THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

Record No: 87/16a

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

J.D.

Appellant

JUDGMENT (ex tempore) delivered 9th of May 2017 by Mr. Justice Edwards.

Introduction
1. On the 18th of December 2015 the appellant was convicted by the jury at his trial by a 10:2 majority of a single count of rape contrary to section 4 of the Criminal Law (Rape) (Amendment) Act 1990.

2. On the 29th of February 2016 he was sentenced to seven years and six months imprisonment, to date from the 18th of December 2015.

3. The appellant has appealed against the severity of his sentence.

The Circumstances of the Crime
4. The conviction arises out of events which occurred in the early hours of the 10th of October 2010. On the previous evening, the 9th of October 2010 three women, comprising the complainant S.S., her mother J.S., and her sister L.T., went to a public house in a village in the North-East of the country, arriving there between 7.30pm and 8.00pm, where they met with the appellant by prior arrangement. The appellant knew the complainant's mother from doing odd jobs for her and he had been invited by text to meet her and her daughters for a sociable drink. The group stayed in the public house until approximately half past midnight, and while there they each consumed a fair amount of alcohol. After they had left the public house a Chinese takeaway was purchased, as well as some more drink, and the group repaired to the complainant's home.

5. The thrust of the prosecution evidence was that after the group had returned to S.S.'s house, which was a two storey dwelling, the three women all went to bed in the upper storey leaving the accused on the couch downstairs. SS slept alone in her own bedroom, while J.S. and L.T. slept in another room in separate single beds.

6. The jury heard evidence that S.S., who was lying on her stomach, awoke in the early hours of the morning to a bad pain in her backside. She quickly realised that the appellant was in her bed, on top of her, and engaging in the act of anal intercourse with her. The complainant told the jury that she went to scream but her first scream wouldn't come out. Then she managed to scream and as she did so she turned around and pushed him off her with all her might. She then jumped up, looked down and realised that her pyjamas were off her and a body suit, which she had been wearing under her pyjamas was open. She saw the appellant pulling up his trousers and could hear his belt jingling as he did so. The complainant then grabbed the bed quilt, put it round her and ran screaming into the room in which her mother and sister were sleeping. Her sister asked her *"what's wrong"* but she found she couldn't talk. She just pointed at the appellant who was observed walking down the stairs at this time.

7. The matter was reported to the Gardaí, who commenced a criminal investigation and the complainant was taken to the sexual assault unit at a particular hospital. In the course of the investigation the appellant was arrested and interviewed. He denied ever having gone upstairs, or having committed any act such as that alleged by the complainant. In the course of a Garda interview he claimed that S.S. had come down to the sitting room for a chat. He claimed that he had put his arm around her in a non-sexual way after which she had jumped up saying *"Ah, ah"* and then went upstairs talking loudly, but not screaming.

8. The appellant was subsequently charged with the offence with which he was ultimately convicted.

The Personal Circumstances of the Appellant
9. At the time of his sentencing the appellant was 59 years of age and going on 60. He comes from a family of five having two sisters and two brothers. His parents are no longer living. He is a separated man with nine children ranging in age from 14 to 39, and was said to be in contact with all of them. He had been quite active in the life of his youngest daughter who stays with him from time to time due to the periodic illness of her mother. He also has sixteen grandchildren. He was said to be presently in a relationship with a woman who has certain medical difficulties. The appellant has a history of employment in the construction sector. He is also said to have suffered a back injury some years previously which has left him in constant pain such that he is required to take 17 tablets daily. He has no previous convictions.

10. The sentencing court received a testimonial letter signed by the appellant's nine children that testified to his role as a loving and caring father. The court also received similar positive testimonials from his siblings, from his partner of three years, from a neighbour, from a work colleague, from his former employers, and from the appellant's grandson. In addition, documentary evidence confirming his partner's medical difficulties was placed before the court.

11. The appellant also submitted a personal letter to the court. In this letter he indicates that while he does not accept the verdict of the jury, and continues to maintain that he is innocent, he was pleading for leniency on account of the dependence of his partner and children upon him.

