THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

302 CJA/16

In the matter of Section 2 of the Criminal Justice Act 1993

Between

The People at the Suit of the Director of Public Prosecutions

Appellant

V

Marek Krol

Respondent

JUDGMENT of the Court (ex tempore) delivered on the 22nd day of June 2017 by Mr. Justice Birmingham

1. The matter before the Court sees the DPP seeking, pursuant to s. 2 of the Criminal Justice Act 1993, a review of a sentence that was imposed on the respondent, Mr. Krol. The sentence sought to be reviewed is one of two years imprisonment, wholly suspended, that was imposed in respect of one count of sexual assault in the Circuit Court in Cork on 1st November, 2016.

2. The background to the matter coming before the courts is to be found in events that occurred on 1st February, 2016. On that occasion the injured party, Ms. H., had been out socialising with friends in Cork city centre. A stage was reached where she parted company from her friends. She was feeling tired. At approximately 1.20 am Gardaí were contacted by a member of the public who had concerns about the safety of a female. Garda John Twomey responded to the call and when he came on the scene he found a female whom he believed to be in her twenties in the arms of a male whom he believed to be in his fifties. The female appeared to be passed out and to be slumped over. The male was caressing her and kissing her neck. Gardaí approached and separated the couple. It was obvious that the female was unresponsive and had passed out. When she woke and Gardaí pointed out the male to her, she indicated that she did not know him and did not know that she had been in his arms. Gardaí reunited Ms. H. with her friends and made sure that she got home safely. The following evening, when Garda Twomey was again on duty, he viewed CCTV footage from the scene which revealed that the incident was more serious than had first been realised. The footage showed that the male had opened the female's pants, had his hands inside her pants, and was touching her. When the Gardaí arrived the pants had been closed again and she was fully clothed. The injured party was informed of the details of what had emerged from the CCTV footage and having taken time to consider her position, provided Gardaí with a statement of complaint. The respondent was then arrested on 1st April, 2016 and, having being shown the CCTV footage, made admissions.

3. The Court was provided with details of a Victim Impact Report. In it, the injured party, who was 25 years of age, explained that she was horrified and extremely embarrassed when she came to view the footage. She explained that her general practitioner had advised her to attend cognitive behavioural therapy sessions and that she had done this. Significantly, she commented that the thought of speaking in court made her very anxious. She was, she said, "absolutely dreading it". The complainant said that it was a relief to learn that a guilty plea had been entered which meant that she would not have to relive the experience in front of a court room, adding "I am so glad that the person concerned acknowledged and accepted the crime he committed". The injured party added that overall it had not been a pleasant experience but that she hoped to be able to put it behind her and to move on with her life.

4. In terms of the background and circumstances of the respondent, he was a 53 year old man at the time of the assault, a Polish national, and worked as a handyman and painter. In the course of the evidence offered to the Court by the investigating Garda, it emerged that the then accused had very poor English indeed.

5. The sentencing judge referred to the general obligations on a court when sentencing and then commented as follows:-

> "[T]he first matter I must look at is to see whether there are aggravating circumstances. It is a sexual assault described by [defence counsel] as opportunistic in the sense that the victim was clearly not in a position to resist. In the scale of things, I don't believe there are, as such, aggravating factors. It is an assault, freestanding and in it of itself. On the scale of things, I view this as residing between the lower to the mid end of the scale and therefore, on preliminary examination and having regard to the scaling I have just applied and before I take into account the mitigating and other circumstances, this sentence --- this matter rather would ordinarily attract a sentence of three years imprisonment.
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> There are mitigating factors. The CCTV having been harvested, Mr. Krol did own up fairly readily and apologised. He pleaded relatively early in the process and this, I am assured by the victim herself, is a point which gave her some solace, that she was somewhat terrified, understandably, of having to come into court and give evidence. So she got some solace from that and clearly she was saved the trauma, then, of having to come into court and give evidence. The accused also saved the State a lengthy trial and these are matters of mitigation. I must also have regard to his personal circumstances, he's a man of 53 years of age, he's lived in Ireland for 11 years, originally from Poland and his English is not very good, as I understand it. He is a person who has suffered, in the recent past, from a heart condition and has had a stent imposed and is medicated around that. He is a man who works as a handyman by way of a DIY painter but I understand also and am informed that this is his first offence. [Counsel for the defence] impresses upon the Court that a sentence imposed on a foreigner coming into the Irish prison system at that age and with his language difficulties and health difficulties, he would find it difficult. That this was an opportunistic offence, that it wasn't done with any intentionality. He has no previous convictions and was not before the court previously, wasn't under a suspended sentence around bail when he committed this offence and no issues around drug misuse have been highlighted in the sentence hearing to date.
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> Therefore, in light of the mitigating and other circumstances and in light of the initial assessment which I have placed in this matter, the appropriate sentence in my view is a sentence of two years' imprisonment. The question then is should

