THE COURT OF APPEAL

Record Number: 149/17

Birmingham P.
Whelan J.
McCarthy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND-

K.A.

APPELLANT

JUDGMENT of the Court delivered on the 26th day of February 2019 by Mr. Justice McCarthy

The appeal

1. This is an appeal by the applicant against the severity of a sentence of ten years' imprisonment, (the last year of which was suspended) for rape committed on the 20th June 2013, and imposed on the 29th May 2017 by the Central Criminal Court.

The offence

2. The offence occurred in the early hours of the morning in a bandstand at Ballyphehane Park, Cork. On the previous day the appellant had been drinking with a number of friends there, including the complainant. She had consumed alcohol, to a modest degree, but was drunk. She fell asleep and when she awoke she saw the appellant and his co-accused, since deceased. Her handbag had been interfered with and she could not find her mobile phone. She asked them if they knew where it was but they were unhelpful. However, she recalled them saying words to the effect of:-

> *"If you do us a favour we will do you a favour."*

As she was sitting on the bandstand the two started to kiss her. She told them to stop. The appellant proceeded to push her so that she found herself lying on her side and he kept his hand on her shoulder and held her down; thereafter, his co-accused pulling down her tracksuit bottoms and digitally penetrating her. She was crying and repeatedly said no. The co-accused then raped her and during the course of these events, as he held her down, the appellant said; "it's alright girl" on a number of occasions. The accused role was accordingly that of a principal in the second degree. The principal offender had asked the appellant whether or not he wished to have intercourse with the complainant but he declined. Immediately thereafter the appellant gave the complainant a hug and she hugged him back- she said that in retrospect she was not sure why she did this. He gave her a false name and when she indicated that she would report the matter to the Gardaí the now deceased co-accused told her that he would kill her "stone devine dead". Her perception was that the appellant here expressed some concern for her immediately after the event and that "he had a conscience."

3. The appellant was nineteen years old when the offence was committed and accordingly twenty-three at the time of sentencing. He had forty-one previous convictions for a number of serious offences including robbery (ten offences), theft (fourteen), burglary and criminal damage but none for sexual offences. The offences had been committed between January 2012 and May 2017 and a number of terms of imprisonment had been imposed upon him in the Circuit Court: it is not clear whether the offences were summary in nature or dealt with on indictment but in any event sentences of eighteen months to be served concurrently for two robberies were imposed in 2015. He had no work experience. However, he had what might be described as a difficult start in life: his parents suffered from alcohol and drug addiction problems and, in fact, he had been brought up by his maternal grandparents. The latter was described as being a good home; at a certain point he became addicted in a similar way himself. The offences relating to dishonesty were characterised as being for the purpose of feeding his addictions.

4. The trial judge concluded that a headline sentence of twelve years was appropriate, pointing out that the offence of rape is extremely serious and stressing the aggravating factor that the offence involved two offenders. She had regard to the fact he was not a person of previous good character - referring to his convictions, giving rise to a loss of mitigation. She emphasised the severe adverse effect of the offence on the victim and it is clear from the victim impact evidence, which was read to the court' that there were significant adverse consequences of a long term kind for her. She pointed out rightly that the first step towards mitigation is admission of guilt and whilst that factor was not present there must always be the hope of rehabilitation. She thus reduced the headline sentence because of mitigating factors to one of ten years and suspended the last year to encourage such rehabilitation. It

might be appropriate in the latter context to refer to the fact that the accused was studying for his leaving certificate in prison and hoped to make positive changes in his life. She was cognisant of the fact that he was a principal only in the second degree due to his lesser involvement.

5. The following are the Grounds of Appeal:

(i) Adopted a headline sentence which placed the offence in a category of severity which was not appropriate to the specific offence in the appellant's case and which resulted in an actual sentence being passed which was disproportionate and out of kilter with previous sentencing precedents.

(ii) …[that]… she did not have adequate regard to the mitigating factors in the appellant's case and or passed a sentence which was disproportionate having regard to the particular circumstances of the appellant.

(iii) Failed to attach sufficient weight to the public interest in rehabilitating the appellant.

Ground (i)

6. At the commencement of the hearing Mr Grehan candidly said that the core difficulty here was that the sentence was excessive, whether one characterised that as disproportionate, out of kilter with previous sentencing precedents or the result of failure to attach sufficient weight to the public interest in rehabilitation. It was submitted that the headline sentence of twelve years was excessive and that whilst it was serious in nature, the factors which were required to bring it into a sentencing range of twelve years were not present. In particular, it was submitted that the appellant himself did not carry out the penetrative act or acts, and that he did not act in a violent manner or make threats unlike his accomplice. In effect, the appellant was less culpable than the co-accused. In this regard the trial judge was also criticised for failure to make reference to where, on the scale of severity the offence fell but referred only to aggravating factors. We might dispose of that latter proposition at this juncture by pointing out that it is misconceived since she reprised all of the factors which were indicative of both aggravation and mitigation having explained that the gravity of the offence is measured by a consideration of the moral culpability of the offender and where, on any so called scale of severity, the offence occurred is perfectly clear from the evidence and the judgment.