The Impact on the Victim

12. At the sentencing hearing victim impact evidence was received from the complainant S.S. She told the court (*inter alia*) that she was four months pregnant at the time of the rape, and further stated:

> *"To this day, five years on, I still haven't had one day that I don't have flashbacks or feelings of pure panic and intense sadness. After the incident I had to take antiviral medicine for 28 days to prevent me from being infected with HIV. Every day, all day, I was vomiting, stomach cramps, horrible feelings swallowing down tablets while I was pregnant. I lost my home overnight because after the* [named] *Hospital I never put my foot in that house again. I made my brother dump every toy, plate, cup, blanket from that house. My two sons had to change schools as I moved in with mum to [a named town]. My eldest son was very angry, upset and confused why he had to make new friends in a different area and school. Quite hard for any teenager. I had to lie to my sons by claiming the house was flooded. Myself and my two sons all shared one bedroom in mum's house with none of our belongings with us. I use to have to cry in the bathroom with the taps running so my boys wouldn't hear me crying."*

13. S.S. described the emotional turmoil she experienced during the remainder of her pregnancy in the light of what had occurred, and following the subsequent birth of her only daughter. This aspect of her evidence was well summarized by the sentencing judge in the course of her sentencing remarks when she said:

> *"Her pregnancy was blighted by concerns about possible HIV infection, antiviral medication, regular visits for blood tests, concerns about potential damage to her unborn child, which persisted despite medical reassurances. Her relationship with the father of her unborn child suffered, because of his difficulty in coming to terms with the fact of the rape."*

14. The complainant concluded her evidence by saying:

> *"No matter how hard I cry or pray or wash myself or try to hide it by wearing hats or putting on my happy face, nothing hides the cruel fact that until my dying day I'll always be a victim of rape. Most days I sit staring out the window, I just can't move. Most nights I have flashbacks and nightmares. For the first time in my life I'm on sleeping tablets. Every day I see reminders of what happened. I always said after the court case I'll start counselling. I hate anyone standing behind me, it makes me panic a lot. It's due to the fact that when I woke [J. D.] was behind me. My mum, who I'm living with, has had to help me a lot in the last five years with the children. I suffer a lot of nausea almost daily as the thought of what happened to me sickens me so, so much. It never leaves me."*

The Judge's Remarks at the Sentencing

15. The sentencing judge commenced by summarizing the circumstances of the crime, and then continued:

> *"The first task for the Court is to place this offence at the appropriate point on the scale or spectrum of such offences. Counsel for the accused urged that in doing so the Court should bear in mind that this case does not have the aggravating factors that feature in so many cases before this Court in relation to sexual offending such as breach of positions of trust, the complainant being a minor, repeated offending, threats and the diminution of character which often accompanies such offences. It has been urged on behalf of the accused that this is a single offence by a 59-year-old man with no previous convictions. However the Court approaches this case it cannot avoid the conclusion that this is a serious offence. S. S. was entitled to sleep unmolested in her own bed. She was entitled to feel safe and secure in her own home. The accused by his actions violated her home as well her body. There was a serious breach of trust in this case. The accused, whom she and her family trusted, having availed of her hospitality, for reasons best known to himself decided to avail of her sleeping body for his own sexual gratification. The appropriate sentence for such a violation could not be less than seven-and-a-half years and the Court fixes that as the baseline sentence.*
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> *The Court then must consider aggravating factors and mitigating factors. Aggravating factors consist of the damage done by these actions. The Court has had the opportunity to observe the complainant in evidence during the four days of the trial and during the course of the sentencing hearing when she read her victim impact statement to the Court. The complainant strikes the Court as a gentle, sensitive person almost to the point of vulnerability. The Court has no doubt that she has been devastated by this assault. She left her home on the morning of the assault and never returned. Her pregnancy was blighted by concerns about possible HIV infection, antiviral medication, regular visits for blood tests, concerns about potential damage to her unborn child, which persisted despite medical reassurances. Her relationship with the father of her unborn child suffered, because of his difficulty in coming to terms with the fact of the rape. The fallout also affected her children, particularly her teenage son. After the rape she moved in with her mother and the children went from having their own home to sharing a bedroom with their mother in their grandmother's home. The older son also had to change schools, leaving behind his friends, which is always disruptive and disconcerting for a teenager. The shockwaves of this crime moved beyond the immediate victim and adversely affected the lives of many others.*
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> *As against that the Court has to measure the mitigating factors in the case. The accused is 59, 60 years old. He has no previous convictions. He has health problems, particularly relating to his back. Prison at this stage of his life will undoubtedly present particular challenges to him. The Court has been given testimonials from his nine children, setting out their love for him and his care for each of them. Similarly his siblings have presented accounts of his kindness and reliability. His current partner of three years has again attested to his goodness and to her dependence on him. The Court has this morning received a letter from the accused man himself, again pleading the dependence of his children and his partner upon him. The Court has also received this morning a testimonial from his grandson, who appears to be a successful young athlete on the verge of perhaps greater success, crediting his grandfather with a material influence on his success to date. The Court has also received three testimonials from sometime employers/friends of the accused. They draw the Court's attention to his hard-working ethos and his commitment to the community and indicate a willingness to use his services into the future.*
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> *While the Court must give weight to the high opinion in which the accused is held by his family and community, the Court is also conscious that many of those who have come become the Court in recent years charged with sexual offences are also otherwise exemplary members of society. The Court has seen, as in this case, many people who would be described as good members of the community, but who at the same time appear to have a warped sense of entitlement in sexual matters. The Court again has seen, and sees here, people who do not seem to understand or do not accept that consent is the foundation of all sexual interaction.*
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> *Mr D., as is his right, has chosen not to accept the verdict of the jury and in the correspondence handed into Court*

