



THE COURT OF APPEAL

**Birmingham P
Edwards J
Hedigan J**

The People (at the suit of the Director of Public Prosecutions)

And

Anthony Hussey

249/2016

Respondent

Appellant

JUDGMENT of the Court delivered on the 2nd day of July, 2018 by

Mr. Justice Hedigan

1. The appellant pleaded guilty to a charge of rape and a charge of section 4 rape on 14th March, 2016. The appellant was sentenced to 13 years imprisonment coupled with a 5 year post release supervision period. This is an appeal against the severity of that sentence.

Background

2. The offence in question occurred on 20th September, 2014 in the victim's home. The victim, Ms A, was 74 years old and the appellant, was 22 years old at the time of the offence. The victim moved to Ireland in 1995 and had worked from home. She lived alone.

3. The appellant on the night in question had been out drinking with friends. Having been out for several hours he was brought home by a friend. He was dropped home by a friend but to the wrong house near to his own. The appellant went onto the grounds of the victim's house and started banging on the windows of the house presumably in order to gain entry. This was at approximately 6.12 am. The banging woke Ms A up. She was very frightened and crawled into her living room where she phoned her neighbour, Mr M, at 6.13 am for help. Mr M upon arrival observed the appellant in an intoxicated state on the grounds of the property. The appellant also appeared to be soaking wet. It transpired that he had fallen into the pond at the back of Ms A's home. Mr M took the appellant home. Ms A remained awake and went to take a shower. She was in a state of semi undress in her bedroom when she saw a man, now known to be the appellant, standing in front of her wearing dark clothing and a balaclava. The victim described herself as being paralysed with fear. She began to scream and a struggle ensued between herself and the appellant. The appellant placed his hand over her mouth to stop her from screaming. Thereafter the appellant grabbed the victim's breasts. He struck the appellant on her face cutting her lip. Ms A was repeatedly told by the appellant that he had a boss and that his boss was making him do this. She was told that if she screamed, there would be "three more" people waiting. When the appellant said "you're going to like it", Ms A stated that she understood she was going to be raped. She was sobbing uncontrollably.

4. She was put in a position where her upper body was on the bed, and her thighs were pressed against the bedframe. She was then undressed and raped vaginally, anally and digitally penetrated. She was left completely covered in a duvet, and she was afraid that she would be suffocated. Once the appellant had left her home she contacted Mr M and informed him that she had been raped and required urgent help. This was at 7.47 am. Her GP and the Gardaí attended at her home. When the Gardaí arrived at the scene, the friend who had dropped the appellant home was still sleeping in his car and was intoxicated.

5. The victim gave a victim impact statement. A portion of the statement reads as follows:

"My life has not been easy but nothing has been so devastating, so hard to face as the shock and trauma of the morning of the 20th of September 2014. Now a year and seven months after this horrific experience, I am still trying my very best to overcome this terrifying shock of having been terrorised, physically and verbally assaulted, abused and raped by the son of my neighbour. Often, I don't want to go on living. I don't want to remember and believe what happened. I have not been able to prevent reliving again and again the intruder forcing me down on my front over the side of my bed, holding me down at the base of my neck. Therefore I feel like screaming, have to scream out what I had to endure on that morning. How can I break free from the disturbingly vivid and destructive memories still lodged and alive in my body, emotions and mind after more than a year and a half? My lower body does not feel that it is part of the rest of my body, as if it does not belong to me anymore. Writing about it makes me cry. I still feel limp and hollow, deeply sad, not being myself. I want to give up. Nothing makes sense. I have no meaning. Will I ever recover? At times, my head feels like buzzing inside, like being stuffed with tangled wires, live wires that must be the constant presence of painfully troubled and tangled thoughts. My head seems too large for my body now, my lower body feels hollowed out, the vagina and rectum scratched out and sore. In this daily nightmare, I have no voice to speak but I cry silently, tucked away in fear."

6. She commented on the immediate impact of the offence on her daily life - at a "sudden noise, a person on the road, a young man with dark hair or hooded passing, seeing a group of youth or a few slim men dressed in black leisure wear, my body tenses. I have to look the other way or cross the road, focus on my breathing, telling myself that I am safe".

