THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

200CJA/15

IN THE MATTER OF AN APPLICATION PURSUANT TO

S. 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MAGNUS MEYER HUSTVEIT

RESPONDENT

JUDGMENT of the Court delivered on the 15th day of March 2016 by

Mr. Justice Birmingham

1. In this case the Director of Public Prosecutions, pursuant to s. 2 of the Criminal Justice Act 1993, seeks a review on grounds of undue leniency of a sentence imposed in the Central Criminal Court. The sentence sought to be reviewed, one imposed on the 13th July, 2015 was one of seven years imprisonment, suspended on terms on a count of rape and a concurrent sentence of two years imprisonment also suspended, in respect of a count of sexual assault. The Court was invited to sentence on a "full facts basis" and was in fact dealing with several incidents of rape, perhaps up to ten in total as well as frequent sexual assaults over a period of approximately seven months.

2. The respondent, who was born on the 14th December, 1990 and was aged between 21 and 22 years at the time the offences were committed. met the injured party, Ms. Niamh Ní Dhomhnaill who was born on the 1st January, 1987 and was aged between 24 and 25 years at the time the offences were committed against her, socially and they started dating soon thereafter. By the end of September 2011, they had moved in together. They had, what was essentially a normal sex life together. One morning in or about Easter 2012, the injured party woke to discover that there was what appeared to be sperm on her. She had no recollection of having had any sexual contact that night, but the respondent, Mr. Hustveit confirmed to her that he had sex with her. It might be explained that in or around this time Ms. Ní Dhomhnaill was sleeping very heavily because of a medical condition relating to a low white blood cell count for which she was taking medication. There was a conversation between them after this incident and the victim made it very clear to the respondent that consent was the most important issue for her in this context.

3. Some days later on the 27th April, 2012, Ms. Ní Dhomhnaill was asleep once more and awoke having felt that she had been penetrated whether digitally or by the respondent's penis, she was unsure. She found the respondent in bed bedside her masturbating and watching pornography.

4. The victim left the respondent very briefly at that stage, but returned on the 29th April, 2012, apparently in an attempt to save the relationship. The parties had consensual sex at that stage. In a conversation that he had with the injured party, the respondent admitted to having had sex with her while she was sleeping on a number of occasions during the course of their relationship. The relationship then ended.

5. About a month later Ms. Ní Dhomhnaill sent him an email in which she asked him what he had done to her, why he had done it and how often he had done it. The accused replied in detail. It is significant that it is clear that in replying as he did that he was aware that he was providing evidence against himself in respect of possible criminal charges.

6. Given the significance of this exchange of emails to the plea in mitigation that was advanced on behalf of Mr. Hustveit it is convenient to quote from them at this stage. On the 27th May, 2012, Ms. Ní Dhomhnaill emailed Mr. Hustveit as follows:-

> "Hey, I am finding all this really difficult to come to terms with. I still don't understand what it was you did, let alone why you did or how many times. Everyone has told me that it was rape, but I still can't put it together that you could do that to me repeatedly for almost a year. I need to understand what exactly you did and why so that I can try to get closure and forget about all of this and get on with my life".

Mr. Hustveit responded as follows on the same day:

> "It is really difficult, I am not sure I have come to terms with it myself. The only conclusion I can come to is that I did it for short term gratification. I convinced myself that it was a victimless crime because you were asleep. That is the only way I could do it without making the connection that I was hurting you. I know its stupid, but I didn't think it was. On some level, I must have realised that it was wrong, but I managed not to think about it. I would interpret the no's as either just subconscious reflex that didn't mean anything or just try to be more careful. I didn't want to hurt you. I just wanted to come. I didn't want to dominate you either. I think I also used the fact that I felt I wasn't allowed to watch porn or masturbate as an excuse on some level as well, that I had no other outlet other than to have sex with you. I mean one time I woke up and you yelling at me to stop masturbating when I was doing it in my sleep. I think that sort of thing had an effect on how I dealt with my sexuality. I tried to repress it for you, but it ended up that I just found

> another way. I am not trying to blame you in any of this. I am only trying to explain all the facts that must be part of it. It is in no way a complete picture but I think it goes some way to explaining it."

7. At another stage in the email he addresses the question of the frequency of offending. He did so in these terms:

> "As for how many times I did it, I am not sure. I would guess that the amount of times I penetrated you while you were asleep, it must be under ten times or somewhere around there. The amount of times I did anything from kiss you or feel you with my hands or penis would be several times a week. It felt like the same thing every time though. It was using your body for my own gratification without consideration of how it would affect you, because I assumed it wouldn't."

