THE COURT OF APPEAL

Birmingham J.
Irvine J.
Edwards J.

269CJA/11

In the matter Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

v

Christopher Farrell

Respondent

Judgment of the Court (ex tempore) delivered on the 17th day of December 2014

by Mr. Justice Birmingham

1. In this case the Director of Public Prosecutions has applied to this Court for a review of sentence imposed contending that the sentence imposed was unduly lenient. The sentence in question was imposed on the 28th October, 2011 and the sentence hearing was consequent on a contested trial which took place between the 11th and 22nd July, 2011.

2. The offences in respect of which sentences were imposed, and which are now the subject of the request for review, were as follows:

> (a) on count 1, an attempted rape in a motor vehicle on the 16th September, 2007 of J.C., in respect of which a sentence of four years was imposed;
>
> (b) an offence under s. 4 of the Criminal Law Rape Act, that is to say oral rape, on the 16th September, 2007 of J.C., in respect of which a sentence of six years was imposed;
>
> (c) Rape of J.C. on the same day, in respect of which a sentence of six years was imposed;
>
> (d) an offence of false imprisonment of J.C. in respect of which a sentence of four years was imposed;
>
> (e) a sexual assault on D.McG. on the same date.

All sentences were to be concurrent and all were to date from the 22nd July, 2011.

3. In seeking the review, the Director is critical of the sentence hearing and the sentencing process, which the Director identifies as flawed. It is said that the aggravating features were dealt with in a summary or cursory fashion, whereas everything that could possibly be said in favour of the appellant was dealt with in great detail giving rise to a real imbalance. It said that there was a failure to focus on the fact of premeditation and planning, both of which were clearly features of the offences. It was said that there was inadequate attention to the impact that the offences had on the victims and an overstressing of the fact that the victim impact reports ended on what was seen as a hopeful note. It said that there was an over emphasis on an apology, given that the apology came late in the day and specifically that it came only after conviction and only after the injured parties had had to participate in the trial, give evidence and be subject to cross-examination.

4. It said that there was a mistake in dealing with the case on the basis that there were no relevant previous convictions as that there were in fact relevant previous convictions. There were two convictions for assault, which showed a propensity for violence, and one of those was an offence of assault causing harm on a female. It said that in all the circumstances this was a case where the sentencing judge should have considered actively the question of consecutive sentences. The DPP, through her counsel, submitted to the trial judge that the sexual assault offence, the offence in which Ms.McG. was the injured party, was a midrange offence, whereas the J.C. rape offences were at the high end.

5. The basic facts of these two offences which occurred within a very short period of time of each other were these: Ms.McG., who is from the mid Louth area, had been socialising in Drogheda. She had attended a number of licensed premises and night clubs and she found herself close to a fast food restaurant and she was at that stage looking for a taxi. She was offered a lift by Mr. Farrell and next she recalls waking up in a field, the accused was kissing her, her jeans were loose, the zips of her jeans were down and as she describes it, he was rooting at her vagina. It is true that the appellant did desist and that he eventually brought her home and indeed he asked for a telephone number and she gave him an old one. It is also the case that the incident involving Ms.McG came to light when the respondent Mr. Farrell was interviewed in relation to the other incident, the incident involving J.C., and it was following the reference to her in the course of those interviews that gardaí made contact with Ms.McG.

6. Following the incident that has been described, the accused, now respondent, returned to Drogheda and there he encountered J.C. who had no shoes on at the time, was in a distressed state, she had had a row with her boyfriend and she was looking for a lift home. She got into her vehicle and the vehicle was driven to what was described as a country lane, where a struggle ensued. In resisting the appellant, J.C. succeeded in breaking the windscreen with her feet. His response to that was to move to another location and on this occasion he parked the car with the passenger door tight up to a brick wall, so that the door could not be opened. He pulled

down her jeans and proceeded to vaginally rape her. He forced her to perform oral sex and she describes the fact that he also attempted to anally rape her.

7. After this, she had extensive bruising to her breast, her chest, her arms, her leg and her face. Again it is to be noted that the respondent did bring his victim back to the general vicinity of her home.

8. The victim had sufficient presence of mind to note the registration number of the car and gave it to the gardaí. When the gardaí contacted the respondent they noted the presence of cuts and scrapes and were told by him that he had been in a fight. He indicated that he had been involved in consensual sex on that evening.

9. This is a case where the matter went to trial and so the situation was that the respondent was not in a position to point to a plea of guilty which the courts, specifically since the judgment of the Supreme Court in *People (DPP) v Tiernan* [1988] I.R. 250, but in fact long before that, have recognised as a particularly significant feature in sexual cases. If there is a plea, that does provide a basis for affording significant leniency. However this was a case where there was no plea.

10. In terms of the personal circumstances of the respondent, he was 27 years old at the time of sentence and had been 23 years at the time of the offences. There was information put before the court that indicated that he had himself been the victim of sexual abuse at one stage, that he had difficulties with alcohol and it was suggested that he was a damaged individual.

11. It was also pointed out that he was the carer of his father. He had 26 previous convictions and significantly of those, one was for a s. 2 assault and another was for assault causing harm on a female. For that offence and a related offence of criminal damage to her property, he had received a custodial sentence.

12. It is the Court's view that these two offences were each significant and serious offences in their own right and that it was necessary and appropriate in those circumstances that the trial judge would consider the question of making any sentences that he was imposing consecutive. In a situation where the offences occurred within such a short period of time, the Court does not take the view that deciding not to make the sentences consecutive amounted to an error of principle, but that if the sentences were not to be made consecutive then it was necessary that the trial judge would recognise that that benefit had been afforded to the person being sentenced and that that required, when considering the range of sentences that were available, that consideration would focus on the higher end rather than the lower end of the range that was under consideration.

13. The Court is in no doubt but that the rape offences, which is the second in time, was indeed in the high end of the spectrum. The area of sentencing for rape has being the subject of quite an amount of research and quite an amount of surveying has been carried on in recent years. That task was undertaken by Charleton J. in *People (DPP) v Drought* [2007] I.E.H.C. 310, and that has been followed up by the Judicial Researchers' Office on their paper "*Recent Rape Sentencing Analysis: The WD Case & Beyond,"* that is on the ISIS website.

14. There is just one other topic that should have been mentioned earlier and which will now be the subject of a brief comment. That is that the sentencing judge is criticised by the Director in this application for a review for referring to and making use of a report of the Inspector of Prisons, which had focused on overcrowding in the prison system and the lack of facilities. In that regard, the Court is of the view that a judge has to be scrupulous to observe the separation of powers, but that equally if a judge is aware of a report, it is hard to see that he is going to be in a position to totally ignore it. But if it is a report that is going to have a significant influence on his thinking, it would be appropriate that the parties should be informed of the fact that the report is one to which regard is likely to be had, and that they would be invited to comment or make submissions and, it might well be, to put evidence before the court.

15. Really, though, this Court is focused not so much on the question of the procedures, but on the question of the appropriateness of the sentence that was imposed. It is the view of this Court that the sentence imposed was very seriously inadequate and was to a very significant extent unduly lenient. In the circumstances, in respect of the two counts where sentences of six years had been imposed, that is to say the oral rape on J.C. and the rape charge in respect of J.C., the Court will quash those sentences and, in place of the sentences of six years which had been imposed in each case, impose a sentence of twelve years in each case.