pm on that date and later that evening spent time drinking in a public house in Cavan town before returning to their hotel where they continued drinking.
5. In the early hours of the 24th of June 2012 the Respondent was in the hotel foyer with another cyclist, Mr. Louis Finnegan. A woman, S. P., had drink consumed to the extent that she was asleep or certainly not conscious. She was sitting slouched on the couch in the hotel foyer. The man working behind the desk in the foyer asked the Respondent and Mr. Finnegan to move into the residents' bar. Mr. Finnegan put his hand on the woman's shoulder to try to wake her but it was not possible because she was not responding. Mr. Finnegan then moved into the residents' bar and was sitting at a table facing the door looking out into the foyer.
6. Mr Finnegan described seeing movement from the couch where the girl in the foyer had been asleep. He noticed the respondent was beside her. When the respondent came back into the bar, he asked him what he had done to the girl. The respondent had then put two fingers of his right hand up to his nose and sniffed them and he stretched his hand towards Mr Finnegan and asked Mr Finnegan if he wished to smell them. He made the same gesture to a Mr Tommy Lawlor and asked him did he want to "smell her". The respondent then stuck his index finger into his mouth and sucked it.
7. Mr Finnegan, who was ostensibly disgusted with what he had observed, reported the matter the Gardaí who commenced an investigation. Unbeknownst to the respondent the incident had been captured on CCTV, and gardaí quickly discovered this and took possession of the relevant footage.
8. Sergeant Harten of Cavan Garda Station described to the sentencing court what the footage showed in the following terms:

"At 4.08 a.m., S.P. entered the hotel foyer and is greeted by her sister. She sits down on a couch in the foyer and falls asleep. She has her legs crossed and she is slumped to her right on the couch, it's like a two seater couch. She slumps slightly to her right. At 5.17 a.m., the Accused, Edmund Stewart, sits down beside her on her right hand side. He then gets up and he uncrosses her legs. She had the legs crossed. He uncrosses her legs and he sits on a low table which is directly in front of her with the table in the foyer. He can be seeing looking around as in watching for any persons approaching. He opens her legs slightly and then he opens them wider. She has a dress on her and at this time then he appears to be disturbed by something off camera and he stops and he looks around and he then stands up and he places his right hand up between her legs and he then sits down back down beside her on the couch and then, so she is sitting on his left, so he places his left hand right up between her legs. Her skirt or dress is pulled right up at this point. At 5.21 a.m., the Accused leaves and she remains in the same position on the couch with her legs apart and her dress up. At 5.28 a.m., he returns, the victim is still in the same position. He stands over her with his right hand around her upper thigh and he lifts up her up and he puts her lying down on the couch. So, she is now lying on the couch and he sits

beside her. At this stage he has his back partially to the cameras so you can't really see what he is doing but he appears to open her legs again at that point. Somebody approaches and he gets up but he remains in her immediate vicinity. At 5.29 a.m., when the coast is clear, he returns to the couch and he lifts up one of her legs again and he spreads them wide. Someone then approaches and he gets up and he leaves the foyer. At this point, the victim is lying on the couch with her legs wide apart and again her dress is fully pulled up. It is believed that he went to the toilet, at that time. He returns to the foyer shortly afterwards; and there is another man with him, it is one of the cycling party and a coat is secured from the porter in the hotel and its placed over her, at that point. That's at 5.32 a.m. At 5.35 a.m. members of the victim's family arrive and they try to wake her without success, she is completely comatose. At 5.38 a.m., the Accused he appears to notice the CCTV camera in the corner, inside the door and he walks directly towards it and looks up at it. Now, he subsequently identified himself from that CCTV, as did other witnesses, that it was Edmund Stewart, the Accused and at 5.43 a.m., members of the victim's family take her from the foyer to bed."

9. The respondent had returned to Northern Ireland shortly after the incident and it was necessary for Gardaí to travel to Northern Ireland to interview him. He was co-operative to the extent of making himself available for interview at Grosvenor Road Police Station in Belfast, and in the course of being interviewed admitted that he had touched S.P's upper thigh but denied touching her vagina. He was subsequently returned to this jurisdiction on foot of a European arrest warrant in order to be charged and tried for sexual assault. He consented to his rendition.

The respondent's personal circumstances

10. The respondent was born on the 9th of July 1983 and accordingly was almost 32 years of age at the date of his sentencing, and was almost 29 years of age when the offences were committed.

11. At the time of sentencing the respondent was a single man. He has since married / entered a stable long term relationship and he and his partner now have a young daughter who unfortunately has hydrocephalus. His only previous convictions were for minor road traffic matters. He was in employment at the time of the offence, and was working as a bus driver with a substantial and reputable transport firm. He was let go as a result of his involvement in this crime.

12. The respondent was assessed by the Northern Ireland Probation Service as being of medium risk of re-offending, and by his own psychologists, whose report was handed in, as being of moderate / low risk of re-offending. He has a history of substance abuse issues, principally with alcohol. It is understood that since this matter was before the Circuit Court he has addressed his alcohol abuse and has not come to adverse police notice in any way. He has managed to secure another job as a car valet.