today, he again makes it clear that he does not accept the verdict of the jury. By so doing he has deprived himself of the most potent form of mitigation. In the area of sexual offending an admission of wrong and an expression of remorse is of particular value, even at sentencing stage. Firstly, such an admission of wrong and indication of remorse indicates to a Court that an accused understands the wrong that has been done, so that the Court can be satisfied that a recurrence of the behaviour is unlikely. Secondly, such an admission and expression of remorse validates the complaint, so that the complainant has an opportunity to move on without the persistent whisper of the denial of responsibility. Had Mr D, even at sentencing stage, accepted his responsibility for the wrong perpetrated by him on S. S., this Court would have been generous in discounting of sentence. It could have taken into account that as a 59, 60 year old man Mr D grew up in a culture where the sexual autonomy of women was not recognised, where until 1981 the law did not recognise rape within marriage, where an attitude of entitlement pervaded the sexual interaction of men and women. Unfortunately Mr D, from the Court's point of view, has chosen a different course. As matters stand therefore the Court is left with the aggravating factor of the undoubted devastation of the complainant, and the mitigating factor of a 59, 60 year old man with no previous convictions and with an otherwise blameless record, and for whom, having regard to his health, prison will be particularly difficult.

In these circumstances the Court considers, and the Court acknowledges the devastation involved, both for the accused's family as well as for the complainant. But the Court comes to the conclusion that the appropriate course is to allow the baseline sentence of seven-and-a-half years to stand. The Court therefore sentences the accused to seven-and-a-half year's imprisonment."

Grounds of Appeal

16. The appellant contends that his sentence was unduly severe on several grounds that may be summarised as follows:

(i) The sentence imposed was disproportionate to the circumstances of the case;

(ii) The sentence imposed failed to take account of the penal objective of rehabilitation;

(iii) The sentencing judge failed to follow the recommended best practice of first identifying an appropriate headline sentence with reference to the range of available penalties and having regard to the gravity of the offence, and then discounting from that to reflect the mitigating circumstances of the case;

(iv) The sentencing judge failed to give any or any adequate discount for mitigation;

(v) The sentencing judge erred in making inappropriate comments about the *"sexual autonomy of women"* and *"an attitude of entitlement pervading the sexual interaction of men and women"*, that it is said unfairly obscured the applicant's prior unblemished record and the references and testimonials tendered on his behalf;

(vi) The sentence imposed was out of kilter with appropriate comparators including, and in particular, with this Court's decision in *The People (Director of Public Prosecutions) v T.V.* [2016] IECA 370.

17. We have received helpful written and oral submissions from both sides to which reference will be made as necessary in indicating this Court's determination on the sentence appeal, and the reasons for it.

Analysis and Decision

18. Counsel for the appellant does not seek to seriously criticise what the sentencing judge characterised as the "baseline" sentence, if this is to be treated as what is more commonly referred in the jurisprudence of this Court as the headline sentence. He accepts that a headline sentence of seven and half years' imprisonment is in line with sentences for comparable crimes, and points to the decisions of this Court in cases such as *The People (Director of Public Prosecutions) v T.V.* [2016] IECA 370 ; *The People (Director of Public Prosecutions) v Power* [2014] IECA 37; as well as to the judgment of Charleton J in *The People (Director of Public Prosecutions) v W. D.* [2008] 1 I.R.308 in circumstances where he contends that the case falls for consideration towards the upper end of the lower range on the spectrum of gravity discussed by Charleton J. The main complaint by counsel for the appellant is that if the trial judge's baseline sentence was indeed the headline sentence, then it appears she gave no discount at all for mitigation.

