THE COURT OF APPEAL

113/2016

Peart J.
Mahon J.
Hedigan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

D.B

APPELLANT

JUDGMENT of the Court delivered on the 27th day of June 2018 by

Mr. Justice Hedigan

The Appeal
1. On the 1st of March 2016, the appellant was convicted by a Jury after a seven-day trial in the Central Criminal Court of a single count of rape. He was sentenced to eight years with the final year suspended. The appellant now appeals against that sentence.

Background
2. The appellant was brought before the Central Criminal Court in respect of an incident that took place in the early hours of the 27th of February 2013. He was convicted by a Jury of the single count of rape. The victim of the offence, Ms P, was his first cousin. She was aged 22 at the time of the offence. The offence took place in the appellant's home in Waterford. The appellant and Ms P had been attending a gathering in a pub in Waterford that night which was held to mark the first anniversary of the death of the appellant's late mother, who was also the aunt of Ms P. Both parties had moved on to two other pubs in the Waterford City area with other family members before returning to the appellant's house. They were both intoxicated.

3. At trial, Ms P gave evidence to say that she had very limited recollection of her time in the three pubs and that her next memory was waking up in the home of the appellant, although she had not been there before. Ms P recalled waking up and feeling pain in her vagina. She then realised that the appellant was on top of her and having sexual intercourse with her. The appellant was completely undressed. Ms P told the appellant to stop and to leave the room and he did so. She was undressed from the waist down. Ms P then used the appellant's mobile phone to contact her father, but he was unavailable. She spoke to her father's partner, then rang a close friend, and then her mother. She told them that something had happened and that she needed to go home. All three people described Ms P as sounding distressed on the phone. The appellant came back into the room and his phone rang. He spoke to Ms P's uncle-in-law and provided him with the address of his house so that he could pick up Ms P. This happened between 4.00-5.00 in the morning. Ms P's aunt and uncle then collected her and brought her back to their house. They both observed her to be upset. Ms P later went to the bathroom and found that she had vaginal bleeding. She had not had sexual intercourse before this event.

4. Ms P told her aunt what had happened. She explained that she woke up to find the appellant on top of her. She was aware that the appellant had not been using contraception and was concerned about the possibility of becoming pregnant as a result. Contact was made with the Waterford Regional Hospital and then it was decided to report to the Gardaí. Detective Garda Maureen O'Neary gave evidence explaining that she called to the house and arrangements were made so that Ms P would be seen by the Sexual Assault Treatment Unit at Waterford Regional Hospital later that morning. Ms P was examined by a clinical nurse specialist. It was found that she had injuries consistent with the history given of sexual assault.

5. Ms P initially indicated that she did not wish to make a complaint at that point in time due to concerns over the effect such a complaint would have on her family. However, she did decide to make a complaint against the appellant in August 2013. The appellant was arrested on the 4th of September 2013 and detained in Waterford Garda Station. An interview took place in which the appellant denied sexual contact with Ms P. The appellant was informed during the interview that Ms P had been examined at the Sexual Assault Unit and there may be forensic evidence resulting from that. The appellant was given an opportunity to change his answers if he so wished. He said that he would like to change some of his answers and explained that there was sexual contact between himself and Ms P but he could not say whether or not sexual intercourse had occurred. He said that at one point Ms P asked him to stop and he did. A number of times thereafter he asserted that any sexual contact that occurred between him and Ms P was consensual. It was upon that basis that the case was defended.

Personal Circumstances
6. The appellant was born on the 17th of February 1982. He was 34 years of age at the time of conviction. He was single when sentenced but has a son, who was approximately 11 years old at the time of trial, making him now approximately 13. The appellant had separated with the child's mother but maintained a close relationship with his son.

7. The appellant had seven previous convictions in total. These include road traffic offences, conviction of theft for which he received a sentence of 30 days in Cork prison and another for the sale and supply of drugs under s. 15(a) of the Misuse of Drugs Act, 1977, for which he was sentenced to four years in prison by the Court of Criminal Appeal. Arising from the same incident, the appellant also was charged with unauthorised possession of firearms, contrary to s.15 of the Firearms Act, 1964, which was taken into consideration.

8. The appellant had previously worked in the construction industry but had more recently been working in sales for a company. He was not working prior to the trial due to being on sick leave. The appellant was on bail prior to and during the trial. He has been in custody since he was convicted on the 1st of March 2016.

Sentence

9. The appellant was sentenced on the 18th of April 2016. The court imposed a headline sentence of eight years, commencing on the 1st of March 2016, with the final 12 months suspended on the condition that the appellant be of good behaviour for three years. The appellant was automatically placed on the sex offenders register on the basis of the conviction. The court did not impose post release supervision, with regard to s.28 of the Sex Offenders Act, 2001. The court also required the appellant to enter a bond of €500.