13. An up to date report from the Northern Ireland Probation Service which this Court agreed to receive on the usual contingent basis states that his lifestyle is stable and that no further action by, or involvement of, the probation service is considered necessary.

The impact on the victim

14. The victim elected not to give evidence at the sentencing hearing, but provided a victim impact statement instead which was handed in. The report states (*inter alia*):

Ms P described the immediate effect of viewing the assault on her as shock. She describes feelings of disgust that she was violated in such a manner. Her immediate feelings were also disbelief and powerlessness. She found it difficult to believe that someone could be so offensive.

In the months following the offence she states that she experienced many negative emotions and feelings. She had feelings of guilt as she reports that she had consumed alcohol on the night of the offence and had blacked out and fallen asleep in the lobby of the hotel. She has outlined that she has had ongoing difficulties with alcohol over a number of years. On this occasion she was attending her brothers wedding in Cavan with her family. She had resolved not to drink to excess but had and suffered a blackout and had fallen asleep. She felt guilty for finding herself in that situation where she was sexually assaulted.

S. P. outlines how in the year following the assault she had difficulty concentrating as she thought of the offence. She had less trust in people and became fearful of being attacked and isolated herself from people. Out of fear she began to lock internal doors at night where she resides. Her feelings of depression led to her sometimes contemplating thoughts of taking her own life S reports how her abuse of alcohol increased. She outlines how she could not manage her parental responsibilities and as a result her two elder teenage children were taken in to care with her agreement. Her two younger children have been mainly cared for by the father of the children

S. P. reports how she is attending the Rape Crisis centre in Athlone and is attending Addiction Counselling in dealing with her problems with alcohol. She reports progress in dealing with her problems"

The sentencing judge's remarks

15. In the course of sentencing the respondent the sentencing judge commented as follows (*inter alia*):

JUDGE: "The aggravating factors in the case are the fact that he was clearly abusing alcohol at this particular time and has no real recollection of what went on or what happened. Certainly he has a vague recollection of what happened, he didn't believe that he had done anything out of the ordinary but in fact, the complainant made it quite clear that he had and he, as I said, put his hands up to that. But it was an aggravating factor that he allowed alcohol to take him over, if you like. One takes alcohol voluntarily, some people have an addiction to it but still it is voluntary, if you pay the money over the counter you get the alcohol and you make your own mind as to whether to consume it or not and he did chose to consume it and that was that. That is really the aggravating factor and the only aggravating factor. It could be said perhaps that the fact that he didn't turn up and it required a European Arrest Warrant to be issued is an aggravating factor but while I take it into account, I don't think it's particularly an aggravating factor but it's something I have taken into consideration.

On the other hand there are a great deal or a great number of mitigating factors. First of all his plea, which has saved the complainant the experience of having to go through court and square up to what happened and to convince, if you like, beyond a reasonable doubt a jury that that is in fact what happened. That is a very trying experience for any young woman to have to go through and to, in other words, to plead to 12 members of the jury to believe her in the hope that they will believe her and she has been excused that because of course, he has admitted his involvement in the offence

and pleaded guilty to it. The other matter I must be careful not to do and I mustn't take revenge on him for what he has done. In other words, I'll punish him for what he has done but the fact that he has done this to this young lady, I should not be seen to take revenge on him for it and, if you like, punish him to such an extent as to throw away the key, that I would not do. The maximum sentence is 10 years, if he had been convicted by a jury of this particular offence I probably would have sentenced him in the light of his lack of previous convictions to a period of three years' in prison. I am conscious of the media coverage that has been given in this case and I have read it, I think that it has succeeded in reducing Mr Stewart's reputation to the depths of the gutter, I think is the best way to describe it. He's going to have to live with that for the rest of his life, I don't know who wrote the article, but that individual, in so destroying an individual such as they have done, also has to live with it and I'm conscious of the fact that the various experts that he has seen believe that he is of a low risk of reoffending. I now know that he is engaged to be married and very happily hopefully, he is going to be a father and hopefully the press and the media will leave him alone to get on with his life. He has no previous convictions, he got a couple of road traffic convictions but he has got no previous convictions either on the other side of the boarder or here. He has not come under the radar of the PSNI or here. He accepts that he has an alcohol problem and on the evidence before me he has taken it in hand and has sought the appropriate advice and counselling and continues to do so, but for various reasons he has to engage in counselling and other areas of treatment for the effects of what this whole case has brought about in his particular life and to help him to move on.

Another factor which is very important in this case is that he's from the North of Ireland, he has absolutely no obligation, as such, to appear here, other than under an arrest warrant or to be brought here under an arrest and in custody but he has answered to his bail and he has continued to answer to his bail and he has turned up here in court on any time that the matter has appeared in front of me and that's an important factor. His references are very considerable and they're very supportive.

There's another milestone that has been reached in his life, he's a professional driver. He, to some extent, has no other means of livelihood other than professional driving and if he was, as he was employed as a bus driver with the bus company in the North of Ireland he has lost that job. And he has lost all the support that he would have of an income from that job. And indeed, his employers were entitled to suspend him."