19. As we explained in *The People (Director of Public Prosecutions) v Kelly* [2016] IECA 204

"32. 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.

33. However, as has been stated on many previous occasions, the sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that offender. Accordingly, if the ultimate sentence is to be a proportionate one, relevant circumstances that are personal or particular to the accused must be taken into account at appropriate points in the process and given proper weighting, with care being taken to avoid double counting.

34. The gravity of an offence is measured by a consideration of the moral culpability of the offender for the offence and the harm done."

20. We should add that while it has always been recognised, at least in modern times, that regard should be had to the harm done in any assessment of gravity, the need to do has received statutory reinforcement in s.5 of the Criminal Justice Act 1993 as substituted by s.4 of the Criminal Procedure Act 2010.

21. It is not entirely clear that what the sentencing judge referred to as the "baseline sentence" was in fact the same thing as what we have frequently referred to the "headline sentence", in as much as while the judge seems to locate the offence at a particular point on the range of available penalties with reference to the intrinsic moral culpability of the offence (which of its nature involves a gross violation of the person of the victim) and certain clearly aggravating factors bearing on culpability (such as the abuse of the

hospitality afforded, the breach of the trust on foot of which the offender had been allowed into the victim's home, the fact that the offence was perpetrated in the victim's home where she was entitled to feel safe, and be free from molestation); it does not appear that regard was had at that stage to the particular and especial harm done to the victim in this case as described in her evidence. It is not explained why this factor was left out of the sentencing judge's consideration up to this point, and why she considered it appropriate to nominate a "baseline sentence" before the assessment of gravity exercise was completed, and a baseline sentence that failed to take into account all of the harm done

22. Having nominated her "baseline" sentence, what the sentencing judge did next was to state: *"The Court must then consider aggravating and mitigating factors"*. This approach was not in accordance with the recommended best practice repeatedly commended to sentencing judges by this Court.

23. Be that as it may, as the sentencing judge was clearly not entitled to engage in double counting her reference to aggravating factors at this stage must be construed as referring to aggravating factors not already taken into account. In truth, all that in fact remained to be taken into account on the gravity side of the equation was the particular and especial harm done to the victim, the judge having already acknowledged the violation to the body and person of the victim that every anal rape causes. The judge went on to rehearse the very serious effects on the particular victim in this case. However, she does not indicate to what extent, if any, she may have considered that her "baseline sentence" required to be adjusted (i.e., increased) on account of the effects on the victim being taken into account.

24. The sentencing judge proceeded then to outline what she considered to be the mitigating factors in the case, and to identify certain matters that might have operated as mitigation but which for various reasons could not be availed of by the appellant. In the last analysis she accepted that the appellant was entitled to have taken into account his age, his lack of previous convictions, what she describes as his "otherwise blameless record", and the fact that he has health difficulties which may make prison more difficult for him.

25. What happens next is that the sentencing judge appears to have concluded that *"the appropriate course is to allow the baseline sentence of seven and a half years to stand"*. We can only infer from this that the sentencing judge considered that to the extent that her baseline sentence required to be adjusted upwards to take account of the harm done to the victim, that upwards adjustment would be exactly cancelled out by the discount she was required to afford for the mitigating circumstances in the case, with the result that her baseline sentence should stand. The problem with this approach, from the perspective of this court which is being asked to review the sentence, is that it is impossible to tell whether the sentencing judge's assessment of the extent to which the baseline sentence required be adjusted was proportionate, and whether the extent to which there was a discounting for mitigation was adequate. We are satisfied that for the sentencing judge to have approached matters in this unorthodox way represented an error of principle.

26. In circumstances where the sentencing judgment does not expressly indicate the degree to which there has been a discounting for mitigation, and there is no other way for this Court to quantify and assess it, we cannot be satisfied that the mitigating factors received an adequate discount, and that the ultimate sentence was proportionate. It is not enough for a judge to indicate the headings on foot of which an accused is entitled to mitigation. The quantum of discount actually allowed must be clearly capable of being ascertained, otherwise this Court is going to be hamstrung in any review that it is asked to conduct. Regrettably in this case the weight which the sentencing judge was prepared to afford to the mitigating factors in the case is not identified and her discount is incapable of being quantified.