He continued:

> "We have to talk about the criminal aspect of it as well. Now I have written this, you have it in writing what I have done which means you can have me convicted. I hope you won't. There are only two important things at this point which is I will never do it again and that you recover from it. I don't think either is helped by my life being ruined. I care about your recovery on it so I did reply even though it leaves me vulnerable. It is of course up to you and you have the right to but I ask that you don't. If there is anything at all that you need clarified, I will do anything to help."

8. When contacted by the gardaí, Mr. Hustveit provided his computer and was fully cooperative. When the computer was examined it emerged that Mr. Hustveit had been in contact with a friend and to that friend had expressed his deep remorse and shame for the activity in which he had been involved. Detective Sergeant McKenna, the member in charge of the investigation felt it appropriate to advise Mr. Hustveit as a foreign national to seek legal advice. Subsequently Mr. Hustveit attended at a garda station by arrangement in order to be interviewed.

9. Mr. Hustveit returned to Norway and while there was contacted by the gardaí and he agreed to return to Ireland voluntarily, without the necessity for any form of extradition proceedings, in order to be charged. He was charged on the 9th February, 2013 and was admitted to bail without objection. His bail terms permitted him to continue to reside in Norway and he returned to Ireland on each and every occasion when his presence was required for the court proceedings.

10. Mr. Hustveit entered a plea of guilty to count 1 in the indictment, a rape count on the 18th June, 2014, which was the date fixed for trial. The respondent had notified the applicant some five weeks previously, on the 13th May, 2014, that he intended to enter a plea. The prosecution's position was that was not an early plea, not a plea at the first opportunity, but that it was nonetheless a welcome plea. It seems that there had been an earlier offer to enter a plea to a single rape count, but that had not been acceptable to the Director of Public Prosecutions.

11. The sentence hearing took place on the 6th July, 2015. On that occasion the Court heard from Detective Sergeant Patrick Keegan, the member in charge of the investigation. Then, Ms. Ní Dhomhnaill read her victim impact statement to the court. The statement was a powerful and eloquent one and left no room for doubt, but that the events that had taken place had impacted on her in a serious, indeed profound way and that the impact persisted. Slightly unusually counsel for the defence had a small number of questions for her when she completed reading her victim statement. The questions asked Ms. Ní Dhomhnaill whether she had experienced anxiety prior to these matters coming to light and whether eating disorder issues had been present earlier, Ms. Ní Dhomhnaill having referred to the fact that she was having difficulty in this area in the course of her victim impact statement. Ms. Ní Dhomhnaill was firm in disagreeing with the implicit suggestion put to her.

12. To put this exchange in context it should be explained that there was a significant delay after a plea was entered in the sentence hearing coming on because the defence were anxious to explore whether all of the difficulties that Ms. Ní Dhomhnaill was now experiencing were attributable to Mr. Husveit or whether some were present prior to the incident. At one stage there had been an agreement between all concerned that a particular doctor would be approached and asked to provide a report on this issue. However, the doctor who was requested to report did not feel that this was an appropriate exercise and declined to become involved. The cross examination on this issue was a very limited one and it must be said was conducted with considerable sensitivity.

13. The Director's notice of application seeking a review of the sentence complains that the sentencing court did not appear to take into account the effect upon the complainant of the respondent's claim that his offending behaviour was not the cause, or the sole cause, of the complainant's medical conditions, and his suggestion that the complainant's victim impact statement was incorrect in that regard, his request that she undergo an independent medical examination and his position at the sentence hearing which was to continue to contest the evidence of the complainant in this respect.

14. This Court has some concerns about the way in which this issue is approached by the Director. An individual charged with an offence who has reason to believe that he is not responsible for all of the difficulties being experienced by a victim of crime, must be permitted to explore that. Obviously, if there is not to be a loss of mitigation, that exercise would need to be undertaken very sensitively indeed. In the course of argument before this Court there has been reference to the fact that it is now not unusual for counselling records and the like to be sought with the implication that there was nothing unusual about what was happening. The Court takes the opportunity to express its view that seeking such reports ought not to become routine and that an exercise of delving into the private life of a victim of crime on the basis that something might emerge is not a justified exercise. In particular cases it may significantly undermine the value of a plea. The present situation is somewhat different in that the complainant and respondent were living together and the respondent was in a position to know a great deal about the complainant and about her lifestyle prior to the facts of this incident emerging and about the nature and extent of any particular difficulties that she was experiencing. If Mr. Hustveit felt that there were matters that justified being explored it is understandable why his lawyers would wish to follow upon on that matter. The Court in those circumstances feels that the implicit criticism made by the Director of the respondent, and by extension of his legal advisers in this regard is not justified.

