THE COURT OF APPEAL

Record No.271/18

The President
Edwards J.
Baker J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

THOMAS McKENNA

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 29th day of April 2019 by Ms. Justice Baker

1. This is an appeal against severity of sentence. The sentence under appeal is one of two years' imprisonment imposed on 12 October 2018, at the Circuit Court in Mayo in respect of a single count of sexual assault.

2. The background to the sentence is that the appellant stood trial charged with one count of sexual assault. The trial started on 6 February 2018, and a plea was entered following re-arraignment on 13 February 2018. The trial process had almost completed at that stage.

3. The events in respect of which Mr McKenna pleaded occurred on 25 July 2015 at a hotel complex in Castlebar. The appellant and the injured party were members of a group which, through various activities, raised funds for charity. On the occasion in question, eight members of the group had taken an apartment in the hotel apartment complex. A charity event took place, and afterwards, there was dinner and drinks in the hotel bar. There was evidence at trial that the appellant was quite drunk, whereas the injured party was described as "tipsy" but lucid.

4. There were two bedrooms in the apartment and the plan was that one bedroom, which included a double bed and a single bed, would be occupied by the injured party and her husband who would take the double bed, and the single bed would be available for another identified member of the group. A second bedroom contained three single beds and the appellant and the other two men were to sleep in that room. The others were to sleep on the sofa.

5. Sometime after midnight, the injured party went to the bedroom and changed into her pyjamas. She briefly re-joined the group who were in the sitting room and spent a few minutes with them before going to bed. Sometime later the appellant got up, ostensibly to go to the toilet. His absence was then noted. The husband of the injured party tried to get into their bedroom but the door was locked. He was able to gain access to the bedroom through the bathroom. He then found the appellant in bed with his wife. The appellant's trousers and underpants were pulled down and his penis was visible. The appellant was ordered to leave the room. The injured party seemed dazed and confused. Her evidence at trial was that she was asleep during the events and that the accused had woken her.

6. The matter went to trial and in the course of trial the appellant asked to be re-arraigned. He did this after the injured party had given evidence. Counsel for the appellant described defence counsels' cross examination of her as one of "great sensitivity". It would be fair to say, however, that she herself would probably not accept this characterisation, and she described the trial process as traumatic and invasive, and also gave a similar description of the GSOC investigation that had preceded the trial.

7. The appellant was a member of An Garda Síochána since 2007, and in 2011 he had received the Scott medal for bravery after rescuing a young child from a lake. He married in 2006 and was the father of three young children. The sentencing Court heard that he had been served with a notice of dismissal from the force.

8. The trial judge's approach to sentencing was to fix a headline sentence of four years and he described the offence at being on the low side of the mid-range, and then to mitigate the sentence to one of two years to reflect the various mitigating factors. The mitigating factors he identified were:

(a) This was a first offence,

(b) The accused was of previous good character,

(c) That he had a good family life and a good working life,

(d) That he had entered a plea of guilty, albeit it was late,

(e) That he had expressed some remorse or some regret for the incident, albeit he noted that perhaps that was expressed to an extent in a self-serving way,

(f) He also accepted that there was no risk of re-offending.

9. The trial judge took particular note of the fact that a probation report had been prepared and it contained reference to the fact that the appellant continued to say that the behaviour was consensual.

10. Factors which weighted against a reduction were those factors identified in the probation report, the lateness of the plea, the seriousness of the offence and a strong victim impact statement, to which I will return later in the course of this judgment.

11. The appellant points to a number of comparator cases to suggest that the sentence imposed was disproportionally and inappropriately severe. In particular, he referred to *The People (DPP) v. Stewart* [2016] IECA 369 and *The People (DPP) v. Krol* [2017] IECA 205. Both cases were judgments concerning an undue leniency review. In *The People (DPP) v. Stewart* the respondent was a member of a cycling group from Northern Ireland and he and a group were staying in Cavan. In the early hours of the morning he encountered the injured party who was asleep on the sofa in the hotel foyer and he proceeded to assault her in circumstances which included digital penetration. In *The People (DPP) v. Krol* there was an assault on a comatose female committed by someone who had not gone out in the evening with any intention of committing an offence and yet ended up committing a serious offence.

12. The authorities suggest that case law on undue leniency appeals are not of particular use by way of a guide in severity appeals because the jurisdiction of the court is different in nature and more limited than the jurisdiction the court engages on a full sentence appeal and in that regard we note the judgments of *The People (DPP) v. Byrne* [2017] IECA 97, *The People (DPP) v. McCormack* [2000] 4 IR 356 and *The People (DPP) v. O'Donoghue* [2006] IECCA 134, [2007] 2 IR 336.

13. The question for this Court is whether the two-year sentence was wrong in principle. Counsel argues that insufficient weight was given to the mitigating factors, but in our view, a reduction of 50% from the headline sentence was appropriate, and perhaps even generous, in the light of the factors that weighed both ways. We cannot identify an error in principle in the approach to the mitigating factors.

14. Counsel's other argument concerns the fact that no part of the sentence was suspended and it is argued that this was an error in principle. The same factual matters are relied on in support of this argument as form the basis of the appeal against the approach of the trial judge to the mitigating factors.

15. Counsel draws our attention to an extract from the transcript of the sentencing hearing, the last exchange between counsel and the sentencing judge, and the comment there made by the trial judge:

> "In answer to a request that he suspend part of the sentence, there is no reason to suspend any of the sentence because he is not viewed as an ongoing risk. That is the only situation in which a sentence would be suspended. I did consider it, thank you."

16. Our reading of this exchange is that the trial judge correctly identified one material basis on which a sentence might be suspended in whole or in part, a desire for rehabilitation or a desire to encourage good behaviour in the future. In our view, the trial judge was correct that neither of those factors was engaged in the present case. The trial judge took an approach to the structure of the sentencing and the mechanism by which he reflected the nature and seriousness of the offence and the various factors that weighed in favour of the applicant was to reduce the headline sentence by 50% and not to suspend any part of it. He was entitled in his discretion to take this approach and we have found no fault with his approach. The gravity of the offence must have been seen by him as warranting some custodial element.

17. Further, the evidence from the injured party was forceful and she described the invasive and degrading nature of the crime and her later feelings of shame and disgust towards herself. Her description is that she was overwhelmed by feelings of anger and guilt, anger for what happened and guilt for "letting for happen". She suffered from loss of sleep and feelings of intense vulnerability. The trial judge was entitled to have regard to this evidence in coming to his decision.

18. We have regard to the decision of this court in *The People (DPP) v. Counihan* [2015] IECA 76 where Ryan P. considered that a suspended sentence cannot be justified by reason only of the impact that imprisonment would have on an accused's family. We note that the key argument made by counsel for the appellant in the present case is that the loss of the company of this man to his family, and the loss of his income earning capacity will have a severe impact on the family, but that of itself is not a reason to suspend a sentence.

19. We also have regard to the fact that a custodial sentence is not mandated for the offence of sexual assault. We note the judgment of this Court in *The People (DPP) v. McCormack*, but we do consider that the trial judge made no error of principle in the imposition of a custodial sentence.

20. For that reason, we would dismiss the appeal.