"These are all, I believe, ... mitigating factors in this case and I think they are quite overwhelming mitigating factors in the circumstances. So, what am I going to do? I should say another matter that is there and that is that it's going to follow him for the rest of his life, no matter where he goes and that is that he is on the sex offender's register. So, this incident that occurred in Cavan four years ago is going to follow him for a considerable number of years. It's a fact that must happen but it's a factor that I should take into account.

I have read the evidence, I have heard the evidence et cetera and I would be asked in the current regime classify it as to be serious, mid-range or low and on the evidence that I heard and the evidence that was put before me in relation to what happened and the realisation of the individual upon whom the assault is perpetrated, her recollection of events et cetera, I would put it into the low range as opposed to the medium or high range. However, I do believe that the public are entitled to be protected and they're entitled to be protected from people like Mr Stewart and in particular, the justice system would seek to encourage an individual not to offend again and of course to protect the public and to ensure that that didn't happen. For these reasons I have decided that a suspended sentence is the sentence that should be imposed in this particular case."

The grounds of appeal.

16. The appellant, in contending that the sentences were unduly lenient, makes two main complaints.

17. It is complained first of all that the sentencing judge erred in placing the offences at the lower end of the scale. In doing so, the appellant says, the sentencing judge failed to adequately take into account the significant aggravating factor in the case that the respondent took advantage of a young woman who was in a vulnerable state. He also returned several times to the victim, and had been careful to desist when he had thought someone in the vicinity might see him indicating a clear awareness on his part that what he was doing was wrong.

18. Secondly, it is complained that the sentencing judge attached undue weight to the mitigating factors

19. Thirdly, and in particular it is complained that the case did not in any circumstances merit a wholly suspended sentence and it is suggested that this represented a substantial deviation from the norm and an error of principle in itself.

Discussion

20. After careful consideration we agree that the trial judge was in error in his approach to the assessment of the seriousness of the offence. The scale of available penalties ranged from non-custodial options to a maximum sentence of ten years imprisonment plus a fine. The sentencing judge determined that the offence, before any allowance for mitigating factors, merited a headline sentence of three years imprisonment in the particular circumstances of this case. We would not quarrel with that having regard to the appellant's culpability and the harm done. However, where the trial judge did fall into error was in believing that this was an offence that could be dealt with by means of a wholly suspended sentence. We consider that this was a case that on any view of it required the imposition of a custodial sentence to be actually served at least in part.

21. The sentence imposed was in the circumstances unduly lenient and outside of the sentencing judge's legitimate margin of appreciation. We therefore quash the sentence imposed in the court below we must now proceed to sentence the respondent afresh. We have already stated that we believe that a custodial sentence must be imposed. However, two important features of this case are that this respondent had no previous convictions or at least no relevant previous convictions and was therefore of previous good character. It is also the case that he did plead guilty.

22. In the case of the *Director of Public Prosecutions v. Aoife Maguire* which is a recent decision of this Court also exhibited those features and in dealing with that case, this Court approached the matter in the following way. In giving the judgment of the court, Birmingham J. said at para. 20:-

"In the case of *Director of Public Prosecutions v. Doherty*, the Court of Criminal Appeal, the predecessor of this Court was dealing with a garda who had been convicted of an offence of corruption. In passing a sentence following a successful undue leniency application, the Court, (per Hardiman J.) commented as follows:-

'We also bear in mind the factors which were recited on several occasions yesterday and acknowledge in the case of DPP v. Egan that is to say that in dealing with a person without previous convictions and indeed of positive previous good character, if the court considers as we do, that a custodial sentence is required in the public interest, such a sentence need not be unduly prolonged because it is the fact of the sentence rather than its duration which is the principal effect.'"

23. Birmingham J. also quoted with approval the remarks of Lawton L.J. in the English case of *R. v. Sergeant* [1975] 60 CAR, where he had commented:-

"For men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time."

24. Applying that jurisprudence to the circumstances of this case, it is necessary to sentence the respondent to a term of imprisonment. We propose to sentencing to the term of three years imprisonment identified by the sentencing judge in the court below as appropriate to the seriousness of the case however, we propose also to suspend all but the last nine months of that three year term.

25. In suspending all but the last nine months of the term we are conscious that the respondent was dealt with non custodially at first instance and in circumstances where time has moved on, we acknowledge that it will at this remove be all the more difficult for him to have to face custody, though it is necessary in our view that he must do so. Accordingly the sentence imposed today is one which is less than this Court would in fact have imposed if it had been dealing with the matter at first instance. We believe that in imposing the sentence that we have now indicated, we are striking the appropriate balance in circumstances where he must now go into custody. but as we have said time has to some extent moved on and it is an extra factor to be taken into account.

26. Therefore the sentence that the court will impose is one of three years imprisonment with two year and three months suspended on the respondent entering into a bond to keep the peace and be of good behaviour for a period of three years from today's date and the amount of the bond to be €500.