Personal Circumstances of the Appellant

7. The appellant is now 26 years old. He is one of two children. He has a good relationship with his family. He has no history of psychiatric illness. The learned sentencing judge commented that prior to this offence, the appellant was of good character. The appellant was popular in his local community, well-adjusted and intelligent. He had attended school, completed the leaving certificate and had undertaken further studies in an Institute of Technology. He has a good employment record. He was very involved in sporting activities. He had many close friends at school and fitted in well. The report of psychologist Michael de Villiers stated that the appellant had a somewhat exceptional or abnormal level of sexual activity. On at least one occasion, the appellant went to a prostitute, and has had many consensual sexual experiences. He watched what is described as hard pornography on an extensive basis. The psychologist's report concludes that the offence was out of character and the appellant is at a low to moderate risk of the commission of further sexual offences. The report recommends that the accused engage in therapy to address his emotional

difficulties.

Sentence

8. The learned sentencing judge delivered sentence as follows:

"So, taking the totality of the circumstances, it seems to me that the appropriate sentence is somewhere between 16 and 18 years' imprisonment. One must then address the mitigating factor, which I have identified, that is to say the plea of guilty. I have regard to the other factors to which I have referred in terms of taking the view that the appropriate place on the scale, as it were, is between 16 and 18 years. There's no rational basis for being more precise than that. This is not a precise science, but it seems to me that the appropriate reduction is in or about between a quarter and a third and in those circumstances, I impose a sentence of 13 years' imprisonment. I also believe that post release supervision is essential in this instance, as matters presently stand. One doesn't know what things will be like when he is released from prison. There are therapeutic arrangements after people are released from prison and I hope, at that stage, that there will be no risk of recidivism. So, I will impose five years post release supervision."

9. Aggravating factors the learned sentencing judge took into account included: the violation of the victim in her own home; the age of the victim; the violence of the attack; the devastating effects the crime has had on the victim.

10. The learned sentencing judge as well as the plea of guilty identified the following as mitigating factors: the appellant's previous good character; the low risk of reoffending; the apology in writing (albeit that the appellant did not admit to the offences when originally interviewed by the Gardaí).

Grounds of Appeal

11. The trial judge placed insufficient weight on the plea of guilty offered as it was at a very early stage almost one year before the assigned trial date.

12. The learned trial judge ought to have introduced some element of the sentence to be served as a suspended portion to further incentivise rehabilitation.

13. The trial judge placed insufficient weight on the relative youth of the Applicant herein, which in a rather unusual manner actually counted against the Applicant by virtue of the Courts observations are regards his sexual appetite and desires.

14. The trial judge placed insufficient weight on the genuine remorse expressed by the applicant and indeed that of his family given the unusually close relationship between the families.

15. Trial judge placed insufficient weight on the commitment of the Applicant to undertake and full participate in all rehabilitative opportunities available to him most significantly those of a therapeutic nature whilst in custody or the conclusions reached by the various professional engaged to access principally although not exclusively the likelihood of re offending.

16. The sentence imposed was excessive in all of the circumstances.

Submissions of the Appellant

17. It is submitted that the learned sentencing judge correctly identified the aggravating factors in the case, however, the judge failed to articulate the mitigating factors that were present. Whilst the learned sentencing judge emphasised the devastating effect of the crime on the victim, the judge appeared dismissive of mitigating factors other than the plea of guilty. Thus, the learned sentencing judge did not engage in the usual two-step sentencing process.

18. Little or no weight was attached to the remorse offered, to the previous good character of the appellant, to the appellant's consistent work history, or to the combined conclusions of the psychologists' reports or the probation report. It is submitted that a lack of previous offending behaviour merits a partially suspended sentence to promote deterrence and incentivise rehabilitation.

19. It is submitted that the learned sentencing judge made little or no provision for the prospect of rehabilitation. It should be noted that the appellant expressed that he would attend all courses available to him and undertake any steps directed by the learned sentencing judge so as to reduce his risk of recidivism.

20. The sentence imposed by the learned sentencing judge was significantly out of kilter with sentences imposed for one off incidents of sexual offending. The sentence imposed is akin to sentences imposed on offenders who repeatedly sexually abused and preyed on children. Counsel for the appellant cites many cases as examples of similar sentences, including *DPP v. Griffin* [2011] IECCA 62, where a fifteen year sentence was imposed on the accused who repeatedly raped and sexually assaulted a child over an eight year period when the child was aged between eight and sixteen years old.

Submissions of the Respondent

21. Counsel for the appellant exclusively refers to sentences imposed in cases where parents or those *in loco parentis* raped children repeatedly over a lengthy period of time. The instant case differs from those cases on the facts, however, this does not imply that this case ought not be categorised as the most serious of rape cases. The appellant is now aged 26 years old, and the victim was some fifty years older than him at the time of the offence. She lived alone in a rural setting where she enjoyed her work. She had cordial relations with the appellant's family over many years and had grown to trust them. Very different aggravating factors arise in the instant case including: pre-meditated trespass of the victim's home; the fact that the appellant concealed himself in a balaclava; the fact that he broke into her home using a key that the victim had entrusted to his parents; the age difference between the parties; the vulnerability of the complainant; the use of force and threats; the effect this ordeal has had on an elderly lady.