15. The sentencing hearing also heard from Mr. Hustveit's present partner who spoke very positively about their life together in Oslo. Her evidence focused in particular on how positive an influence he is in the life of her two young children.

The plea in mitigation

16. The plea in mitigation focused on the fact that the accused before the court felt genuine guilt and remorse. It was submitted that his life had changed dramatically in the interim. The accused had returned to Norway, his country of origin where he had obtained good employment and his employer furnished a very favourable reference to the Court indicating knowledge of the matter being dealt with and saying that his employment would be held open to him. There are also letters from his step father and from his fiancé, and as we have seen she actually gave evidence to the court. A very detailed report was submitted from a Norwegian psychologist who reported a low risk of re-offending and that there was no personality disorder present.

17. In seeking leniency counsel for Mr. Hustveit submitted that without the admissions made by the accused, both the oral admissions to the victim and the email that he had sent, that it would have been very difficult to prosecute him.

18. The mitigating factors were summarised as being:

> (i) The acceptance of guilt.
>
> (ii) The attempt to explain the basis of the offending behaviour.
>
> (iii) That there was immediate remorse as expressed to a friend and subsequently confirmed to a psychologist.
>
> (iv) That the respondent's life had changed dramatically in the three years between the offences and the sentence hearing.
>
> (v) That he had returned voluntarily from Norway for court appearances on five occasions.
>
> (vi) That he was in full time employment, had explained the nature of his wrongdoing to his employer who is willing that he should remain in his employment.
>
> (vii) That he was then engaged in a long term relationship and provided both financial and psychological support to his partner and to her children.
>
> (viii) That he was at the lowest risk of re-offending.
>
> (ix) That he had returned voluntarily and there had been no need to initiate extradition proceedings.
>
> (x) That it was the respondent's submissions that allowed the prosecution to proceed
>
> (xi) That he had pleaded guilty and that there were no previous convictions either in Ireland or Norway.

19. During the course of the sentence hearing prosecution counsel, in order to assist the Court, identified what she saw as the aggravating and mitigating factors. She saw as the mitigating factors the fact that the accused man admitted his actions in full and indeed in a fuller form than the complainant herself knew had occurred and then the plea of guilty following on from the admissions. The aggravating factors she saw were the very significant breach of trust, in that regard the length of the relationship and its intimacy were such that when the secret breach of trust was exposed that this would be more damaging to a complainant in Ms. Ní Dhomhnaill's circumstances.

20. The judge decided to take time to consider the matter and remanded Mr. Hustveit in custody.

21. Sentence was imposed on the 13th July, 2015. The judge's remarks when sentencing covered some twelve pages of the transcript and it is clear, as he himself specifically said that he regarded the case as one of great complexity. It is also clear that this was a case to which he had given considerable thought and which he approached with very great care. His remarks addressed the many issues raised in the case. In the course of his sentencing remarks, the judge commented that the exceptional circumstances of the admissions were obvious. He referred to O'Malley on *Sentencing Law and Practice*, which had drawn attention at para. 6.21 to the case of *R. v. Claydon* [1994] 15 Cr. App. R. (S.) 180 as authority for the proposition that a person who gives himself up to the police in circumstances where he would not otherwise have been detected is entitled to a substantial discount. In *Claydon*, the Court of Appeal in England had commented:-

> "Close examination of those cases show that where someone who would otherwise escape detection goes and gives himself up and makes a clean breast of it, discounts of more than 50% can and will, where it is appropriate, be given."

22. In order to assess the significance of the admissions the judge addressed specifically the matters that were known to the complainant before any admissions were forthcoming. The occasion when she woke up with semen present and the second occasion some time later when she felt she was being penetrated, but did not know whether with a finger or penis. The judge was of the view that the evidence that the complainant could have given in relation to first incident would have been insufficient to ground a prosecution and that in relation to the second would have been sufficient only to support a prosecution for sexual assault.

23. The judge then turned to the impact of the offending behaviour on the victim and quoted extensively from the victim impact statement drawing particular attention to her comments about her state of upset and confusion, to her devastation at the violation and at the impact of the abuse of trust by someone that she should have been able to trust. He referred to the effect on her as a person and to her reduced ability to socialise and work and made reference to the impact that the offending had had. He referred to the impact that the offending had had on her relationship with family and friends and how she had lost her sense of self worth. The judge referenced the documents that had been relied on by the defence, the testimonial from the employer, the report from the psychologist, the letter from the respondent's stepfather and the letter and evidence of his fiancé.