Grounds of Appeal

10. Counsel for the appellant put forward the following ground of appeal:

> 1) That the trial court erred in principle in respect of the sentence imposed in that the trial judge:
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> 2) failed to accurately place the offence as committed by the applicant at the appropriate position along the spectrum of gravity for such an offence.
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> 3) afforded the offending conduct a higher rating on the spectrum of available penalties than was merited in the circumstances and erred in principle in determining upon a headline sentence of eight years.
>
> 4) gave undue weight to the aggravating factors in the case and consequently imposed a sentence that was disproportionate, excessive and wrong in principle.
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> 5) gave undue weight to the Victim Impact Statement in the case and consequently imposed a sentence that was disproportionate, overly harsh, and wrong in principle.
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> 6) gave insufficient weight to the mitigating factors in this case when taken individually and in their totality. Consequently, he gave a reduction which was too modest in the overall scheme of the sentence and that the learned trial judge failed to have adequate regard for the personal circumstances of the applicant.

Submissions of the Appellant

11. The appellant submits that the trial judge erred in respect of the sentence imposed having regard to the relevant law and all the circumstances of the case. The court was referred to the case of *DPP v WD* [2008] 1 IR 308 in relation to Charleton J's breakdown of four broad categories of punishment arising from conviction for rape: lenient punishments, ordinary punishments, severe punishments and condign punishments. The appellant submits that the offence in this case aligns with those categorised as ordinary punishments, which attract sentences of five to seven years imprisonment. The appellant quotes from *WD* whereby Charleton J stated:

> *"When one turns to the cases where a sentence of eight years was imposed, one sees that these are characterised by either a more than usual degree of violence on the part of the perpetrator, by a particularly unfortunate effect on the victim or by instances of the conviction being recorded on a number of different counts."*

Based on this, the appellant submits that a headline sentence of eight years falls on the higher end of the sentencing spectrum and does not align with the categories set out by Charleton J. When Ms P asked the appellant to "stop" and to leave the room he did so and facilitated her in arranging to go to her aunt's house on the night of the offence. At no point did he attempt to prevent her from making contact with family or friends, or prevent her from leaving. There was no evidence of violence or threat of violence evident in this case that would warrant a headline sentence of eight years.

12. The appellant submits that the trial judge gave undue weight to the aggravating factors at sentencing which resulted in a sentence that was disproportionate, excessive and wrong in principle. The aggravating factors that were of significance were the familial relationship between the appellant and Ms P, in that they are first cousins, and the appellant's previous convictions. The appellant's last previous conviction, being for theft, was from February 2006 in respect of an incident that took place in 2004. The appellant has no prior convictions for a similar offence.

13. It is submitted that undue weight was granted to the Victim Impact Statement which consequently resulted in a sentence that was overly harsh and wrong in principle. The trial judge described the Victim Impact Statement of Ms P as "grim reading". The appellant refers to the case of *The People (Director of Public Prosecutions) v M*, which sets out that the key issues in sentencing are the nature of the offence and the personal circumstances of the offender, not the general impact of the offence in question. It is submitted that an inference was made that because the appellant and Ms P are cousins, this would have impeded her recovery further, despite that this was never articulated by the victim in her statement. Therefore, it is submitted that the trial judge was unduly influenced by the Victim Impact Statement in this case.

14. The appellant submits that the court gave insufficient weight to the mitigating factors individually and in their totality. The trial judge did not give adequate regard to the appellant's personal circumstances and this resulted in an insufficient reduction of sentence. The appellant refers to the case of *The People (Director of Public Prosecutions) v Kelly* [2016] IECA 204 whereby it was stated:

> *"The construction of a proportionate sentence is fundamentally a two-stage process. It involves in the first instance assessing what is the appropriate headline or notional sentence to be applied in principle having regard to the relative gravity of the offence, and with reference to the range or spectrum of available penalties. It then, in most cases, involves adjusting the headline or notional sentence downwards to take account of relevant mitigating circumstances."*

It is submitted that more consideration should have been given in mitigation to the appellant's extensive history of employment, his efforts made after being released from prison in 2007, his close relationship with his young son, and the absence of violence or threat of violence evident in this case. The appellant submits that the trial judge did not draw the appropriate balance between the offence and the offender, and that the court failed to give full and proper weight to the mitigating factors when sentencing in this instance.

15. In conclusion, it is submitted that in all of the circumstances of this case, the court gave undue weight to the aggravating factors in this case, to the Victim Impact Statement provided at sentencing, and did not fully consider the factors of mitigation. For these reasons, it is submitted by the applicant that the trial judge erred in principle and that the headline sentence imposed of eight years is unduly severe.