> the Court cause all or any of that sentence to be imposed or should it suspend the sentence in its entirety or substitute it with a community service order. In all the circumstances and having regard to the manner in which the accused has met the trial --- the charge, the appropriate sentence in my view is to suspend the matter its entirety. And hopefully, at this point, it will give the victim an opportunity of moving on with her life. I will suspend the matter for a period of three years to ensure compliance and place him under the Probation Service for a period of one year, immediately. And he will abide by all directions given by the Probation Service and that he will be required to pay the sum of €400 within 12 months from today for the purposes of the expenses incurred by the victim in attending for therapy. If those monies are not paid it will trigger the sentence."

6. The judge's comment that he did not believe there were, as such, aggravating factors at first might seem somewhat surprising. In written and oral submissions, the DPP says that there certainly were such aggravating factors. It is said that the judge erred in placing the offence at the lower to mid end of the scale in circumstances where the complainant was highly vulnerable, had become isolated from her friends and was severely intoxicated. The written submissions go on to refer to the:-

> "prolonged and calculated nature of the assault, in the course of which the respondent repeatedly and most invasively groped the complainant's vagina, having opened her pants while she was unconscious and placed his hand inside her pants."

7. The Court is not persuaded that the reference to the "prolonged and calculated nature of the assault" and to the repeated and most invasive groping of the complainant's vagina is fully supported by the evidence of Garda Twomey. There is no doubt, as has been noted above, that the reference to not seeing aggravating factors might seem surprising. In fairness to the trial judge, it is clear that he was fully conscious of the fact that this assault was directed at a woman who was incapable of offering resistance. It may also be that the judge was indicating that there were no factors present such as, for example, gratuitous violence, which were additional to and over and above the essence of the offence that was being dealt with, which was one involving the molestation of a young woman who was unconscious and unable to resist. When this possible interpretation was raised during the course of the appeal hearing by one member of the Court, it drew a firm riposte from counsel for the DPP. Be that as it may, the Court would caution against over-parsing and analysing brief sentencing remarks made immediately after a brief sentencing hearing.

8. At this stage, the principles that apply when courts are dealing with applications to review sentences on grounds of undue leniency are well established and in truth they have not been in doubt or dispute since the first such case of *DPP v. Byrne* [1995] 1 I.L.R.M. 279. In this case the real issue between the parties is whether the nature of the offence was such that there had to be a custodial sentence actually served and that any sentence which did not include a custodial element had to be seen as an error in principle involving a substantial departure from a sentence that would be regarded as appropriate.

9. In the course of the hearing, this Court drew the attention of the parties to the case of *DPP v. Stewart* [2016] IECA 369, a case where judgment was delivered on 21st November, 2016 by Edwards J. and provided the parties with an opportunity of making submissions as to its relevance, if any. In the *Stewart* case, the Court was dealing with a review of a sentence on grounds of undue leniency, the sentence under review being a three year suspended sentence. The background was that the respondent was a member of a cycling group from Northern Ireland who were staying in a hotel in Cavan. In the early hours of the particular morning the respondent encountered the injured party who was asleep or unconscious on a sofa in a hotel foyer. The respondent proceeded to assault the woman in circumstances which included digital penetration.

