



THE COURT OF APPEAL

Edwards J.  
Hedigan J.  
McCarthy J.

Record No: 203/2013

THE PEOPLE AT THE SUIT OF  
THE DIRECTOR OF PUBLIC PROSECUTIONS

V

W.M.

Respondent

Appellant

**JUDGMENT of the Court (*ex tempore*) delivered on the 3rd of July, 2018 by**

**Mr. Justice Edwards**

**Introduction**

1. On the 8th of July 2013, the appellant was convicted by a ten member jury of the offences of aggravated sexual assault, contrary to s. 3(1) of the Criminal Law (Rape) (Amendment) Act 1990, and causing serious harm, contrary to s. 4 of the Non Fatal Offences Against the Person Act 1997, respectively.

2. On the 29th of July 2013, he was sentenced on each count to 13 years imprisonment, both sentences to run concurrently. The sentences were to take effect from the 11th of January 2012. The appellant now appeals against his conviction and sentences.

3. On the 15th of May 2018, this Court (*per* Mahon J, Edwards J, Hedigan J) upheld the appellant's conviction on all grounds. On today's date, the 3rd of July 2018, this differently constituted Court heard submissions on the appellant's appeal against the severity of his sentences. Accordingly, this *ex tempore* judgment deals with the sentence appeal.

**Background facts**

4. The case was concerned with an incident that took place some days prior to the 8th of December 2011, at an address in a small village in rural Ireland. The victim in the case was a thirty-three-year-old woman who is an alcoholic and who also had had a drug problem, although she was off drugs at the time of the incident. The victim first encountered the appellant approximately eighteen months prior to the incident. At that time, she was living alone in rented accommodation in the village. On the evening on which she first met the appellant she had been drinking and had lost her keys. The appellant, a resident of the village and sixty-six years of age at the time, came upon her as she was searching for her keys. He was helpful to her, and when it was evident that the keys could not be found, he brought her to his house and let her stay until she managed to get new keys.

5. Thereafter a friendship developed between them, and the victim began to visit the appellant's house regularly. She moved away from the village for a time but eventually returned. Throughout this time she remained friendly with the appellant. Upon her return to the village the victim had nowhere to stay, having given up accommodation she had previously been renting. At the appellant's invitation she moved into his house, and was allowed to sleep on a sofa. The evidence at the sentence hearing was that the appellant "*had expressed interest in having a child with her and offered her the sum of €10,000 to have a child with him*". Over time the victim and the appellant became sexually intimate. The evidence was that this was due to her feeling trapped in the situation as she had nowhere else to go "*with very few friends and very few family outlets within this country*".

6. On the date of the incident forming the subject matter of the charges with which the appellant was ultimately convicted of, the victim was woken from sleep in the middle of the night to find her trousers down. She could feel the appellant's hand inside her vagina. She described the pain as "excruciating, worse than the pain of having a baby, and that she thought he was twisting his hand within side her". The victim began gushing blood from her vagina to the extent that she thought she was haemorrhaging.

7. The evidence, both at trial and at the sentence hearing, was that the victim became progressively more unwell over the succeeding days. Eventually the appellant called the victim's general practitioner on the 7th of December 2011, who made a domiciliary call, and formed the view that the complainant had a significant infection for which she needed hospitalisation. Although the victim was initially reluctant to go to hospital, and resisted the suggestion for a further 24 hours, by the evening of the 8th of December 2011 her condition had deteriorated to the point where the victim was unable to put up further resistance and she was taken to hospital by ambulance.

