THE COURT OF APPEAL

Birmingham P.
Hedigan J.
McCarthy J.

143/2018

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT/

PROSECUTOR

- AND -

A. A.

APPELLANT/

DEFENDANT

JUDGMENT of the Court delivered on the 31st day of July 2018 by

Mr. Justice McCarthy

1. This is an appeal against sentence imposed by the Central Criminal Court on 30 April 2018 in respect of two counts of sexual assault, the offences having occurred between the 1st June and the 30th June 2003. The complainant, S. B., was born on the 24th December 1989 and the appellant on the 11th August 1997. He was originally charged with one count of rape contrary to s.4 of the Criminal Law (Rape) (Amendment) Act 1990, one count of attempted rape contrary to common law and three counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 37 of the Sex Offenders Act 2001. He was acquitted on the charges of attempted rape and so-called s. 4 rape and one of the three sexual assault counts. Those of which he was found guilty involved touching of the injured party's breast area and the licking of her vagina respectively.

2. The complainant made a complaint to the police in Australia on 2 December 2014 and the accused, having been apprised of the desire of the Gardaí to interview him, and being afforded ample time to consider his position, was so interviewed under caution on the 11th May 2015. Very shortly before the trial, which commenced on 11 February 2018, his solicitor furnished to the Gardaí a statement made by him.

3. Whilst in his interview the accused denied all of the allegations against him in his statement, and subsequently in evidence, he asserted that there was a consensual sexual relationship extending to kissing, fondling and masturbation. He pleaded not guilty to all five counts notwithstanding the fact that on the basis of what he said himself he had no defence to the charges of which he was convicted as the age of the victim meant consent was irrelevant. It was submitted by counsel on his behalf that there should not have been any loss of mitigation on sentence merely because he pleaded not guilty to all counts asserting that there was an air of unreality in expecting that the accused might have pleaded to those to which he had no defence since his whole stance was that a consensual sexual relationship had developed.

4. We have difficulty in understanding the reason behind the latter proposition: it is not uncommon for accused persons to plead guilty in respect of some counts and not guilty in respect of others involving, say, sexual wrongdoing with respect to one person. It could not undermine his capacity to defend the offences of which he was found not guilty to have pleaded guilty to those of which he was. It was not disputed that in a sexual offence case particular weight had to be placed on the fact that a plea of guilty would save the victim from giving evidence: Counsel said that this factor was not present here since it would have been necessary for her in any event to give evidence about those which were successfully contested. Effectively, Mr Cody is saying that it is irrelevant to sentence that this mitigating factor did not matter and that there are good reasons why this was so – we think that he is wrong.

5. Neither is there any question of remorse or contrition beyond the fact that counsel, at the sentencing hearing, and on instructions (which is not evidence) apologised on behalf of the accused for speaking ill of the complainant and her family in a most obnoxious manner when being interviewed, a step of little moment. Indeed, as appears from Mr Justice Hunt's judgement -

> *"Mr. A. seems to regard the absence of legal consent [by the complainant] in the circumstances put forth by him as amounting to some sort of inconvenient legal technicality. I believe he stated at one stage in his evidence that he didn't regard himself as blameworthy and was cross examined in relation to this issue".*

Even as late as the hearing of this appeal there is no remorse or contrition: the position, from the time, it seems, of provision of the statement to the Gardaí has effectively been that there was factual consent, as identified by the trial judge and no moral culpability. Needless to say a proper inference from this is that he has no insight into the offending or its ill effects on the victim.

6. Ultimately, in the absence of those mitigating factors the accused relied only on the bald submission that in failing to suspend the sentence it was unduly severe. The trial judge engaged, correctly, in the two-stage process of deciding on penalty. In particular, he identified the fact that it was necessary for him to assess the gravity of the offences with reference to culpability, including aggravating factors tending to increase it and mitigating factors tending to reduce it and the harm done with a view to determining where, on the scale of available penalties, the offence should be located, objectively speaking. He then proceeded to the second stage of reducing the penalties having regard to mitigating factors specific to the case and not otherwise taken into account. The

aggravating factors were clear: the unlawful act were performed on a girl of approximately 13 and a half years and she was thereby prematurely sexualised, the assaults were of a significant kind and the long term adverse effects were severe. On the other hand, there was no application of physical force, there were no previous convictions and the accused had had long periods of positive application to employment, educational, family and parental matters.

7. In the course of that two-stage process he took the view that the assault involving fondling was at the midpoint of the lower end of any tripartite division of the spectrum of offences of sexual assault and that that involving touching her vagina fell into the category which might be described as at the lower end of the middle part of such a scale. In respect of the first, accordingly, he took the view that the starting point at the first stage should be a sentence of two to three years and at the second stage he reduced this to period of one year. His starting point in respect of the second of the two was five years ultimately reduced, at the second stage, to one year and eight months.

8. In arriving at the sentences and because there was a degree of similarity he undertook a close analysis of the decision of this court in *DPP v. J.H.* delivered on the 7th July 2017. Whilst the sexual misconduct was more serious and his victim was somewhat younger the accused was described as being the youngest in his school class and consequently said to have underdeveloped maturity: the crucial difference, however, is that the accused there admitted his wrongdoing, cooperated with the Garda investigation and pleaded guilty at an early stage in the proceedings: thus the fact that a sentence of one year that was ultimately imposed there is of limited assistance.

9. It can be seen, accordingly, that the present case is quite different. Whether to suspend the sentence or not was a matter of judgement within the margin of discretion of the trial judge, and, in any event, we think he was right having plainly taken into account, and addressed in the most thorough way, all relevant factors.

10. We refuse this appeal accordingly.