THE COURT OF APPEAL

[31/2018]

The President
Whelan J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

AXMED SALIM

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 26th day of February 2019 by Ms. Justice Kennedy

1. This is an appeal against the severity of sentence imposed on the appellant by the Central Criminal Court following a plea of guilty to the offence of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990. A *Nolle Prosequi* was entered on a count of attempted rape.

2. The offence in question took place on the 6th November 2015 and a trial date was set for the 24th July 2017. Following an offer of a plea of guilty to sexual assault by letter to the Director of Public Prosecutions on the 19th July 2017, the appellant pleaded guilty to that offence. Evidence was heard by the sentencing judge on the 23rd October 2017 and a sentence of five years' imprisonment was imposed on the 4th December 2017 with three years' post-release supervision.

3. By way of background, the appellant is a Somali national who is resident in Ireland since 1997 and is now an Irish citizen. At the time of the offending conduct, he was forty years of age. The injured party was fourteen years of age and lived with his mother, his stepfather and his younger siblings.

4. The circumstances leading to the offence of the 6th November 2015 came about when the appellant came to the injured party's home to visit the family. It seems that the appellant had spent a portion of the year abroad and on his return met with the injured party's stepfather who was a friend of the appellant. Of relevance to the index offence is the fact that when in the family home, the injured party's mother informed the appellant that her son, the injured party had made known his sexual orientation sometime in 2014, she also informed the Gardaí that the appellant was aware that the injured party when he was approximately seven years of age had been the subject of sexual abuse. These two pieces of information are relevant in that they were known to the appellant at the time of the offence and we will return to the significance of that in a moment.

5. It seems that the injured party's stepfather and the appellant left the house for a period during which the appellant had some cannabis and then they returned to the injured party's home. It seems then at this point that the appellant saw fit to raise the injured party's sexual orientation with him, causing upset to him. The boy then retired to bed, sleeping on an upper bunk facing the wall. His brother occupied the lower bunk.

6. Having fallen asleep, the injured party was awoken to pain at the bottom of his spine, he felt what seemed to him to be a hard object pushing into his bottom, with that came the realisation that his pyjama bottoms and underwear had been pulled down. He then saw that the appellant was under the blankets lying beside him and was trying to push his penis into the injured party. He did not succeed but the injured party realised the appellant's penis was hard when he pulled the appellant's penis away from his bottom at which point the appellant told him to "shush" and then the boy felt fluid between the cheeks of his bottom. He jumped from the bed and ran into his mother's room crying. He immediately complained to his mother and stepfather, who saw the appellant coming from the victim's bedroom.

7. The appellant at this point sought to blame the injured party. Immediately after the incident the appellant tried to leave the house when he heard that the police had been contacted. He was prevented from so doing and he was subsequently arrested and detained. The injured party was taken to the Sexual Assault Treatment Unit and on analysis it transpired that semen was found on the perianal and rectal swabs taken from the injured party and the DNA profile extracted therefrom matched the DNA profile of the appellant. Understandably the offence has impacted severely upon the injured party.

8. It is noteworthy that the injured party's stepfather informed the Gardaí that he provided the appellant with a duvet and pillow and told him to sleep on the couch downstairs. As regards the sleeping arrangements, the appellant, in interview, told the Gardaí that he was to sleep upstairs as there was a dog downstairs, that he was invited by the injured party's stepfather to sleep upstairs, that he was shown into the boy's bedroom, that he, the appellant, suddenly woke up and found that there was semen all over him, that the reason he had gone to sleep on the top bunk was due to the dog and he did not want to be bothered by the dog. These accounts conflicted entirely with the prosecution's evidence.

9. At the sentence hearing, a sentence, as I have said, of five years' imprisonment was imposed in respect of the sexual assault count with three years' post-release supervision. Eight grounds of appeal have been filed and the crux of the appellant's complaint is that the sentence was excessive and disproportionate in all the circumstances both in terms of the assessment of the gravity of the offence and the reduction by virtue of mitigation. In particular, the appellant asserts that he was not afforded a reduction of sentence in light of the fact that he is a foreign national, that insufficient credit was given to him by virtue of his plea of guilty, and insufficient regard was given to the mitigating factors in general. Further, that undue emphasis was laid on general deterrence and that there was a failure to suspend a portion of the sentence.

10. This is a case where a number of aggravating factors were present. The offending concerned a young boy of fourteen years of age whom the appellant knew to be a person who had previously been sexually abused. The appellant, earlier that evening in the knowledge that the injured party had recently disclosed his sexual orientation, saw fit to, in effect, joke with the injured party in a manner which any rational person would consider to be insensitive and offensive. There can be no doubt but that by virtue of his age alone, the injured party was a vulnerable individual and one could say was particularly so at the relevant time and the appellant took advantage of this.

11. Moreover, the nature of the sexual conduct itself was of a serious character involving as it did the attempt, albeit unsuccessful, to penetrate the injured party and which involved the appellant, having removed the injured party's nightclothes, putting his penis between the cheeks of the injured party's bottom and ejaculating.

