



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

35/2013

17/2013

The People at the Suit of The Director of Public Prosecutions

Respondent

- and -

Jimmy O'Brien and Shane Folan

Appellants

Judgment of the Court delivered on the 23rd day of October 2015 by Mr. Justice Mahon

1. Both appellants have appealed sentences imposed on them at Cork Circuit Criminal Court on 7th November, 2012, following a jury trial, for convictions arising from serious assaults on Ms. G in Co. Cork. The attack on Ms. G took place in the back of a van late at night and involved a number of individuals including the two appellants. Their appeals against their convictions were dismissed by this Court in July of this year.

2. Mr. O'Brien was convicted of rape, sexual assault, rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 and the un-authorised taking of Ms. G's car (an offence to which he pleaded guilty). He received concurrent sentences of ten years, ten years and four years respectively.

3. Mr. Folan was convicted of attempted rape and sexual assault for which he received two ten year concurrent prison sentences.

Background

4. The offences in respect of which both appellants were convicted were committed on 13th September, 2009 near Glanmire in Co. Cork. The complainant was Ms. G, a South African national, then working in Co. Cork, and who was thirty one years old at the time of the offences. The appellants were, respectively, sixteen and eighteen years old at the time of the offences.

5. The complainant was out socialising with a group of friends at a public house in Glanmire. She became separated from her group and somehow ended up in the back of the appellant, Mr. Folan's, van, but she denies hitching a lift as she had ample money on her person at the time to pay for a taxi. There were four males in the van, Mr. O'Brien, Mr. Folan, a fifteen-year-old boy and an eleven-year-old boy. These individuals attempted to and/or engaged in sexual relations with Ms. G while she was in the van, and without her consent. There was a mattress in the back of the van.

6. Ms. G was ultimately dropped off close to her home. She exited the van with no shoes, no underwear and no bra. She was wearing a torn black top (which had been damaged with the left strap being ripped off and torn), her trousers in a damaged state and her handbag. She sustained extensive bruising to her arms, legs and torso. Her handbag had been rifled and money taken. Her car keys were taken and her motor car stolen by Mr. O'Brien.

The appellants

7. Mr. O'Brien was born on 25th May 1993 and was sixteen years old at the time of the commission of these offences. For most of his life he has lived in and around Co. Cork. He is the eldest of four siblings. He remained in formal education until he was sixteen years of age, following which he did a FETAC Level 4 course as part of the Youth Reach programme.

8. Mr. Folan was born on the 27th January, 1991 and was eighteen years old at the time of the commission of these offences. He was born in London where he spent the first part of his childhood before his family moved back to Cork in 2004. He is the fifth of seven children. His parent's relationship broke down prior to the family's move back to Ireland in 2004 because of his father's problem with alcohol. Mr. Folan was removed from mainstream education in England due to unruly and frequently disruptive behaviour. On his return to Ireland he spent an extended period of time out of school due to difficulties involved in acquiring his educational record from England. He spent a brief period of time in a school retention programme before receiving a place at Nagle Secondary College in Mahon, Co. Cork. He applied for, but did not commence, a FAS training course. At the time of sentencing he was attempting to make a living from trading in scrap. .

The sentencing judgment

9. In the course of his sentencing judgment the sentencing trial judge considered, inter alia, the age of the appellants, and their decision to contest the charges, in the following terms:-

"... Each of these accused have left their childhood long behind at the date of the perpetration of these outrages. To give them special consideration on the grounds of youth would be like treating the perpetrators of a patriside as orphans. ... The most fruitful of mitigation is an early plea of guilty. This is not available here as the accused contested their guilt in a most insulting and contemptuous manner. They are not entitled to be penalised for contesting the case, but doing so has the consequence of forfeiting any leniency that might otherwise have been available. The next fruitful source of leniency is genuine remorse. This is also not available to the accused, who to this day contest their guilt."

10. In the course of his judgment, the learned trial judge also dismissed as mitigating factors the fact that the appellants had

consumed alcohol and that both had a dysfunctional background. He also referred to their previous records.

