



THE COURT OF APPEAL

Record No. 243/2016

Birmingham J.  
Sheehan J.  
Mahon J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

P. G.

APPELLANT

**JUDGMENT (ex tempore) of the Court delivered on the 10th day of February 2017 by Mr. Justice Mahon**

1. Following a five day trial at the Central Criminal Court in June / July 2016 the appellant was found guilty of the single count of rape 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. The appellant was sentenced on 25th July 2016 to eight years imprisonment, with the final year suspended on certain conditions.

2. The appellant has appealed against both his conviction and sentence. His single ground of appeal is in relation to the conviction appeal that the learned trial judge erred in law and in fact in charging the jury in relation to consent.

3. In the course of his charge, the learned trial judge having dealt with the issue of penetration went on to deal with the issue of consent in the following terms:-

*"You must then go on to consider the second ingredient that must be proved beyond reasonable doubt and again as with everything else, it is for the prosecution and the evidence to satisfy you of this.*

*The second requirement is that at the time of penetration, if you are satisfied that penetration occurred, members of the jury, that as an external fact there was absence of consent on the part of the person penetrated, in this case Ms. G., to that penetration. And it is an internal fact but obviously involves consideration of her first state of mind and her state of knowledge and all of the circumstances pertaining at that particular time. Irish law does not attempt to provide a definition of consent, members of the jury, and I think that is probably sensible because consent, in these circumstances, is left in the hands of yourself and that's why I say an application of your own knowledge, your own common sense and your experience will lead you to know and will lead you to be able to identify consent in relation to a sexual act on the one hand and non consent in relation to the other. Perhaps it's as simply as that."*

4. He also said, (quoting a Court of Criminal Appeal decision), the following:-

*"Consent means voluntarily the agreement or acquiescence to sexual intercourse by a person of the age of consent .. well, there is no issue as to that .. and with requisite mental capacity. Again, I don't think there is any particular interest as to that. It also says "knowledge or understanding of facts material to the act being consented to necessary for the consent to be voluntary or to constitute acquiescence."*

5. Furthermore, the learned sentencing judge stated the following:-

*"So, I mean, consent can't arise when somebody is fast asleep or where they are so insensible or incapacitated from drink or drugs that there are incapable of giving any kind of voluntary agreement or acquiescence to ... sexual activity, but after that, I suppose, we do get into a grey area, members of the jury, and perhaps there is something of that in this case because you know, you can be a very enthusiastic participant in sexual activity and clearly doing that with your eyes open, no issue arises in relation to the absence of consent. But consent is also present, members of the jury, somewhat further down the scale than that. You can have perhaps a somewhat more reluctant or bored acquiescence to sexual intercourse and, you know, perhaps I think there was something of a flavour of that in Mrs. G.'s evidence insofar as she thought that it may have been her husband having had two goes already previously, I think she said or she used something of the phrase that she wasn't particularly up for a third time but I suppose it being her husband, she was perhaps prepared to go along with it. I don't know. It is for you, to form whatever view that you want in relation to that."*

6. Following his charge to the jury, Mr. McGinn S.C. (for the prosecution) addressed the learned trial judge as follows:-

*"Judge, there's just one matter about which I have a little concern ... and that was the Court's direction on the absence of consent and it being an ingredient of the offence, which clearly it is. Given the particular circumstances of this case, in my submission, the Court perhaps wasn't clear enough that an absence of consent to - sorry, that consent to having sexual intercourse with Mrs. G.'s husband does not equate to having sexual intercourse with P. G.."*

7. No issue was raised on behalf of the appellant in relation to the charge.

8. In any event the learned trial judge decided to address the jury again in relation to consent. He said:-

*"... I have one, I suppose I don't know whether it is a correction or a clarification, but anyway I have one extra thing to say to you but I don't want you to take it too much out of context. It's just something that I said to you on the second limb of the ingredients of the rape, that is the question of the absence of consent and of course the overall context is for you to be satisfied of these matters on the evidence. I spoke to you generally because I speak always to juries*

