



THE COURT OF APPEAL

[164/16]

Birmingham J.

Mahon J.

Hedigan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

BM

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 9th day of May 2017 by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence under appeal is one of seven years imprisonment with the final 12 months suspended that was imposed on 7th July 2016 in the Circuit Court in Cork in respect of a single count of sexual assault.

Facts

2. The background to this case is that on 29th April 2014, the complainant, Ms. EC, arranged to meet BM, a former boyfriend of hers. He picked her up close to her home in his car, and at that stage, was accompanied by another male who was not known to Ms. EC. They drove around to various locations for a couple of hours and he then dropped her home in order for her to have her tea. Arrangements were made to meet up later, at around 6 pm. They did, and drove around again. Eventually, they went to a particular location and there, according to the summary of the evidence offered by the prosecuting Garda, BM got a mineral bottle which contained alcohol. BM got into the back seat, told Ms. EC to drink it or he would kill her or dump her out of the car and leave her there. He then attempted to have sex with her on numerous occasions, but could not succeed. The other male who was present also attempted sex. At approximately 8pm, BM went to a location close to where he had collected the complainant and left her there. He pulled her out of the car and left her unconscious on the footpath in a state where she was not fully dressed. He took shoes and socks and items of clothing and threw them on top of her and then drove off at some speed. The complainant, Ms. EC, was discovered by members of the public in a hysterical state. The complainant was 16 years old at the time of this incident and BM was 19 years of age and by the time of the sentence hearing he was 21 years of age. The sentencing Court heard that he was a member of the Roma community, that he was married, that it was an arranged marriage, and that he had a child. On the evening of the incident, he was interviewed and there were no admissions at that stage, but some months later, he was arrested when forensic reports came to light and at that stage, admitted being with Ms EC on the occasion in question and admitted attempting to have sex, but said that it was consensual.

3. The appellant had 29 previous convictions, but none were of direct relevance. Nineteen were for road traffic matters, six for theft, one for burglary and three for public order.

4. A number of grounds of appeal have been raised:

- (i.) It is said that there was a failure on the part of the Judge to resolve factual conflicts which arose on the evidence at the sentence hearing.
- (ii.) There is a criticism that the Judge, when passing sentence, referred to the fact that the appellant had touched and digitally penetrated the vagina of the injured party in the absence of evidence of same.
- (iii.) The Judge is criticised for not having adequate regard to mitigating factors that were in the case, in particular, the youth of the accused, as he then was, and also the fact that there was an offer of compensation.
- (iv.) There was insufficient regard to the public interest that exists in rehabilitation.

Conflict of Fact

5. The areas where it is alleged that there is a conflict of fact that were unresolved are to be found primarily in the area of the provision of alcohol for the complainant and also in terms of who first raised the question of having sex. As we have seen from the summary opened to the Court, it suggested that the appellant had told the complainant to drink the alcohol in the mineral bottle or he would kill her or dump her out of the car. If this was true, then it was obviously a significant aggravating factor. However, in the course of interview with the Probation Service, the appellant indicated that the injured party brought the alcohol herself and consumed this voluntarily, while one question asked by counsel on behalf of the appellant seemed to raise the possibility that the

alcohol was linked to the other male who was present.

6. The Court accepts the case of *R. v. Newton* which was endorsed by the Supreme Court in the case of *DPP v. D.K.* [2002] 3 I.R. 534 provides the road map in resolving conflicts of fact. It is to be noted, though, that the conflict in *R. v. Newton* and the conflict in the later case of *R. v. Oliver* were very stark, very dramatic indeed, and altogether of a different order than what are in issue in this case. In *Newton*, the appellant had admitted engaging in buggery with his wife, which would have been a crime, but he contended that the activity was entirely consensual. The prosecution case, in effect, was that this was a violent rape. In *Oliver*, the appellant admitted confronting a householder while in company with his uncle, but says that this happened in a situation where the householder had made an offensive or an abusive remark about the appellant's mother and this led to a punch being thrown. The prosecution case was very different. It was that the burglary, which was the charge before the Court, was a separate incident, some three days later, when the appellant and his uncle entered the house in question in the early hours of the morning wearing masks and brandishing knives and then proceeded to assault and tie up the householder having demanded money.

7. There will be many cases where what is in issue is a difference of emphasis or where there may be nuanced differences present and it will sometimes be the case that an accused will not want to address those issues overtly directly, lest in doing so, it undermines the value of a plea. In this case, the Judge had referred to the issue of alcohol only as follows: "The victim was given alcohol." There is no indication whether it was the appellant or the other male who was present and no suggestion that the complainant was coerced into taking alcohol. In those circumstances, the Court does not see this point about the failing to resolve the controversy about alcohol as a point of major substance.