10. In the course of its judgment, this Court commented at para. 20:-

> "After careful consideration we agree that the trial judge was in error in his approach to the assessment of the seriousness of the offence. The scale of available penalties ranged from non-custodial options to a maximum sentence of ten years imprisonment plus a fine. The sentencing judge determined that the offence, before any allowance for mitigating factors, merited a headline sentence of three years imprisonment in the particular circumstances of this case. We would not quarrel with that having regard to the appellant's culpability and the harm done. However, where the trial judge did fall into error was in believing that this was an offence that could be dealt with by means of a wholly suspended sentence. We consider that this was a case that on any view of it required the imposition of a custodial sentence to be actually served at least in part."

Then, a little later, at para. 24, Edwards J., on behalf of the Court, commented:-

> "Applying that jurisprudence [that is to say the jurisprudence relating to the sentencing of persons of previous good character] to the circumstances of this case, it is necessary to sentence the respondent to a term of imprisonment. We propose to sentencing to the term of three years imprisonment identified by the sentencing judge in the court below as appropriate to the seriousness of the case however, we propose also to suspend all but the last nine months of that three year term."

11. Having been invited to consider the relevance of *Stewart*, counsel on either side of the Court took different approaches. Counsel for the respondent contends that the *Stewart* case was clearly more serious and that was so having regard to a number of factors to which she pointed to. Those included, and were not confined to the fact that it involved digital penetration, that it was a more prolonged incident, that it involved the respondent leaving and returning to his victim, that it involved an element of bragging or bravado, that in that case the victim was left in the public area of the hotel with her legs wide open and her dress pulled up. These were some, but not all, as I have indicated, of the areas where she says the cases can be distinguished.

12. However, on the other side of the coin, there were factors present which were potentially to the advantage of Mr. Stewart. He had married since the incident and was the father of a young daughter with hydocephalus. Any custodial sentence was going to be difficult for him, for his wife and for the young daughter. Prior to the incident, he had been employed as a professional driver with a public transport company in Northern Ireland and because of his involvement in this incident had lost his job.

13. This Court accepts that no two offences are identical and that there are differences between these two offences and, in particular, that there are the differences to which the respondent points. Nonetheless, this Court feels that the comparator is one that is of considerable assistance. Both cases involved assaults on comatose females who were in no position to resist by persons who had not gone out on the evening in question with any intention of committing a serious offence and yet had done so. In the *Stewart* case, we concluded that the judge fell into error in believing that he was dealing with an offence that could be dealt with by means of a wholly suspended sentence. We are unable to reach any different conclusion in the present case and are likewise of the view that the judge fell into error in believing that the case was one to be dealt with by an entirely non-custodial sentence. An invasive sexual assault on a comatose individual who is not in a position to resist requires to be met by a custodial sentence save in

wholly exceptional circumstances. In *Stewart*, we dealt with the case by leaving the headline sentence that had been identified by the trial judge in place but varying the order of the Circuit Court by suspending, not the entire sentence as the Circuit Court judge had done, but all of the sentence other than the last nine months. In this case we propose to adopt a similar approach.

14. In *Stewart*, we referred specifically to the fact that we were requiring someone who had initially received an entirely suspended sentence to go into custody and acknowledged that it was all the more difficult for him to face custody at that stage. That is a consideration that applies in this case too and so, as in *Stewart*, we will impose a sentence that will be less than we would have imposed had we been dealing with the matter at first instance. Having regard to the fact that the judge in this case had decided on a headline sentence somewhat lower than in *Stewart* and to the fact that there were certain aggravating factors present in *Stewart* which are not present here, we will deal with the matter by leaving the headline sentence chosen by the trial judge of two years in place and then proceed to suspend all but the last seven and a half months of that sentence. The terms of the suspension will be as in the Circuit Court.