THE COURT OF APPEAL

[294/2016]

The President

Edwards J.

Whelan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

RAFAEL TISO

APPELLANT

JUDGMENT of the Court delivered on the 5th day of December 2018 by Birmingham P.

1. This is an appeal against severity of sentence. Mr. Tiso was sentenced to 14 years imprisonment with one suspended in respect of counts of rape and aggravated sexual assault respectively. Lesser concurrent sentences were imposed in respect of offences of rape under s.4 of the Criminal Law (Rape) (Amendment) Act 1990, being that of oral rape, and assault causing harm under s.3 of the Non-Fatal Offences against the Person Act 1997.

2. The background to the matter before the Central Criminal Court and now this appeal is to be found in events that occurred on 18th January 2016 in the Harcourt Street/Montague Lane area of Dublin city. It should be explained that the injured party was born on 3rd August 1992 and the appellant was born on 17th March 1985. Both appellant and injured party are Brazilian nationals. On the evening in question, 'Diceys', one of the clubs on Harcourt Street, was holding a Brazilian night. Both the injured party and the appellant were in attendance. The facts were summarised by the trial judge as follows:

> "[f]rom the evidence, which included evidence of CCTV footage, the injured party was intoxicated and had also taken an Ecstasy tablet. She was, as a consequence, clearly in a very inebriated condition. The accused man worked in the rickshaw business . . . there is a rickshaw garage located in Montague Lane. The company for which the accused man worked has two rickshaw garages and the accused man works out of the Thomas Street garage but would have been fully aware of the location of the garage at Montague Lane. The injured party had taken an Ecstasy tablet and another Brazilian man, a mutual acquaintance of both the accused the injured party, became aware of that and was concerned for her. He asked, as a consequence, for Mr. Tiso to remain with the injured party while he got her some water. Security staff in the club were concerned about the injured party and requested that she leave the club. CCTV footage showed that she needed two members of the security staff to assist her outside the door of the club. Mr. Tiso can be seen on the CCTV footage walking behind her as she is assisted by the security men in leaving the club. The footage shows him putting an arm on her shoulders and Mr. Tiso, the accused man, and the injured party then proceed to leave. They proceed down nearby Montague Street where the injured party can clearly be seen in inebriated condition. It is clear from the CCTV footage that she falls flat on her back and she bangs her head. She is then assisted upright, but with some great difficulty by the accused man and is then brought down Montague Lane. CCTV footage shows Mr. Tiso leaving this particular area, which is a very quiet area, 40 minutes later, leaving behind the injured party who is discovered in what can only be described as a shocking condition by two men who immediately go to her assistance. One of the men, described to Gardaí, seeing a girl lying on the ground between two parked cars. He noted that her leggings were around her ankles, that she was bleeding and that a jacket covered her stomach and lower body. Her legs were spread apart and the gentleman thought that she was in fact dead. The gentleman describes a trail of blood coming from her head, her bra was exposed and he noticed blood on the ground. Gardaí were called and Gardaí told the caller to seek an ambulance and he did so. The injured party was initially brought to St. James's Hospital. There was concern that she had been sexually assaulted as a result of what the medics saw and as there was blood in particular on the mid-body region noted underneath her on the stretcher. That having been noted in the A&E Department of St. James's Hospital, the injured party was transferred to the Rotunda Hospital. She was examined there and was found to have a tear, a perineal trauma, which was too painful to examine. She was, as a consequence, sedated and a laceration was found to the wall of the rectum and the anal canal. She was then transferred to the Mater Hospital, examination revealed a tear to the anal sphincter. This required surgery in order to repair that tear and a stoma was required in the circumstances. She remained in hospital for approximately of one month. Surgery was required and the medical evidence that it was hoped to have the stoma reversed. She was on a waiting list for that procedure. She requires physiotherapy and it is hoped that the reversal procedure will have a successful outcome."

3. In her summary, the sentencing Judge did not refer to the fact that the evidence before the Central Criminal Court indicated that the injured party was no longer capable of giving birth naturally, but in the event of becoming pregnant, would require a Caesarean section. Indeed, since then, the victim has had to face this reality.

