THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

89/13

The People at the Suit of the Director of Public Prosecutions

Respondent

V

D.F.

Appellant

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

1. In this case the appellant is appealing against the severity of sentences that were imposed upon him in the Circuit Criminal Court on the 8th March, 2013. The sentences under appeal are of five years imprisonment and three years imprisonment, the sentences being concurrent, imposed in respect of two counts of sexual assault.

2. The background is that back in 2007, a person who will be referred to as Ms. EO'R was sexually assaulted and also in 2007 a Ms. AD was sexually assaulted. The matter came before the court and there was a plea forthcoming in respects of the offence involving EO'R, but in the case of AD the matter went to a jury trial and the appellant was convicted on one of the two counts that he faced. That is of some significance for reasons that we will come to in a moment.

3. The sentences imposed were three years in respect of the EO'R offence and five years in respect of the AD offence.

4. The essential facts may be stated briefly. AD is the appellant's niece and at the time of the assault she was 22 years of age and she was working for a commercial state body, that description may not be technically accurate but it certainly gives an indication of the nature of the institution, which cannot be named as it might indirectly lead to the identification of the victims.

5. On Friday 15th June, 2007, Ms. AD went out for after-work drinks with colleagues and she met the appellant and she asked him back to her home for a drink on the basis that there was a social gathering taking place there that evening.

6. She went off to bed around 11.30 and she heard the appellant coming up the stairs and entering the room, sitting on the bed, shaking her to wake, and he said "come on, wake up, you asked me over for a drink". She responded by saying "leave me alone, I'm wrecked". At that stage he proceeded to put his hand inside her underwear and to place his finger inside her vagina. She told him to "eff off" and his response to that was that he stood up and walked out of the room, saying something of that order, "you better come down or I will have to come back up to wake you".

7. The appellant went downstairs and joined Ms. AD's family and was followed down shortly afterwards by Ms. AD. Later Ms. AD went back up to bed and a taxi was called for the appellant who left.

8. The second count in time was approximately three months later on the 15th September, 2007 and it related to Ms. EO'R who was aged approximately 39 years at the time and was a sister of Ms. AD. The position was that Ms. EO'R had organised a party in honour of her father to which the appellant was invited and on the occasion of the party, and this is of some significance, the husband of EO'R was away, he was abroad in the US, and as it happens the wife of the appellant was in hospital at the time. On his arrival at the party, the appellant is said to have indicated his intention to get drunk, indeed to get very drunk, the word used was that he was apparently going to get "locked". He asked whether it would be possible for him to stay over for the night. Sometime in the early hours of the morning Ms. EO'R retired to bed along with her four year old daughter. While she was in bed, she saw a man enter the room, she recognised the appellant. He pulled the duvet off her, put his hands on to Ms. EO'R's bottom and started rubbing it. She asked him what he thought he was doing and he said "oh, oh" and left the room. Soon thereafter, Ms. EO'R told members of the family what had happened and some months later again, she received an apology.

9. In the immediate aftermath of the incident, the appellant apologised to the father of Ms. EO'R and, very significantly, on the Sunday after the incident the appellant took an overdose and he was admitted to Beaumont Hospital in the aftermath of that overdose. Subsequent to his discharge from Beaumont Hospital, he went to the Rutland Centre for treatment of alcoholism. It is a feature of the case that it is not in dispute but that the appellant was indeed suffering from alcoholism.

10. In terms of the personal circumstances of the appellant, he was 58 years at the time and he had no previous convictions and he had not come to the attention of gardaí. After the incident involving Ms. AD he left his employment with the commercial state body, to which there has been reference, being the same one with which Ms. AD was working. At that time he had been there for 35 years, having attained a senior management position having started off there as a filing clerk.

11. In the Circuit Court, the plea focused on the fact of no previous convictions, of the appellant's good work record, of his loss of career, of his difficulties with alcoholism and his efforts to rehabilitate himself through the Rutland Street Centre and his participation in the work of Alcoholics Anonymous. It focused also on the attempted suicide involving the overdose and the fact that he was in a coma for seven days thereafter. The Court also had before it a report from a consultant psychiatrist dealing with alcoholism, dealing with the depressive illness that he was now experiencing and the treatment that he was receiving, including ECG treatment in the context of three admissions to St. Patrick's Hospital.

12. It was pointed out that this offending had resulted in a very significant fall from grace, the loss of his home, his career and his marriage. It was pointed out that there was an acceptance, though it has to be said a belated acceptance, of the jury verdict and along with that, a belated expression of remorse.

13. A very considerable number of references and testimonials were presented to the court. The judge took the view that the AD offence was at the upper end of the scale and the EO'R offence at the lower end of the scale, save for the presence in the bed of the daughter of the injured party.

