



## THE COURT OF APPEAL

[60/18]

The President

Edwards J.

Baker J.

### BETWEEN

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**PADDY HARTY**

**APPELLANT**

### **JUDGMENT (Ex tempore) of the Court delivered on the 8th day of April 2019 by Birmingham P.**

1. This is an appeal against severity of sentence. The sentence under appeal is one of four years imprisonment in respect of the offence of sexual assault, which was imposed in the Central Criminal Court on 29th January 2018. The sentence imposed was made consecutive to a sentence of five years imprisonment, with the last year suspended, that had been imposed in the Circuit Court in Galway on 29th November 2017 in respect of a theft offence committed on 16th May 2016. Provision was also made by the Central Criminal Court for two years post-release supervision.
2. The background to the sentence hearing is that the accused had stood trial, charged with rape. At the end of the prosecution case, however, the trial Judge directed an acquittal on the rape charge, but indicated that she proposed to tell the jury about the alternative verdict of sexual assault. At that stage, the then accused sought time to consider his position and then proceeded to enter a plea of guilty to sexual assault. It was specifically accepted by the DPP that the case should be approached on the basis that there had been an early plea of guilty.
3. The factual background to the offence is to be found in events that occurred on 22nd and 23rd April 2013. On that occasion, the complainant and the accused had met in the Long Bar in Edenderry and had a number of drinks there together and then moved to other pubs, at least two other pubs, for further drinks. At some stage during the evening, it is accepted that they kissed. The accused then drove the complainant to a secluded area known as Braveheart Hill near the Curragh. There, he removed her bottom clothing, her leggings and underwear, and held her forcibly by her arms. It is this behaviour that gives rise to the charge of sexual assault. After the incident, the injured party left the vehicle, taking her handbag and phone with her, and hid for a period in a bushy and thorny area. She phoned the Gardaí on a number of occasions and these phone calls indicated that she was in a distressed state. From there, she made her way to the home of a Ms. Victoria Morris who contacted the Gardaí to say that someone had called on her in a distressed state. In response to that call, Gardaí arrived and commenced an investigation which involved viewing CCTV footage. Based on this, Mr. Harty was identified as a suspect. Gardaí availed of a s. 42 warrant with a view to questioning Mr. Harty in relation to the matter, but he denied having met the complainant.
4. In terms of the appellant's background and personal circumstances, he is forty-five years of age and the eldest of twelve siblings. He is married with five children. The Court heard that he had a mild to moderate intellectual disability.
5. The appellant had a very large number of previous convictions recorded, some 168. The most recent of these was a sentence of five years imprisonment with the final year suspended, imposed in the Circuit Court in Galway on 29th November 2017 in respect of an offence committed on 16th May 2016. The record included forty-two thefts, three burglaries, and twelve breaches of the domestic violence legislation. It also included a very large number of road traffic offences. At the time of the commission of this offence, he was unlawfully at large, having been released from prison while serving a sentence in order to attend the Coolmine Centre to address his difficulties with alcohol, but he left that centre. None of his many previous convictions were for sex offences.
6. The Court heard that the offence impacted very significantly on the injured party. The injured party is a lady of 53 years. Mr. Harty wrote two letters of apology to the injured party during the course of the sentencing process. However, the Judge felt that the expressions of remorse had to be treated with some caution, the reason for this being was that there was no acceptance by the accused man in the course of the trial that he had removed the victim's clothing.
7. The Judge's approach to sentencing was to identify and refer to the aggravating and mitigating factors. Having done that, she then fixed a headline or pre-mitigation sentence of seven years which she first reduced to one of five and a half years, but then, having regard to the progress that the appellant had been making in custody and the contents of a Prison Governor's report, which was positive, reduced the sentence to one of five years. At that stage, the Judge addressed the fact that the appellant was serving a sentence of five years imprisonment with one suspended that had been imposed on 29th November 2017, and the fact that he was unlawfully at large at the time of the commission of the offence before the Court. The Judge commented that she did not think it appropriate, therefore, to impose a concurrent sentence, as to do so, effectively would mean that Mr. Harty would not be serving any additional time in custody for this particular offence. Accordingly, she felt it was a case for a consecutive sentence, but having regard to the totality principle and the need to ensure that the sentence was proportionate, the Judge reduced the sentence of five years, which she had earlier indicated, to one of four years and made that sentence consecutive to the sentence that was then being served.

8. The appellant says that the Judge was in error when she said that to impose a concurrent sentence would mean that the appellant would serve no additional time in custody. It is said that had that sentence been imposed, that the accused would in fact have been incarcerated for a further year.

9. In the Court's view, the sentence of four years imprisonment which was imposed cannot be regarded as overly severe. The Court would not disagree with the identification of seven years as a pre-mitigation headline sentence. There remains for consideration, though, the decision to make the sentences consecutive and it is this aspect of consecutive sentences which has been the main focus of the appeal. The Judge addressed this aspect as follows:

"I take into account his progress to date in custody and the Prison Governor's report which I have received this morning and in order to further incentivise rehabilitation, which is of course in society's interest, I reduce the sentence to one of five years imprisonment. However, the matter does not rest there. Mr. Harty is serving a sentence of five years imprisonment with one year suspended imposed on 29th November 2017. He was unlawfully at large at the time of the commission of this offence. I do not think it appropriate, therefore, to impose a concurrent sentence, for to do so effectively means that Mr. Harty would serve no additional time in custody for this particular offence. I must, in imposing a consecutive sentence, have regard to the totality principle and ensure that the sentence is a proportionate one. Therefore, in that particular respect, I reduce the sentence of five years imprisonment to one of four years imprisonment and I make that sentence consecutive to the sentence that Mr. Harty is currently serving which was imposed on 29th November 2017."

10. It is, in fact, the case that the Judge was not correct when she said that the imposition of a five-year sentence would not see any additional time being served. Whether the Judge had miscalculated or whether she was seeking to indicate that the imposition of such a sentence would not see any significant additional period being spent in custody is not altogether clear. It is, however, clear that the Judge regarded this as a serious offence, a matter reflected in the headline sentence identified, and she felt it necessary and appropriate that Mr. Harty should serve a significant period in custody, referable to this offence. This Court does not believe that the Judge was in error in that regard. Indeed, counsel on behalf of the appellant realistically accepted that it was inevitable that his client's period in custody would be extended. Having decided that this was a case where the sentence that she was going to impose should be a consecutive one, the Judge then addressed the totality principle and the need for proportionality by reducing the sentence. Judge then addressed the totality principle and the need for proportionality by reducing the sentence that she had identified by a further year.

11. In the Court's view, the Judge's actions in that regard were appropriate and the sentence that was imposed fell within the available range. The Court does not believe that it discloses any error in principle, and in those circumstances, the Court will dismiss the appeal.