11. Finally, the learned trial judge summarised the appalling nature of these offences in the following terms:-

"The accused encountered her and behaved as a predator would towards a wounded quarry in a David Attenborough documentary. Unspeakable outrages were perpetrated upon her which are recorded in the transcript and do not require to be rehearsed by me here. I take account of the effect which this had on the victim."

The submissions

12. Both appellants maintained that the learned trial judge erred in principle in the imposition of sentences which were, in all the circumstances, excessive, particularly having regard to their young age and on the basis that the sentences did not provide in any way for rehabilitation.

13. Counsel for Mr. O'Brien emphasised the fact that his client was only sixteen years old at the time of the commission of these offences and was in the company of his co-accused who was then aged eighteen years.

14. On Mr. Folan's behalf, it was contended that his sentence was also unduly harsh in that there was a failure in terms of the sentencing to distinguish between the jury verdicts in relation to himself and his co-accused, Mr. O'Brien. In particular, Mr. Folan was acquitted of the s. 4 rape offence while Mr. O'Brien was convicted of that offence as well as the s. 112 offence. In essence, and on that basis, it was contended that Mr. Folan should have received a lesser sentence than that imposed on Mr. O'Brien.

15. There was criticism of the comments of the learned trial judge when he stated the following:-

"Each of these accused had left their childhood long behind at the date of the perpetration of these outrages. To give them special consideration on the grounds of youth would be like treating the perpetrators of a patricide like orphans."

16. This view, it was argued, suggested that the learned trial judge expressly stated his intention to ignore the youth of the appellants.

The decision

17. The ordeal to which Ms. G was subjected to by the appellants can only be described as horrific, extremely degrading and violent. It was, in essence, and as described by counsel for the prosecution, a gang rape of an innocent and defenceless young woman. It was clear, that having regard to the manner in which the van was fitted with a mattress, the offences were predatory in nature and very much pre-meditated. It was clear that on the night in question it was intended by the appellants to subject one or more women to the dreadful ordeal experienced by Ms. G and that it was her misfortune to be such a victim. It is extremely difficult to identify any factors which could reasonably operate to justify any lesser sentence than that imposed by the learned trial judge in this case.

18. Although Mr. O'Brien was only sixteen years old and was two years younger than his co-accused, Mr. Folan, at the time of the commission of these offences, this court cannot identify any reason to differentiate as between the sentences. It is quite clear that these two young people were experienced in criminality beyond their years and it is perhaps this fact that prompted the learned trial judge to comment that *"each of these accused had left their childhoods long behind at the date of the perpetration of these outrages"*. If the appellants were older than they in fact were at the time of the commission of these offences, say, for example, young men in their early twenties the appropriate sentences would almost certainly be in excess of ten years and possibly significantly so. To this extent therefore, it is apparent that their relative youth was indeed taken into account in the imposition of sentences of ten years.

19. The prospect of rehabilitation is an important consideration in the sentencing of any offender, but particularly so where the offender is very young. There is a clear public interest in the rehabilitation of, in particular, young offenders because the likelihood of re-offending when released from prison, albeit at the end of a lengthy sentence, is greater in such cases. In this case both appellants will be in their twenties when they have completed their sentences and there will undoubtedly be a strong temptation and indeed likelihood, having regard to their past record that they will return to criminality. It is on this basis that the learned trial judge might appropriately have given greater consideration to the prospect of rehabilitation in these cases, and the need to structure the sentences accordingly.

20. The court will allow the appeals against sentence to this extent. The ten year imprisonment sentences will be replaced also by ten year sentences, but with the final twelve months suspended in each case for the remaining time in custody and for a period of three years post release. It is to be hoped that for a considerable period subsequent to their release the prospect of being returned to prison for committing a further offence or further offences will act as a strong deterrent from so doing. Both appellants will be required to enter into a bond in the sum of €100 in respect of the suspended element of their sentences.