Submissions of the Respondent

16. The respondent submits that no error was made by the trial judge when sentencing in this case. The headline sentence imposed was indeed significant but this reflected the seriousness of the offence for the following reasons:

17. The appellant took advantage of the injured party in vulnerable circumstances by engaging in sexual intercourse with her while she was asleep and in an intoxicated state. The assault only ceased when the victim woke up and realised what was taking place; that the appellant was fully undressed, that she was undressed from the waist down, that she felt pain in her vaginal area, and that he was on top of her having sexual intercourse.

18. The seriousness of the offence is aggravated due to the fact that the injured party is a first cousin of the appellant. The victim was entitled to view her elder cousin as someone to feel safe around in the circumstances. Further aggravating factors are present in that the injured party was 22 years old and the appellant was 31, and that the victim was sexually inexperienced. Evidence was heard from the nurse who examined the injured party in the Sexual Assault Treatment Unit in Waterford Regional Hospital to confirm that there were two lacerations in the vaginal wall of the victim and the injuries were consistent with forced sexual assault.

19. It is submitted that is was entirely reasonable for the trial judge to take the impact of the offence to the injured party into account and to infer that the fact that the appellant is her cousin would further impact her recovery from such an assault.

20. It is submitted that the mitigating factors in this case are limited. The appellant did not plead guilty and maintained the defence that the sexual contact between him and the injured party was consensual. There was no remorse expressed by the appellant. Furthermore, the mitigating factor of previous good behaviour was unavailable to the appellant due to a number of previous convictions, including a s.15 (a) conviction for the sale and supply of drugs for which he received a four-year sentence.

21. It is submitted that the appellant's reference to the offence categories in DPP v WD are misplaced, as the guidelines set out by Charleton J are not exhaustive and would enable a trial judge to impose the sentence given in this case.

22. For the mitigating factors that were evident, notably that the appellant has a young son with whom he has a close relationship, that the appellant had a good history of employment, and that there may be scope for rehabilitation, the trial judge fairly reflected this by suspending the final year of the headline sentence.

23. In all of the circumstances of this case, outlined above by the seriousness of the aggravating factors and the limited mitigating factors, it is submitted that the trial judge made no error in law or principle by imposing a headline sentence of eight years with the final twelve months suspended.

Decision

24. The learned sentencing judge in this case reserved his decision and delivered it on the 18th April 2016. He imposed a sentence of eight years backdated to the 1st March 2016 and suspended the final year for a period of three years. He considered a range of penalties available in particular by reference to *DPP v. W.D.* cited above to which he was referred by counsel for the appellant. This case referred to the different categories of punishment that may arise from a conviction for rape. It was submitted on behalf of the appellant that this offence should be located in the category of ordinary sentences. This, it was argued, put it in a range of five to seven years. This was below the sentence of eight years referred to therein which would be justified where the offence was characterised, inter alia, by a more than usual degree of violence or by a particularly unfortunate effect on the victim.

25. In his sentencing, the learned sentencing judge outlined what he considered the mitigating factors. He was not very impressed. The documentary testimonials, he noted, did not indicate any awareness of the appellants having previous convictions albeit for non-sexual offences. They seem unaware that he had been convicted herein or indeed of anything else about the case. He did note the fact that in his statement to Gardaí he had stated that Ms. P. had awoken. This, he noted, contradicted the assertion that his victim was engaged in some consensual act. He did however note that when asked to desist he did so. Moreover he also assisted her departure to her aunt's home. No mitigation was available in relation to his conduct of his trial as he had exercised his right to plead not guilty.

26. The learned sentencing judge identified the aggravating factors as primarily the impact on the victim. He found the victim impact statement made for grim reading. He noted the vulnerability of the victim as she was intoxicated. Instead of taking her home safely, the appellant brought her to his house where he took advantage of her whilst she slept. There clearly was a measure of violence as the victim's internal injuries demonstrated. The breach of trust involved in preying upon his own cousin was also noted by the learned sentencing judge.

27. For the above reasons the learned sentencing judge considered the offence was outside the range of five to seven years submitted on behalf of the appellant. He found a headline sentence of eight years was appropriate but suspended the final twelve months. Thus he actually ended up with a custodial sentence that was at the top of the range suggested to him by senior counsel for the appellant. The Court can identify no error of principle. The learned sentencing judge took into account the very limited mitigation that was available and balanced it with the aggravating factors which he clearly considered were substantial. He identified a headline sentence of eight years and gave as much off that as could be allowed in all the circumstances. We agree with the sentence at which he finally arrived. The appeal is dismissed.