8. So far as the point about the fact that the complainant first raised the issue of sex is concerned, it is not clear just what the extent of the point being made here is. If it is suggested that the sexual activity that followed was consensual, as seems to have been what was being said by the appellant at interview at one stage, then this is inconsistent with the plea of guilty entered. If, on the other hand, what is suggested is merely that a drunk 16-year old raised the issue of sex, then the Court would not see this as a matter of great significance. It would have to be seen in the context of what followed: the repeated attempts to have sex with a 16-year-old so drunk that she repeatedly fell off the accused, at one stage hitting her head in the process.

9. The Court feels that if an excused person or his legal advisors believes that there is a perceived difference in the evidence and that that is really material, then it is incumbent on the advisors to state that specifically and directly to the Judge and invite the Judge to resolve the issue.

The reference to the Touching of the Vagina and Digital Penetration

10. The next matter that arises is the reference to the touching of the vagina and digital penetration which is a matter that was recited by the Judge. The complaint is made that there was no evidence to support that recital, and that is true. It is, however, the case that there were repeated attempts at intercourse, repeated instances of pulling the complainant on top of the appellant and of her falling off because of her drunken state. It is an inescapable conclusion that the incident involved touching and interference with her vaginal area. Again, in the circumstances of this case, the Court does not see this as a point of substance. The reference objected to is to matters less serious to what was actually alleged and established. The situation would be quite different if what was in issue was an allegation of inappropriate fondling and there was then a reference to digital penetration, thus bringing the case into a different category.

11. The point is made as well that the Judge did not have adequate regard to mitigating factors that were present, with particular reference to the youth of the appellant and the offer of compensation. It is the case that the Judge referred specifically to the youth of the appellant and to his cooperation throughout, though noting that, as the question of identity could not have been an issue given that the parties were known to each other and that his motor car had been captured on CCTV when leaving the victim behind after the offence, that the appellant may not have had much option.

12. It is the case, though, that the Judge did not refer specifically to the question of compensation in his sentencing remarks. However, the DPP says very firmly that he must have been very conscious of that because the sentence hearing was adjourned in part, perhaps to a significant extent, specifically to allow the question of compensation to be addressed and that issue to be completed. Moreover, the hearing at which sentence was actually pronounced commenced with counsel on both sides referring to issues touching on compensation. The Court recognises the considerable force behind this argument. However, if one looks at the final paragraph of the sentencing remarks, the Judge's final paragraph was as follows:

"In all the circumstances, I believe that a sentence of ten years imprisonment would be appropriate without mitigating factors. Credit is given in respect of the guilty plea in the amount of three years. In light of BM's lack of previous convictions in relation to offences such as this, I sentence BM to seven years imprisonment with the final year suspended for a period of two years that he be of good behaviour, remain drug and alcohol free and avail of the Probation and Welfare Service."

13. This Court has stated repeatedly that there is no obligation on a Judge, when sentencing, to address each and every argument that is raised on behalf of an accused person and the Court does not deviate from that position in any way. Nonetheless, the payment of a sum of money by way of compensation or by way of a token of remorse was a significant matter. The money paid was a substantial sum. The information before the Court would indicate that BM and his family were not persons of means. Raising the sum which was offered and accepted cannot have been easy for them. In these circumstances, the Court is left with some element of disquiet about the fact that there was no mention of this happening. In a situation where the Judge indicated that he felt that a sentence of ten years without mitigating factors would be appropriate, and where there was a specific statement that credit in respect of the amount of three years was being given for the plea of guilty, and where the Judge had then gone on to say that because of the fact that there were not any relevant previous convictions, he was imposing a sentence of seven years with one suspended. It is not clear what impact, if any, the payment of compensation or the payment of the money by way of a token of remorse actually had. This Court would endorse the approach of the trial Judge when he said that he ranked the offence as being at the upper end of the scale in terms of gravity. This was clearly and very obviously the case where notwithstanding the factors in favour of the accused which was going to have to be met with a significant sentence to be actually served.

14. However, in the circumstances where a significant sum was offered which was indicative of remorse, the Court is prepared to readdress the balance between the portion of sentence required to be actually served and the portion of the sentence that is to be suspended but prepared to do so to a limited extent only. What the Court will do is that it will leave the sentence of seven years in place, but will suspend the final two years of the sentence. That means that the sentence required to be served will still be a

significant one, particularly for someone as youthful as BM. It does mean, though, that when released, that he will be subject to a significant suspended sentence which will hang over him and that offers a degree of protection for the community. The suspended sentence will be suspended on the same terms as provided for in the Circuit Court. It will be suspended for a period of two years and, in addition, the Court will make specific provision for 12 months post-release supervision under the direction of the Probation Service.