THE COURT OF APPEAL

[105 CJA/17]

Birmingham P.

Edwards J.

Hedigan J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

FRANK KELLY

RESPONDENT

EX TEMPORE JUDGMENT of the Court delivered on the 28th day of June 2018 by Birmingham P.

1. This is an application brought by the Director of Public Prosecutions seeking to review, on grounds of undue leniency, a sentence. The sentence sought to be reviewed was one that was imposed on 7th April 2017 at the Circuit Court in Wicklow and was one of 5 years imprisonment, with the final two and a half years suspended, that was imposed in respect of three counts of sexual assault. Provision was made at the time of sentencing for a two-year post-release supervision.

2. The background to the Garda investigation and to the Circuit Court proceedings is a rather unusual one.

3. On 29th July 2014, the victim, and for reasons which will become apparent, I will refer to her as the victim rather than the more usual term of complainant, one Ms. LG, whose date of birth was in 1993, was out socialising with two friends in Dublin city centre. Ms. G and her friends met up with Mr. Kelly and a friend of his, Mr. M. All decided to go back to Bray to the home of Mr. M. They travelled out to Bray in two taxis, LG and the two males in one taxi – that was the taxi that arrived first - and the other two females in the other car. All stayed over and there is no suggestion of anything untoward happening at the time when all were present in the house.

4. The next morning, Mr. M drove the three females to Dublin. On the way back to Bray, he was involved in a fatal car crash. His mobile phone was accessed by Gardaí as part of their investigation into the fatal collision. On the phone were three clips covering some eight minutes. In these clips, Mr. Kelly, the respondent, and Ms. LG are clearly visible. On the first clip, Mr. Kelly is seen licking the vagina of Ms. LG and pulling at her clothes. On the second clip, there is an act of digital penetration. On this clip, Mr. Kelly is heard to remark that he is going in for the kill and that he was "going to ruin her". At one stage on this clip, she appeared to stir from her slumbers and the clip shows Mr. Kelly telling her to go back to sleep. The third clip shows an act of anal digital penetration. Ms. G was not aware of the fact that she had been assaulted until the matter was brought to her attention by Gardaí. It is clear from the victim impact statement that she found the experience of being asked to view the clips by Gardaí as very distressing indeed.

5. In terms of Mr. Kelly's personal circumstances, he was born on 26th February 1994 and so was 20 years old at the time of the offence. He had no previous convictions and at the time was studying and working part-time. The Court heard that in advance of the sentence hearing, that Mr. Kelly had contacted a psychologist and had attended 20 counselling sessions with her. That psychologist was a witness on behalf of the defence during the course of the sentence hearing. By the time that that sentence hearing took place, he was halfway through a degree course leading towards a business degree in applied entrepreneurship.

6. In written submissions, the DPP made clear that she takes no issue with the sentence of 5 years imprisonment, but rather, her concern is with the portion of that sentence that was suspended. She says that the period suspended was excessive.

7. In oral submissions, Mr. Lorcan Staines, Barrister-at-Law, who did not appear in the Court below and who was not the author of the written submissions, has refined that situation somewhat. He points out that the judge described the offences being at the higher end and he is quick to add that apart from what the judge had to say in that regard, that it is clear that the offences are indeed at the higher end of the scale. On that basis, he says that the sentence of 5 years imposed before consideration of any question of suspension was obviously not the starting point because regard was had to factors such as the complete absence of previous convictions and the early plea of guilty. He says that in a situation where there was a very significant element the sentence suspended, the question of whether there was any element of double-counting arises for consideration. Nonetheless, he accepts that 5 years, after mitigation was applied, was not an in appropriate sentence and indeed he is prepared to go further and accepts that it was not inappropriate that some element of the sentence be suspended, but the quarrel is with the extent of the suspended sentence.

8. There has been reference to the clips on the phone taken possession of by Gardaí during the course of their investigation. The sentencing Court viewed that video at the request of the DPP and the question of this Court viewing the video was raised with us.

Having considered the matter, we decided that it was inappropriate that we should do so. We took that view for a number of reasons. Firstly, because the contents of the three clips are described in very considerable detail in the transcript of the Court below and also in the submissions of the parties and it is not clear to us what viewing the video would add to that account. In deciding that it is not appropriate, we have regard to what we believe to be the privacy rights of the injured party which we see as engaged. We have already referred to the fact that the injured party, in her victim impact report, referred to the fact that she found being required to view the clips as very distressing and any further viewing would be unnecessary. In a situation where the focus of the appeal is really on the question of whether the sentence should have been suspended, whether in full or partially or to what extent, that also means that the question of viewing the video is less significant than it might be in other cases. It is for that reason that we decided not to accede to the suggestion.