7. The respondent's submission under this ground was that the appellant played an initiating and significant role in the rape and then attempted to cover up his involvement, though it was accepted on behalf of the director that his role was a lesser one than the deceased co-accused and did not, when offered the opportunity of doing so, engage in any penetrative sexual act. It was urged upon us, however, that the fact that two men were engaged in the offence must have caused a greater sense of fear, intimidation and humiliation to the victim who was vulnerable because she was alone in a park in the small hours of the morning and had drink taken. It was further submitted that there was evidence of planning but we think it is fair to say that cannot legitimately be said to be of any significance in the present case.

Ground (ii)

8. On the second ground it was submitted that the judge failed to have a proper regard to the youth of the appellant at the time of sentencing, his difficult upbringing and personal circumstances, his lack of previous convictions for serious offences (including similar offences) and the fact that he had been engaged with educational services whilst in prison: the appellant also criticises the fact that the judge failed to make reference to the appellant's age at the time of the offence merely referring to his age at the time of the conviction but we cannot see how she could not have been unaware of his youth and considered it relevant. It was submitted that inadequate consideration was given to the difficulties of his upbringing and the fact that he suffered from problems with addiction. Whilst the fact that the existence of the previous convictions meant that he was not of previous good character it was submitted that the offences for which he was before the court were very different and that this demonstrated that he might be less likely to reoffend in terms of a sexual offence or pose a risk to society in the future. The respondent, of course, on this ground, submitted that there was no error and referred to the observations of the trial judge which, at the risk of repetition, which seems to indicate a very comprehensive consideration of all aspects of the case.

Ground (iii)

9. Under the third ground the appellant points to the well-established principle that one of the objects of passing sentence is to encourage rehabilitation in the public interest. Here, it was suggested that the sentence of nine years afforded little encouragement. Notwithstanding the appellant's previous convictions, it was said that he did not have a long history of criminal behaviour, that at the time of sentencing he was making efforts supported by his parents to overcome his difficulties and that he also had been engaged in educational activities in prison. It is submitted that the court was incorrect to suggest that rehabilitation is unrealistic purely by reason of the fact that the appellant contested his guilt and that such an assumption is not based either on evidence nor is an established principle of sentencing. We agree the first step towards rehabilitation is acknowledgment of guilt. This is no more than the trial judge said; she, rightly, however, made the point that even after a trial, the potential for rehabilitation cannot be totally excluded and a court must provide light at the end of the tunnel to incentivise rehabilitation. It is plain that she sought to have regard to this factor by reducing the headline sentence and making provision for a period of suspension thereafter.

10. We think that it is important to stress here that the accused contested this matter and that the most significant single ground of mitigation, namely, a plea of guilty, was not present. He was a person with significant previous convictions, although of relative youth. If anything followed from previous convictions for a series of serious offences, it would have been a higher sentence to that imposed; similarly had he committed sexual offences in the past his offence would have been aggravated. The judge left light at the end of the tunnel. She had regard to his youth. She had regard to his addiction difficulties and family circumstances and his attempted rehabilitation in prison.

11. Equally, she rightly had regard to the aggravating factors in the case namely, the vulnerability of the complainant, the fact that two men were engaged in the act of sexual violence in question even though one only engaged in penetrative sex, the fact that the events occurred in the small hours of the morning and hence in the hours of darkness, to be followed by a threat by the co accused and the giving of a false name, at variance, at least somewhat, with the proposition that as compared to the co accused the appellant "had a conscience." Of course it is the case that even if a judge ostensibly has regard to all relevant factors in sentencing in truth the judge may have fallen into error.

12. We should say that comparators are frequently of modest assistance only because there will be such a wide variation in the facts in respect of and the same offences. Ultimately, as here, if the judge has quite obviously carefully considered all relevant factors and given a comprehensively reasoned decision, it is a question of judgment as to whether or not she has committed an error in principle

to the point that she has exceeded her margin of discretion. We are satisfied that the sentence was neither "out of kilter" with sentences for similar offences, disproportionate, failed to have regard to relevant mitigating factors or failed to attach sufficient weight to the public interest in rehabilitation.

13. We cannot detect any error of principle. We accordingly dismiss this appeal.