12. Furthermore, the conduct took place whilst the appellant was a guest in the family home and so breached the trust of the residents of that home and violated the injured party's right to feel safe in his own home. This was not an offence which took place on the spur of the moment but required prior thought on the part of the appellant as it necessitated him going upstairs, climbing to the top bunk, removing the complainant's clothing and sexually assaulting him as he did. Sexual offending is an attack on the bodily and psychological integrity of a victim with a consequential and long lasting impact, such as in the instance case where the victim was a fourteen-year-old boy.

13. Accordingly, the judge was required to approach this case on the basis of it being a serious one in view of the aggravating factors. In these circumstances, the judge found the appropriate notional sentence to be one of six years' imprisonment and this court can find no error in this respect. In fact, if the sentencing judge had considered the appropriate notional sentence to be greater than that, it would be difficult for this court to find an error in that respect. However, the headline sentence was within the available range having regard to the gravity of the offence in issue and in that respect we cannot identify an error in principle.

14. The complaint is made that the sentencing judge did not give the appellant sufficient reduction for his plea of guilty. This complaint must be assessed in light of the prevailing circumstances. We have already set out the timeline in relation to the plea of guilty. It is indeed the position that there were two counts originally on the indictment and that the Director of Public Prosecutions accepted a plea of guilty to sexual assault which was offered by letter on behalf of the appellant with communication between the parties in advance of the formal notification.

15. However, it is noted by this Court that such offer was made within days prior to the trial date. The plea was entered in circumstances where the evidence against the appellant was strong and cogent, involving as it did, the immediate complaint by the injured party, witnesses seeing the appellant vacating the injured party's room, the analysis of the swabs for the purposes of DNA and the results thereof linking the appellant to the crime and the appellant's accounts in interview.

16. It is, of course, the position, as was recognised by the trial judge that a plea of guilty is always a mitigating factor. However, this does not mean that a court may not consider the time when that plea is entered as impacting upon the level of mitigation to be attributed to that plea of guilty. It is well settled that a late plea does not necessarily carry with it the benefit which would be given to an appellant for what could be termed as an early plea of guilty. This was not an early plea of guilty, the plea to the offence of sexual assault was notified days prior to the trial. One of the obvious benefits of a plea of guilty concerns an injured party being aware at an early stage that the matter will not be contested. In the instant case a period of approximately twenty months elapsed between the date of the offence and the date of knowledge on the part of the injured party that the appellant intended to enter a plea of guilty. We are satisfied that the trial judge did not err as to the weight he afforded to the plea of guilty in mitigation.

17. The appellant complains that the judge did not apply any reduction for the fact that he is a foreign national. This must be examined in light of the factual circumstances of this case. One of the reasons why a sentence may be more difficult for a foreign national to serve involves a lack of family or friends in the jurisdiction in which the person is to serve the sentence or a lack of familiarity perhaps with the social environment.

18. However, in this instance the appellant had been resident in this country from 1997 and in fact subsequent to his arrival became a naturalised Irish citizen. It is clear from the number of testimonials, that he has a wide circle of friends and indeed support in this country. Therefore, we are satisfied that the factors which could make a sentence more difficult for a person to endure as a foreign national were not present in this case.

19. Moreover, it is submitted that the sentencing judge did not take into account that the appellant was intoxicated with alcohol and substances on the occasion in question in that such was put forward to provide context for the appellant's conduct. Quite properly this is not put forward as a mitigating factor but as part of the circumstances concerning the commission of the offence.

20. It is said on behalf of the appellant, that the judge wrongly determined that the appellant was not intoxicated and therefore wrongly concluded that the offence was calculated and deliberate. The trial judge did acknowledge that there was evidence that the appellant had taken cannabis and in light of the circumstances of the offending conduct, we are not of the opinion that he erred in concluding that this was not "a spur of the moment" type offence.

21. It is asserted on behalf of the appellant that undue emphasis was placed upon the concept of general deterrence by the trial judge. It is, of course, the position that specific and general deterrence form part of sentencing policy. In this regard, the sentencing judge accepted that the appellant was unlikely to re-offend and said that the sentence did not have as one of its principal components personal deterrence but rather general deterrence.

22. It is clear from the sentencing judge's sentencing remarks that he considered the aggravating factors, he assessed the gravity of the offending conduct, he assessed the mitigating factors, the primary mitigating factor being that of the late plea of guilty and he reduced the sentence accordingly. Therefore, he not only considered the issue of general deterrence but he also carefully considered in accordance with well settled principles, the offence as committed by this offender.

23. The offence is, as stated above, on any rational analysis a serious offence, on the upper end of the mid-range of gravity for offences of sexual assault given the nature of the conduct complained of. Furthermore, the breach of trust, the impact on the victim, the age of the victim and the particularly vulnerable features concerning the injured party in this case, all these factors together with the undoubted efforts made by the appellant to effect the abuse of his victim render this a serious matter.

24. In all the circumstances, the sentencing judge identified the appropriate headline sentence which fell within the available range though perhaps it could be said at the lower end of that range. The fact that we might have imposed a different sentence in this instance, a somewhat higher notional sentence, is not the point. The question is whether the sentence actually imposed falls outside

the available range and in that regard we are satisfied as stated above that it does not. We are also satisfied that the trial judge did not err in assessing the reduction downwards to a sentence of five years' imprisonment as a result of a consideration of the mitigating factors, the greatest of which was the plea of guilty.

25. Accordingly, the appeal is dismissed.