The Judge's Approach to Sentencing

4. The sentencing Judge commented that these were undoubtedly among the most serious of offences, involving a violent and callous

sexual assault perpetrated on a vulnerable, inebriated young woman, leaving her with horrific and unimaginable consequences with which she will have to live for the rest of her life. She said that to her mind, the aggravating factors were:

i. The nature of the offences,

ii. the appalling injuries suffered by the injured party as a result of the conduct of the accused;

iii. the taking advantage of a very vulnerable young woman;

iv. leading her to a quiet area known by him to be such;

v. leaving the injured party in a dreadful state in the aftermath of his violation of her;

vi. the severe emotional and mental impact on the injured party and

vii. the violence of the attack and the consequential harm to her.

5. The sentencing Judge referred to a number of mitigating factors present in the case. The first of those being the guilty pleas at the earliest possible opportunity, this took the form of entering signed pleas of guilty in the District Court on 26th April 2016 which were affirmed before the Central Criminal Court on 7th June 2016, the sentencing Judge had been told that the plea was of enormous assistance to the injured party, the fact that there were admissions to the Gardaí and that remorse was expressed. So far as admissions to the Gardaí are concerned, the position is that following his arrest, the accused was interviewed on five occasions. On the first four occasions, he suggested that consensual sexual had occurred, but in the fifth and final interview, he admitted his involvement in the offences.

6. The sentencing Judge is criticised by the appellant for what she had to say in relation to his remorse. This is a reference to the fact that the sentencing judge noted that Mr. Tiso had said in interviews that he too had suffered trauma, an approach that she felt was consistent with what emerged from a psychologist's report that was put before the Court. The sentencing Judge said that she was also taking into consideration that he was a non-national and the difficulties that would present for him serving a prison sentence in this jurisdiction. The sentencing Judge took into consideration that he was a well-educated young man with a good work history and a person of no previous convictions. She then identified sentences of eighteen years as appropriate for the vaginal rape and aggravated sexual assault offences, but mitigated these having regard to the factors present to 14 years and suspended the final year of that sentence conditional upon the accused entering a bond and conditional, too, that he would leave the State upon his release from prison and remain outside the State for a period of ten years.

Grounds of Appeal

7. The Grounds of Appeal advanced by Mr. Tiso were as follows:

i. Fixing a notional or pre-mitigation starting point that was disproportionate and excessive;

ii. Further or in the alternative in failing, when considering the appropriate reduction in sentence, to have any or any adequate regard to the mitigating factors in all the circumstances of the case;

iii. Further or in the alternative the sentence imposed was too lengthy given that the Learned Sentencing Judge intended (and so ordered) that the Applicant leave the jurisdiction at the conclusion of his sentence;

iv. the sentence imposed was excessive in all the circumstances.

Discussion

8. It is said that the headline sentence identified, eighteen years before regard was had to mitigating factors, was too high and out of line with sentences imposed in other cases. In the course of written submissions, the appellant has referred to a number of comparator cases. It is to be noted that a number of these are undue leniency reviews. In those circumstances, the Court recalls that it has, on a number of occasions in recent times, expressed some doubt about the usefulness of reliance on undue leniency review cases in the context of appeals against severity of sentence. We have pointed out that in the first undue leniency case, the case of DPP v. Byrne [1995] 1 ILRM 279, the point was made that it would rarely be of assistance to ask whether a more severe sentence would have been upheld. By the same reasoning, it must be the case that while it may be that sentences more severe than those imposed at trial or by the Court of Appeal/Court of Criminal Appeal on review might well have been imposed and had they been imposed might well have been upheld. The case of DPP v. Vardoshilli [2009] IECCA 14 was a case where a sentence of ten years imprisonment was imposed at trial and reduced to one of eight years. It appears that the concern of the Court of Criminal Appeal was that the sentencing court had not adverted to his non-national status and the fact that this would create particular difficulties and would cause additional hardship to him while in prison. On that basis, two years of the ten-year sentence were suspended.

9. The case of *DPP v. Zimants* [2017] IECA 124 was another undue leniency review. In acceding to the application and increasing the sentence, this Court commented that even giving the maximum credit that was proper, the sentence could not have been reduced to one below ten years and that, indeed, a higher sentence than that might well have been considered. *DPP v. Christopher Farrell* [2014] IECA 51 was an also undue leniency review which saw sentences of six years imposed in respect of offences against two complainants increased to twelve years in each case.