27. Moreover, while we have said in *The People (Director of Public Prosecutions) v. Davin Flynn* [2015] IECA 290 that a failure to follow best practice in sentencing procedure will not necessarily, and in every case, result in an interference by this Court with a sentence imposed by the court below, particularly if the ultimate sentence appears to be right, we have also said very clearly in the *The People (Director of Public Prosecutions) v M.C.* [2015] IECA 313 that:

> *"…if this Court when asked to review a sentence cannot readily discern the trial judge's rationale for how he or she ended up where they did having regard to accepted principles of sentencing it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question."*

This is one of those cases where the deficit of information is such that we feel we cannot uphold the sentence. The failure to provide this information was a significant error of principle.

28. In circumstances where we have identified a significant error of principle on the part of the sentencing judge, on foot of which we feel we must quash the sentence imposed by the Court below and proceed to a resentencing of the appellant, it is not necessary for us to consider the remaining grounds of appeal.

29. In accordance with established jurisprudence the Court invited the parties to submit to it on a contingent basis any materials that they might wish to have taken into account in the event of the court finding an error of principle and setting aside the sentence that was imposed by the sentencing judge.

30. We were informed that the appellant is getting on well in prison, that he has had no disciplinary issues, and that he is a model prisoner.

31. We have considered the evidence that was adduced before the court below and are satisfied that the relevant aggravating features were correctly identified by the sentencing judge. The range of available penalties runs from non-custodial options to life imprisonment. However, neither the penalties at the extreme low end of the scale nor those at the extreme high end of the scale have any potential relevance in the circumstances of this case. That said, we are satisfied that a substantial custodial sentence is warranted in the circumstances of this case, and we find value and assistance in the three ranges of typical sentences in cases of rape identified by Charleton J in *The People (Director of Public Prosecutions) v. W. D.* [2008] 1 IR 308.

32. We have considered the gravity of this offence having regard to the issues of culpability (including aggravating factors bearing on culpability) and the harm done. We are satisfied that for the purpose of fixing a headline sentence this case is properly to be located at the upper end of the lower of the ranges identified by Charleton J, namely the three year to eight year range. We therefore nominate a headline sentence of eight years imprisonment.

33. It is then necessary to have regard to the mitigating factors in the case and to discount appropriately from the headline sentence we have identified to arrive at a proportionate ultimate sentence.

34. By far the greatest mitigating factor in the case is the appellant's absence of previous convictions. Moreover, the evidence goes further than that in that it establishes that he was of previous positive good character, as evidenced by the wealth of positive testimonials to his qualities as a parent and family man, as a worker and as a positive contributor to his community. It cannot be gainsaid that the appellant has committed a horrendous crime, and the fact that it is his first offence and that he was of previous good character is no doubt cold comfort to his victim, Ms S., who has suffered greatly on account of his actions. Nevertheless these are objective facts, and the Constitution requires a court in passing sentence to be proportionate and to take into account the personal circumstances of the offender as well as the gravity of the offence and the harm done.

35. It has long been established that first time offenders should be afforded leniency unless there is evidence that they were engaged in serious undetected offending over a long period. There is no such evidence here.

36. Moreover, as Prof Thomas O'Malley, in his well regarded work on Sentencing Law and Practice (3rd ed: 2016) points out at para 6.43: *"There is no logical basis for denying mitigation to first time offenders solely on account of the nature of the offence"*. Reflecting that sentiment it has been reiterated time and again in the jurisprudence of this Court, and its predecessor the Court of Criminal Appeal, that even where the offence is serious and the court is satisfied that nothing but a substantial custodial sentence can meet the case, a first time offender should still be afforded a degree of leniency. In practice this means that although a custodial sentence must inevitably be imposed, it may justifiably be somewhat less than would otherwise be the case. This is in part to reflect that the experience of imprisonment will be harder and more onerous for an offender who has never been in conflict with the law before and who has been of positive good character. In that regard, O'Malley makes the further point (again at para 6.43) that: *"This consideration is all the more valid where the offender also happens to be middle aged or elderly"*. This is a factor in the appellant's case.

37. In addition, the appellant has back problems which the sentencing judge acknowledged will also make prison more difficult for him to bear.

38. Having considered and weighed the relevant evidence, and having taken due account of the mitigating factors we have identified, we are satisfied that it is appropriate to discount from the headline sentence that we have nominated by a factor of 25%. Accordingly we sentence the appellant to a term of six years imprisonment to date from the 18th of December 2015.