9. We begin our consideration of this case by stating the obvious: that these are very serious offences. The fact that each of the three assaults charged took a different form adds an additional dimension of seriousness, as does the fact that the activity was all targeted at a young woman at a moment of particular vulnerability. Again, the fact that the activity was recorded, and it appears while the first clip may not have been recorded by Mr. Kelly himself, that the second and third would seem to have been, adds a further dimension of seriousness. That seriousness is highlighted and emerges powerfully from the very eloquent victim impact report that was prepared by the injured party.

10. So serious were these offences that it is absolutely clear to us that they had to be met with a custodial sentence and indeed with a significant custodial sentence. The Court does not disagree with the starting sentence, after application of mitigation of 5 years, and the Court agrees that there was scope thereafter for an element of suspension and that that was an appropriate course of action to follow.

11. As indicated earlier, the net question for this Court is whether the period suspended was excessive so that the period that was required to be served was unduly lenient.

12. The jurisprudence that is applicable to cases such as this involving requests to review sentences on grounds of undue leniency is at this stage well-know and has not really been seriously in dispute ever since the first such case, the case of DPP v. Byrne in 1994 when the decision of the Court of Criminal Appeal was given by O'Flaherty J. It worth calling to mind what he had to say. O' Flaherty J. said as follows:

> "In the first place, since the Director of Public Prosecutions brings the appeal, the onus of proof clearly rests on him to show that the sentence called into question was unduly lenient. Secondly, the Court should always afford great weight to the trial judge's reason for imposing a sentence that is called in question. He is the one who receives the evidence at first hand, even where the victims chose not to come to Court, as in this case, both women were very adamant that they not want to come to Court. He may detect nuances in the evidence that may not be as readily discernible to an appellate Court. In particular, the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced, what Mr. Justice Flood has termed 'the constitutional principle of proportionality'. His decision should not be disturbed. Thirdly, it is, in the view of the Court, unlikely to of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr. Grogan SC, the test to be applied under the section is not the converse of the enquiry the Court makes where there is an appeal by an appellant. The enquiry the Court makes in this form of appeal is to determine whether the sentence was unduly lenient. Finally, it is clear from the wording of the section that since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

13. The suspension of two and half years of the sentence, as occurred in this case, was generous. It might indeed be said that it was very generous. The result of that part-suspension is that the net sentence required to be served has to be seen as lenient.

14. Whether dealing with appeals against severity or with undue leniency reviews, the Court has always made clear that it is not sufficient to justify intervention, that the Court, if it had been sentencing at first instance, would have been minded to impose a somewhat different sentence. Still less, would the fact that an individual member or members of the Court would have been so minded justify an intervention. In this case, the fact that the Court might have been minded to structure the sentence differently or to have struck a different balance between the period to be suspended and the period to be actually served would not justify an intervention.

15. In this case, there can be no doubt that it would have been open to the sentencing Court to have struck a different balance. Had the judge in the Circuit Court decided to suspend 12, 15 or indeed 18 months, as he might well have done, it is unlikely that the Court would have intervened. But, as was pointed out by O'Flaherty J. all those years ago in Byrne, that is not really what this exercise is about. The question is whether the sentence represents such a substantial departure that the sentence has to be seen, as not just lenient, but unduly lenient.

16. We have referred already to the serious nature of the offenses and really the serious nature must be obvious. But it is the case that there were significant features present by way of mitigation: the fact that there was a plea of guilty; the fact that the intention to plead and not to contest the case was communicated at an early stage; the remorse expressed by the respondent, remorse that was conveyed on his behalf through his counsel; the absence of previous convictions; his youth – 20 years at the time that these offences were committed; his efforts to address his offending behaviour though contact with the psychologist who gave evidence at trial; the support that was available to him from his father, his girlfriend and his employer which meant that the prospects for rehabilitation were encouraging and offered every reason to believe that there would not be reoffending.

17. Having regard to the factors that were present that makes these offences so serious, but also having regard to the factors present by way of mitigation, we have concluded that the sentence required to be served, while undoubtedly lenient, was not so lenient as to require an intervention from this Court. We have decided that the sentence required to be served, while perhaps on the outer end of the lenient range, does not fall outside the range of sentences available. In coming to that view, we have had regard to the fact that had we decided to intervene, it is likely that we would have followed our usual, though not absolutely invariable practice, of imposing a sentence somewhat less than we would have regarded as having been appropriate in order to take account of the fact that someone is being sentenced a second time, and, as in this case, sentenced at a time when they are well into the sentence that was imposed at first instance.

18. In the circumstances of this case, we are not prepared to accede to the Director's application.

19. The application is refused.