14. A feature of the sentence hearing was that there was an exchange between the learned trial judge and defence counsel, with the judge referring to the fact that one count relating to Ms. AD was still pending and also making reference to the fact that there were other counts on the indictment apparently involving other family members, and the judge was indicating that considerable credit

would be given if an approach was taken that would see all counts disposed of on that occasion and matters brought to a final resolution.

15. That has given rise to one of the main issues in this appeal in that, on behalf of the appellant, it is said that there was an impermissible attempt by the trial judge to cajole the appellant into pleading and that when that did not happen, that there has to be a perception that the appellant was in fact sentenced for matters other than those to which he pleaded.

16. This is a case where the offending has had a significant impact on the two victims and that appears very clearly from the victim impact reports that were presented to the trial court. In the case of Ms. AD, she became moody, withdrawn, she began to drink, she was actually hospitalised in respect of post traumatic stress disorder.

17. In the case of Ms. EO'R too, while the physical act of the assault to which she was subjected was perhaps less grave, she also, it has to be said, was seriously affected. It is also the case that the family and the wider family have been sundered by this activity.

18. There are two points made on the appeal. The first has have already been touched on, being the suggestion that the exchange that was precipitated by the trial judge between himself and the defence counsel meant that there was a perception that pressure was being applied and when the plea that was being canvassed was not forthcoming, that it ended up in a situation where the appellant was sentenced for an offence other than those that he had been convicted or pleaded of.

19. The second point made is that the sentences are disproportionate and it is said that the window opening to that conclusion is to be found in relation to the sentence of three years imprisonment, which it is said could not be possibly justified in respect of an offence that has to be seen as being very much at the lower end of the spectrum.

20. The Court's view of the matter is this, first of all so far as the three year sentence is concerned, the Court accepts that the physical act there that constituted the assault can properly be regarded as being at the lower end of the scale of offences that come before the courts and, if the case stood alone, it is very possible that the case might have been dealt with in the District Court and it is very possible that the case might have been dealt with in a non-custodial manner. But there were unpleasant aspects and dimensions added by the fact that the injured party's young daughter was present in the room in the bed, but also in the Court's view, a very significant additional dimension is provided by the fact that this was in time a second offence against members of the same family in a family home, the offences were within close proximity of each other and that in the view of the Court adds a very significant additional dimension which has to be marked.

21. In the circumstances so far as that offence is concerned, the Court will reduce it, but not by the level that it would be prepared to consider if the case stood alone. The Court has been told that in the period that he has been in custody that the appellant has been making use of his time and one indication of that is that we have been furnished with a number of magazines that he has been working on, indeed editing as we understand it, while in the Midlands Prison, and the Court is pleased that the time that he spent in custody is being put to use.

22. The Court's view is that there was an error of principle, that the sentences imposed do represent a significant departure from sentences that have in the past been imposed for comparable offences. So far as the exchange with counsel is concerned, the Court understands why the learned sentencing judge would have been anxious to see if a final resolution could have been achieved and might have taken the view that if that happened, that there would have been advantages for all concerned. However, if the judge was going to explore that prospect, it was very important that there would be no room for misunderstanding or confusion and that it would be made very clear that no pressure was in fact being imposed and that if the suggestion was not taken on board, that that would not have had an adverse consequence. The manner in which the exchange was, as it were, let hang in the air does mean that there is scope for concern as to whether the fact that suggestions were not being taken on board was continuing to feed into the sentencing process.

23. Overall, the Court has concluded that there was an error of principle and will therefore set aside the sentences imposed in the Circuit Court and is therefore called to address the question of what is an appropriate sentence.

24. So far as the sentences were originally a three year sentence was imposed, the Court will set aside that sentence and substitute a sentence of eighteen months imprisonment and, as the Court has already indicated, that that is a more severe sentence than it would have been minded to impose if the offence stood alone, but it takes account of the fact that it occurred soon after the other offence targeted at a member of the same family in a situation where at that stage the appellant must have believed that he was getting away with the first offence.

25. So far as the more serious offence is concerned, where the learned sentencing judge imposed a sentence of five years, the Court will also set that sentence aside and will substitute a sentence of three years imprisonment. Both sentences are to run concurrently and both sentences will run from the date that was specified by the sentencing judge.

26. The first thing that has to be said as a consequence of the order of this Court, the appellant is and will remain on the sex offenders register and there are obligations that arise out of that. Secondly, it is the Court's view that an element of post release supervision is appropriate and that is particularly so in the situation where it appears that alcoholism difficulties formed part of the background to the offence.

27. The Court will make provision for twelve months post release supervision. The effect of that is that when he is released from prison and the release will obviously now be at an earlier stage than would otherwise have been, he will still have obligations in terms of the fact that he is in the sex offenders register and he will also be required to comply with the directions of the probation Service for a period of twelve months after the release from prison. If the appellant does not comply with the obligations in respect of the sex offenders register or the obligations in respect of post release supervision he will be committing a further offence and that would give rise to the prospect of being brought back before the court and a further sentence potentially being imposed.