24. The judge then referred in some detail to the level of cooperation that had been forthcoming and addressed the question of the circumstances in which the plea had been entered. The judge did not feel that the original proposal involving an offer to plead to a single count of rape without reference to the surrounding circumstances had been a realistic one. He identified the aggravating factors as the subterfuge and deceit involved in the offending behaviour, the fact that the behaviour was repetitive and the effect that the crimes had had on the victim. The significant mitigating factors were the admissions made and the fact that the crime as a pattern of offending would not have been capable of being prosecuted without admissions.

25. The judge referred to the well known case of *DPP v Tiernan* [1988] 1 I.R. 250 and addressed the question of whether this was an exceptional case that made it appropriate not to impose an immediate custodial sentence.

26. In her application for review, the Director has made it clear that she is not challenging the seven year sentence as such, nor is she disputing that part of the sentence could be suspended, but what she takes issue with is the fact that the sentence was suspended in its entirety.

27. The starting point for consideration of the pleas that have been entered and the sentences imposed has to be the case of *People v. Tiernan*. There, Finlay C.J. commented.

> "Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must attract very severe legal sanctions.
>
> All these features, which I mention in summary and not as an attempted comprehensive account of the character of rape, apply even when it is committed without any aggravating circumstance. They are of such a nature as to make the appropriate sentence for any such rape a substantial immediate period of detention or imprisonment.
>
> Whilst in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional."

28. In this case it is not in dispute that this is an unusual case. Indeed, prosecuting counsel's first words to the sentencing court were that it was an unusual case. The factors that render the present case unusual and in one sense at least exceptional, are the fact that much of the offending behaviour occurred without the knowledge of the victim. The nature and extent of the offending is known only because of detailed admissions made by the respondent in response to a request for information from the victim. Also very much to the credit of the respondent, though less unique is the level of cooperation in terms of assisting the investigation, returning voluntarily to be charged, obviating the necessity for any extradition proceedings and then returning on several occasions from Norway for court proceedings. These are in addition more usual, though still significant features such as the plea of guilty, the absence of any other convictions, the fact that the respondent was otherwise of good character and that he is now leading a positive life in Norway both from a domestic and career point of view.

29. In the view of the Court, the combination of these factors certainly justified and indeed required the imposition of a sentence that would be appreciably less than would be normal in the case of multiple rapes and sexual assaults. In this case it is not disputed by the Director that the selection of seven years imprisonment as a starting point was appropriate. This Court is in no doubt that there was scope for suspending a significant portion of that sentence. However, the Court cannot agree that the case was so wholly exceptional as to permit an entirely non custodial disposal. This case involved repeated offending over a significant period of time. Disturbingly, even when the facts first began to emerge, Mr. Hustviet re-offended on the occasion of the second incident of which the complainant has some memory.

30. In all the circumstances, notwithstanding the obvious care with which the judge in the Central Criminal Court approached his task, the Court is of the view that he erred in imposing an entirely non custodial sentence and the Court must accordingly set aside the sentence and proceed to impose a sentence that is appropriate as of today's date. It has been indicated to the Court that if that conclusion was reached, both sides may wish to put further material before the Court and make further submissions and the Court will now provide them with an opportunity to do so.

---

1. This morning the court gave judgment acceding to the application on behalf of the Director of Public Prosecutions for a review on grounds of undue leniency of a sentence imposed on the respondent Mr. Hustveit.

2. In the course of that judgment we set out in some detail the background facts the referring to the victim impact report to the personal circumstances of the accused/respondent to the analysis conducted by the prosecution in terms of what were the aggravating and mitigating factors and in particular to the very detailed remarks made by the judge in the Central Criminal Court when imposing sentence. The court will not repeat that exercise at this stage.

3. In that judgment we indicated that it was an unusual case, indeed an exceptional one and that that was so for a number of reasons. The fact that the offences were committed without the knowledge of the victim, the fact that the nature and extent of the offending that had occurred became known only because of admissions. The court also commented on the way in which the respondent had met the case. In concluding that judgment this morning, the court referred to the fact that it had been asked if it was coming to the view that the sentence was unduly lenient to permit the parties to put further material before the court.

4. The Director of Public Prosecutions indicated that she had an up to date victim impact report and also indicated that the complainant was prepared, indeed anxious to give evidence. The court explained that in accordance with its usual practice as an appeal court in a review court, that it did not ordinarily hear evidence, instead operating on the basis of transcripts and documentation.