*generally in pretty much the same terms on the issue of absence of consent, of the concept of consent covering a fairly wide range of things between you know, somewhat bored or reluctant acquiescence on the one part and very enthusiastic participation on another. But that's - that is so and that remains valid as a general observation. This is clear to you I'm sure but in case it is not members of the jury the prosecution case in this case on the issue of the absence of consent and it only arises if you are getting - if you are getting past the first hurdle, members of the jury, in so far as Mrs. G. was - and this is what the prosecution say and what she says herself, or at least implicit in what she says insofar as she may have been consenting to sexual activity with somebody that night, it was only with her husband and not with anybody else ... the prosecution say that insofar as there was consent to anything it was consent to something with her husband and she was firm in her evidence that she wasn't up for anything with anybody else alright? .. "*

9. The complainant, Ms. G., was at the time of the allegation in March 2014 living with her husband and young children in a caravan in a halting site in Belcamp Lane in Coolock in Dublin. On the evening of 7th March 2014 Ms. G. was in bed with her husband in their caravan. A baby of eighteen months was also in the bed with her and her husband, while three other children were sleeping in another part of the caravan. In the course of the night she was disturbed from her sleep and awoken by a man in her bed. She assumed that the man was her husband, but in fact it was the appellant. He was in the process of attempting to have sex with her, and penetrated her at that time. She realised that the man in question was not her husband and woke her husband who saw the man sitting at the end of the bed pulling up his trousers. There was then some shouting and the man left the caravan. Ms. G. recognised this other man as the appellant, who was her uncle and well known to her. The next day the appellant went to the gardaí, and gave a statement some days later. She also went to the Sexual Assault Treatment Unit at the Rotunda hospital but no evidence of any recent injury was noted.

10. The appellant was arrested on the 1st April 2014, and co-operated fully with the gardaí.

11. It is submitted on behalf of the respondent that the learned trial judge's charge to the jury in relation to the consent issue was clear, simple and in no way confusing. The appellant raised no serious objection to any aspect of the charge, and this may explain the decision not to make oral submissions to this Court in relation to the issue.

12. The Court is satisfied that the learned trial judge comprehensively and fairly explained the consent issue to the jury and in terms which would have left them in no doubt that consent to sexual activity with the complainant's husband was not consent to such activity with the appellant. It is difficult to imagine how the concept of consent in the context of this trial could have been stated more clearly.

13. The appeal against conviction is therefore dismissed.

#### **The sentence appeal**

14. The appellant was sentenced on 25th July 2016 to a term of imprisonment of eight years with the final year suspended for a period of five years post release, during which time he was directed to have no contact directly or indirectly with the injured party or her immediate family. It was also directed that for a period of twelve months post release the appellant place himself under the supervision of the Probation Services, and comply with all their terms and conditions during that period. The appellant has appealed against that sentence.

15. The focus of the appeal is the contention that having decided that the headline sentence was one of eight years, a term with which Mr. Colgan did not take any particular issue, the learned sentencing judge did not then sufficiently discount for the mitigating factors, or as put by Mr. Colgan, he ought to have "*mitigated backwards*".

16. The learned sentencing judge having decided that the appropriate headline sentence in this case was one of eight years imprisonment proceeded to describe the mitigating factors as being slim, they being the appellant's cooperation with the investigation, his *reasonable approach to the running of the trial*, his honouring of his bail conditions, and his personal circumstances. He commented that while not treating the appellant's decision to contest the case as an aggravating factor it was nevertheless a fact that he was unable to discount the sentence in the absence of a plea of guilty which he would otherwise have been in a position to do. A plea of guilty in a sexual offence case is of particular value as it saves a complainant from the trauma of a full trial, and will normally be reflected in a significant reduction in the sentence, either by way of reducing the headline sentence or by suspending a portion of the term imposed. In any event, the learned sentencing judge did reduce the custodial element of the eight year sentence by suspending the final year on the conditions already referred to.

17. The Court is satisfied that the eight year sentence with the final twelve months suspended was within the margin of discretion available to the sentencing judge in this case, and it does not therefore identify any error of principle in the imposition of that sentence.

18. The Court therefore also dismisses the sentence appeal.