10. It is worth pointing out that in a sentencing appeal the Court is not entitled to simply substitute its own opinion for that of the sentencing judge. As per *DPP v. Redmond* [2001] 3 IR 390, the appellant must establish that there has been an "error in principle" if this Court is to intervene. While cases may deal with similar issues or fall within certain categories, thereby providing guidance in terms of sentencing, each must nonetheless be decided on its own facts.

11. The headline sentence given by the sentencing Judge of 18 years was not an inappropriate starting point. We agree with the view that this was among the most serious of offences, with a number of aggravating factors which placed it at the upper end of the

scale, and so must carry a custodial sentence that reflects same. There was no error in principle in the sentencing Judge's approach of taking 18 years as a starting point. Yet, in considering the totality of the sentence, the Court must also be cognisant of Mr. Tiso's early signed plea of guilty in the District Court. There is also evidence that Mr. Tiso's solicitor indicated to the Gardaí on 26th January 2016 that his client would not be contesting the allegations and would be pleading guilty. Mr. Tiso is said to have expressed remorse to Gardaí through his solicitor on this occasion.

12. The value of a guilty plea is well-known in that it saves time and resources for all involved, but more importantly ensures that victims do not have to go through the secondary trauma of a full trial. Accordingly, the timing of a guilty plea is significant when determining the level of mitigation to be afforded to an individual who so pleads. What occurred here was highly unusual with the solicitor for the applicant making contact at a very early stage to confirm that there would be a plea of guilty and then that being followed up by the entry of signed pleas of guilty in the District Court on 26th April 2016 which were then confirmed at the first appearance in the Central Criminal Court on 7th June 2016. Eight days passed between the event itself and the indication to the Gardaí that a guilty plea would be lodged. Three months later, Mr. Tiso entered his signed pleas before the District Court. Just over a month later, these pleas of guilty were confirmed in the Central Criminal Court. The sentencing hearing itself took place on 1st November 2016. The case, outside of this sentence appeal, was complete within ten months. This Court accepts that the sentencing judge took Mr. Tiso's guilty plea into account, but does not believe that full credit was given to the unusual circumstances in which it came about, and in particular, the fact that it involved signed pleas of guilty in the District Court. In the Court's view, an approach of entering signed pleas of guilty in the District Court is to be encouraged and merits particular consideration.

13. The total discount for the various mitigating factors that were present, the plea in the circumstances referred to, the fact that the appellant had no previous convictions and would appear to have otherwise been of good character and that he was particularly far from home would not suggest that particular significance was attached to the fact that this was a case which, very unusually, involved signed pleas of guilty. To that limited extent, and to that extent only, the Court feels that there was some element of error on the part of the sentencing Judge. It is important to emphasise that had the case not featured a signed plea of guilty, the Court would have dismissed the appeal and upheld the sentence imposed. However, having regard to the circumstances of the plea, the Court feels that some amelioration is required.

14. There were others factors that the sentencing Judge might have referenced, and to some extent, did. Account must be taken of the fact that Mr. Tiso is a non-national whose home country is very distant and who faces a very lengthy sentence in a country that is foreign to him. The sentencing Judge did so in general terms, but did not go into his specific circumstances in any great detail. While the appellant has had the benefit of some visits from his family in recent times, this as a rare occurrence and it is unclear if it will be repeated. Mr. Tiso will not have the same access to the familial support structure as he may otherwise have had.

15. The reduction of eighteen years to fourteen years amounts to a reduction of approximately 22%. When the Court takes into account the fact that the final year was suspended and so the total time to be served was 13 years, that amounts to a reduction in sentence of approximately 28%. The Court is of the view that a sentence where the total time to be served was eleven (an approximate reduction of 39%) or twelve years (an approximate reduction of 35%) would be more appropriate having regard to the foregoing. This is not a decision the Court takes lightly, but the unusual circumstances of the case should be fully reflected in the sentence imposed.

16. Accordingly, this Court will uphold the appeal and quash the sentence in the Central Criminal Court and replace that with a sentence of 12 and a half years imprisonment with the final 12 months suspended.