5. So far as the victim impact report which had been prepared was concerned, it was explained that this had been prepared in circumstances where the complainant had experienced a number of blackouts and a medical adviser had opined that this was stress related. Objection was taken to the court receiving this in a situation where the defence contended that they were denied an opportunity to probe or make a challenge. In the case of *DPP v. Dundon* which was also a s. 2 application, this Court refused the Director's application to review the sentence as unduly lenient, when the sentencing court, in that case the Special Criminal Court had refused to receive a victim impact report when objection was taken. The court felt that the approach taken by the sentencing court in refusing to receive the report was the correct one. In this case the evidence before the sentencing court was that the victim had been adversely impacted. That the impact was significant and that the impact would continue into the future. It is on the basis that the trial court sentenced and given the objection that has been advanced to the receipt of the report this Court feels that it must approach its task of resentencing on the same basis. The fact thought that this issue has been raised does serve as a reminder if a reminder were needed of the extent of the impact of the offending behaviour and of its duration.

6. The defence too have sought to draw attention to matters which they say have emerged since the original sentencing hearing. They referred us to a new psychologist report, to letters from the employer, letters from the partner of the respondent and from her student adviser and counsellor about how this has affected her and has affected her children.

7. The point that the court made about the proposed new victim impact evidence not being truly new is also relevant here in that the sentencing court was aware of the developments that had taken place in relation to employment and on the domestic front, since the return of the respondent to Norway. These were therefore already factors in the equation. One point on which Ms. Biggs places emphasis is the fact that it has now been confirmed by a way of a statement from Simon Leon a Norwegian lawyer that had Mr. Hustveit not returned voluntarily to Norway that he could not have been extradited as Norway does not extradite its own citizens. Ms. Biggs says that that is further evidence of how exceptional has been the manner in which Mr. Hustveit has engaged with these proceedings.

8. This Court agrees that this is a matter of considerable significance. On the basis of what Mr. Leon had to say, it appears that by virtue of the Norwegian Extradition Act of 1975, that Mr. Hustveit could not have been extradited. He is amenable to the court today to exercise its review jurisdiction because he chose to make himself amenable. It is particularly of note that he did so at the sentence review stage when his attendance could not have been compelled, at a time when it was clear as indicated by the request of the parties to furnish further information in a particular eventuality, that the question of setting aside a wholly suspended sentence was a live possibility.

9. This morning the court summarised the position of the DPP as being that she did not take issue with the starting sentence identified by the trial judge and indeed did not dispute the fact that there was scope for suspending part of that sentence. Her issue was with the fact that the sentence was suspended in its entirety. This Court indicated its agreement with the Director of Public Prosecutions that the case was not a wholly exceptional one as to justify an entirely non custodial sentence. However, the court did state expressly that it was sufficiently exceptional in order to justify, indeed require a sentence that would be less than would normally be imposed in a case of repeated rapes and sexual assaults.

10. In the courts view, the factors referred to earlier would have justified the sentencing judge suspending upwards of half of the sentence that he had identified as the appropriate starting point. However, the court cannot see that it would have been possible to go below a sentence of two and half year's imprisonment to be actually served. This is not the end of the matter. This Court is now required today to resentence someone who came to court for his sentence hearing and left to return to his homeland having been told that he would not be serving a custodial sentence. That having happened, he then faced an application for a review of sentence. An application that he fully engaged with by returning voluntarily. This Court has on several occasions indicated its recognition and appreciation of the fact that taking away from someone of a chance that they have been given, must be particularly burdensome and particularly difficult. It has indicated on a number of occasions that it would for that reason impose a sentence less than it would have done had it been sentencing at first instance.

11. Other common law jurisdictions have done likewise to the extent that this practice of imposing sentences less at the review stage than would otherwise have been regarded as appropriate has acquired the misleading shorthand of "double jeopardy". In this case there is the fact of returning voluntarily to participate in the review stage and as the court has indicated, considerable significance is attached to that.

In the view of the court what has happened since the sentencing hearing means that this Court can go to a point lower than was available to the sentencing judge and whereas in the view of the court it would not have been possible for the sentencing judge to require less than two and a half years of the sentence that had been identified to be served. What will happen in this Court is that he will be required to serve half of that period of two and a half years. The effect of that is that the sentence that was imposed in the Central Criminal Court and suspended in its entirety will be set aside. The headline sentence will remain, but instead of the sentence being suspended in its entirety all bar fifteen months of the sentence will be suspended.