THE COURT OF APPEAL

Record No. 186/2017

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

C.T.

APPELLANT

JUDGMENT (ex tempore) of the Court delivered by Mr. Justice Mahon on the 14th day of May 2018

1. The appellant was convicted of one count of sexual assault on the 9th May 2017 at Cork Circuit Criminal Court, having pleaded guilty to the offence. He was sentenced on the 23rd June 2017 to a term of imprisonment of four years with the final twelve months suspended for a period of twelve months post release. He has appealed against that sentence. The appellant has not appealed against the sentence of twelve months imprisonment imposed by the same court in respect of a separate offence of sexual assault to which he also pleaded guilty.

2. The first sexual assault (in respect of which the sentence is not the subject of this appeal) occurred at a private dwelling in County Cork between the 1st August 2011 and the 31st October 2011. The complainant, E.P., was fifteen years old at the time while the appellant was either eighteen or recently nineteen years old. The complainant had settled down to go to sleep on a couch in the house. She was friendly with the tenants of the house, and the appellant was also a guest in the house overnight, and was sitting on a chair in the same room. While the complainant was on the couch and appeared to be asleep the appellant partially removed her upper and lower clothing. He repeatedly touched her breasts and digitally penetrated her vagina. The entire incident lasted for approximately fifteen minutes whereupon he then left the house and drove off. During the entire incident the complainant pretended to be asleep because of her fear of a reaction from him if he discovered that she was awake and conscious of what he was doing to her. The complainant and the appellant and their families were known to each other. The complainant went to the gardaí in February 2016, some months after the event. To his credit the appellant admitted the offence at a very early stage, never attempted to avoid responsibility for it, pleaded guilty and was genuinely remorseful. His sentence for this offence was twelve months imprisonment.

3. The second offence, and the offence with which this appeal is concerned, occurred on the 27th December 2014 at a separate private dwelling in County Cork. The complainant was H.K. who was nineteen years old at the time while the appellant was then twenty two years old. The complainant was staying overnight with friends and slept in a room on her own. She awoke in the morning to find the appellant lying beside her digitally penetrating her vagina. She got up and left the room. She made a complaint to the gardaí the following day. As had occurred in relation to the first offence the appellant when approached by the gardaí immediately fully admitted his involvement and co-operated with their investigation. He pleaded guilty at an early stage and was genuinely remorseful.

4. The grounds of appeal relied on by the appellant are that the learned sentencing judge:-

> (i) erred in law in failing to structure a sentence balancing punitive, deterrent and rehabilitative elements, and in failing to construct a sentence proportionate to the gravity of the offence and the circumstances of the offender;
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> (ii) erred in law in assessing the gravity of the offence as warranting a headline sentence of four years and in doing so had undue regard to the fact that the offence was a second offence;
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> (iii) erred in law in failing to get any or any adequate account of the mitigating factors submitted on behalf of the appellant in particular, the admissions and early guilty plea, his youth, the lack of previous convictions and the fact that he had not offended in the two and a half years since the 2014 offence, and
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> (iv) erred in law in failing to take adequately into account at the time that had elapsed since the offences occurred, in relation to the evidence of rehabilitation during that time.

5. In the course of his sentencing judgment, the learned sentencing judge commented as follows:-

> *"These are very troubling offences and any one of them on its own would merit a custodial sentence. The fact that there are two such similar type offences within such a short period of time is very worrying and initially I had contemplated imposing a consecutive sentence, but considering that it is not absolutely incumbent upon me by statute, I won't do that. But I do regard the fact that there is a second offence within - the first offence was in 2011 and the second in December of 2014. The fact that two - that these offences took place so soon upon each other I think merits particular consideration…"*

6. The learned sentencing judge expressly referred to *"the undoubted mitigating factors"* which were present in respect of both offences. He noted, in particular, the appellant's young age and his early acceptance of responsibility and plea of guilty. He also referred to his attempts to rehabilitate himself prior to sentencing and believed these were genuine and impressive. He also noted that the appellant had no previous convictions and had a good work record. Finally, he noted the appellant's remorse and believed it to be genuine.

7. Dealing specifically with the second offence, the learned trial judge stated:-

"Now, the second offence is alarming. It's alarming because of its nature, because of the fact that it occurred within, I think, three years of the first and it is alarming because it is so similar. He took advantage and exploited a person whom he was putting up for the night. He penetrated her, either while she was asleep or in the house. Now, I think that is a seriously aggravating factor and I would measure a sentence, because it's the second offence, of a four-year sentence. I won't repeat the mitigating factors because they are present in both cases and they are equally genuine. I accept that he has problems, or that he will need a structure in the future, and in relation to the four-year sentence from today's date I will suspend the final 12 months on condition that, on his release, he will remain under the care of the probation service, obey all their directions for a period of 12 months. Each of the sentences are concurrent with each other from today."

8. The learned sentencing judge treatment of the first sexual assault as, in effect, a previous conviction, is criticised by the appellant. In a purely technical sense such criticism is well made as there was no previously recorded conviction in respect of the first offence at the time of sentencing for the second offence. Nevertheless, and in reality, when sentencing for the second offence the learned sentencing judge was duty bound to fully take the fact of the commission of the first offence into consideration and treat the second offence, when sentencing for that offence, as an offence committed in circumstances where the appellant had on a previous occasion offended in remarkably similar circumstances. That situation required the appellant to be sentenced as a repeat offender; that is someone who offended on more than one occasion within a relatively recent time frame.

9. A further focus of the appeal is the four year headline sentence identified as appropriate in the court below. While the details of the sexual assault do not place the offence into the highest category the offence was nonetheless a serious one and required a custodial term of some significance.

10. The third issue highlighted on behalf of the appellant is the contention that insufficient weight was afforded to the mitigating factors, and in particular rehabilitation and remorse were highlighted. Undoubtedly, there was significant mitigation in this case. The pleas of guilty, and indeed the early admissions made, were of particular value and arguably the twenty five per cent discount allowed by way of the final year of the four year term being suspended was insufficient in this respect. The genuine nature of the appellant's remorse can only be positive in relation to the prospects for rehabilitation, and which the court notes is already underway.

11. Returning to the relatively serious nature of the second offence, it is also arguably the case that a four year sentence was lenient. Certainly it is the court's view that a five year sentence would not have been out of place but on the basis that a thirty to forty per cent suspended element would have been allowed in recognition of the strong mitigating factors present. The net custodial term would, in those circumstances, have been in the region of three years, or in other words, precisely similar to the custodial element of the sentence now under appeal.

12. Another feature of this case is the fact that the sentences for both offences were directed to be served concurrently. It was undoubtedly open to the learned sentencing judge to have made the sentences consecutive given that the offences were clearly separate in time and involved different victims. Had consecutive sentencing featured in the court below it is unlikely that this court would have deemed it appropriate to alter that approach, and which would have resulted in a custodial term of four years.

13. In these circumstances, the court cannot identify any error of principle on the part of the court below. The custodial element of the sentence for the second offence either taken alone, or concurrently with the twelve months sentence imposed in respect of the first offence, is certainly not excessive. Indeed, when considered in conjunction with the sentence for the first offence the overall outcome is almost certainly lenient. It generously respected the principle of totality.

14. The court will therefore dismiss the appeal.