22. O'Malley in *Sentencing Law and Practice* (3rd Edition, Round Hall, p. 371) suggests that "in the highest range (attracting sentences of 12 years or more) are rape offences that are aggravated by circumstances of extreme violence or degradation".

23. *DPP v Tiernan* [1988] IR 250 was a rape case involving extreme violence. The victim and her boyfriend were taken to a remote location. Two men raped the victim after confining her boyfriend to the boot of the car. A sentence of twenty-one years was ultimately reduced by the Supreme Court to one of seventeen to allow some hope of rehabilitation:

"The crime of rape must always be viewed as one of the most serious offences contained in our criminal law even when committed without violence beyond that constituting the act of rape itself. In *Attorney General v. Conroy* [1965] I.R. 411 this Court stated that the nature of the offence was such as to render unconstitutional any statutory provision which

could permit it ever to be regarded as a minor offence. The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes of lifelong duration. In addition to those damaging consequences, rape can distort the victim's approach to her own sexuality. In many instances, rape can also impose upon the victim a deeply distressing fear of sexually transmitted disease and the possibility of a pregnancy and of a birth, whose innocent issue could inspire a distress and even a loathing utterly alien to motherhood. Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must attract very severe legal sanctions."

Further, it is submitted that the learned sentencing judge articulated all mitigating factors present in the case. He expressly stated:

"I take into account his personality and temperament as disclosed by the reports and in evidence. I have regard to the fact that he is otherwise of good character. I have regard to the fact that he has a good employment record. I have regard to the risk factors which exist and the advice given by the probation service that he should have continuing supervision after his release from prison [...] I take into account of course which is by law the most significant factor in mitigation, the fact of his plea of guilty."

24. The Judge considered the psychologists' and probation reports. He referred to the fact that the accused had "an exceptional or abnormal level of sexual activity" and "watched pornography, even hard pornography on an extensive basis." The reduction made in the headline sentence (of sixteen to eighteen years) to one of thirteen was a significant reduction in all of the circumstances.

Decision

25. This appeal involves one of the most serious cases of rape to come before this Court. The facts make the most dreadful reading. The victim was a 74 year old woman, a foreign national living in Ireland. She suffered the terror of first of all the initial banging on her windows at around 6 am when the appellant, in a drunken state, apparently mistaking her house for his own, tried at that stage to enter her house. She was terrified and crawled into her living room. She made contact with a neighbour who assisted her. He took the appellant to his own home nearby and reassured her. Shortly after she was confronted by a man in her house dressed in dark clothing and a balaclava. It is scarcely possible to imagine her terror having shortly before been subjected to what seemed a violent attempt to break into her home, to find so soon after such a renewed threat. She did not know at that stage that it was the appellant. It is truly the stuff of nightmares. She was then subjected to a violent, degrading series of rapes, anally and vaginally, and was also hit on the mouth. As is clear from her striking victim impact statement, the psychological consequences for her have been devastating. Her statement was a heartrending one. Such an egregious offence was sure to and did receive a severe sentence.

26. The sentencing judge took some time to consider the question of sentencing. At sentencing he referred to the fact that a number of testimonials had been furnished on behalf of the accused and that a written apology had been furnished, as was one from the family of the accused. He referred to the fact that, with the exception of this offence, the accused seemed to have been a person of otherwise good character, popular, hardworking, well-adjusted and intelligent. He then referred to the various reports that were available to him; the report of Dr. de Villiers, psychologist, prepared on behalf of the defence; a report prepared by Mr. Rooney, Senior Counselling Psychologist at the behest of the prosecution and to the Probation Report. The judge referred to all of the mitigating factors that were raised on behalf of the appellant. He did indeed refer to what he described as "the" mitigating factor he had identified, "the plea of guilty." Complaint is made of this as though the learned sentencing judge had forgotten the very mitigating factors he had just identified and only allowed mitigation for the plea. However, judicial comments on sentencing are not to be so closely parsed as this. The judge had clearly identified and taken into account all the mitigating factors. He then identified a headline sentence of between 16 and 18 years and allowed five years off the top end of that range by way of mitigation. That equates to over 25% allowance. Taken as a whole, that appears to be a reasonable reduction bearing in mind the valuable plea and the other mitigating factors. It was a severe sentence but we do not believe that it fell outside the range that was available to the learned sentencing judge. The appeal is dismissed.