8. At trial, the jury heard evidence from a Consultant Obstetrician/Gynaecologist who, together with a general surgeon, attended to the victim in the hospital. He told them that she was initially admitted to intensive care in circumstances where he believed her to be suffering from an infection that was most likely intra-abdominal, with a likely build up of pus and fluid in the abdomen. She was taken from intensive care to an operating theatre where the General Surgeon intended to open her abdomen to see where the infection was seated and to clear out any pus and infected fluids found there. The witness was asked to simultaneously examine her from a vaginal or gynaecological point of view. He then described what he and his colleague found in the course of the operation:

*"A. -- to look at the poor girl, when she was on the -- on the operating table I am in a position that I can look at her -- at her bottom end, at her vulva. We noticed that she had unusual burns or -- I'm not quite sure, we weren't able to characterise them really, but her buttocks were -- looked like they had been burnt or, you know, chemical burns, it's hard to know what type of burn, was it flame, fire, heat, water, but nonetheless they looked like burns, they didn't look like anything else. Also down below she was very swollen, but that would be in keeping with somebody that was in intensive care and was very sick. Once I examined inside in the vagina up on the left side of the vagina, very high up in the vagina there was a very long laceration, seven or eight -- or six -- six to seven centimetres long. Tough to kind of quantify length-wise, naturally we don't get out rulers, but that's about the length of it. It was very jagged edged. There*

*was -- and I don't want to, you know, upset people by saying, but it was pouring with pus just coming out of it. And as, you know, it was in a location that was near large blood vessels inside in the middle of her pelvis, and as [the General Surgeon] was doing his end of the procedure we noticed that we could actually make physical contact with each other which should never ever be able to be made, it's impossible.*

*Q. All right, do you mean you made physical contact?*

*A. We actually -- our fingers -- he was -- he was cleaning out the debris and the pus and that kind of material and when he got down and he scooped a lot of this stuff out, he was actually able to -- there was a hole from this laceration. It wasn't just a laceration, it's not just a cut; this was a defect; a hole right the way up inside this poor woman up into her abdominal cavity. And --*

*Q. Am I understanding you, you can touch from her stomach down to her vagina?*

*A. It should never be able to happen, because there's the uterus, the bladder, the bowel, everything's in the way, but this now is a hole that we're -- that was, you know, we were able to meet up and commented almost immediately that, "How is this woman alive?" And that's not for dramatic purposes, this is what we thought.*

*Q. Did you examine the edges of the laceration?*

*A. Yes, as best you can see. As you can understand, it's -- it's up inside the vagina so it's -- it's, you know, as best we could, yes, they were rough edged. You know, again with experience I was able to know that they'd partly healed, this wasn't -- this didn't happen the day before or anything, this was a few days on the go."*

9. The witness stated that he had rarely seen an injury like this, his only previous experience of anything approaching it was while treating women who had been raped with machetes while he had been working in sub-Saharan Africa. He stated that it could not have been caused by normal sex, or with a vibrator. It would have required *"some sort of object that had length to it, that was sharpish. It doesn't have to be a blade sharp, but it could be sharp enough to push through tissue in that part of the body, so it needed to be an object, and because of the, I suppose, the ability of myself and [the General Surgeon] to make contact with each other, this object had to have a certain degree of length and depth to it."*

10. The evidence was that, notwithstanding the gravity of her injuries, the victim survived and nominated the appellant as having assaulted her. The prosecution's case was that the mode of sexual assault was the insertion by the appellant of his fist into the victim's vagina as described by her, as well as possibly some hard object with length and depth to it, such as the object produced in evidence and described as a turkey baster, not designed for vaginal insertion.

11. The appellant was in due course arrested on the 11th of January 2012, on suspicion of sexual assault, and was detained at Kilkenny Garda Station. While in detention he was interviewed. While he denied at all stages inserting his fist in the victim's vagina, he made certain admissions that the prosecution sought to rely upon, including that on occasions he had used a turkey baster to inseminate women with his semen that he wished to impregnate and who had had problems conceiving. However, he denied causing the injuries as described to the victim. Notwithstanding these denials, he was ultimately convicted of the charges against him on the 8th of July 2013.

#### **Victim Impact Statement**

12. The victim in this case furnished a victim impact statement to the Gardaí, which was in turn handed into the sentencing court. The statement, dated the 22nd of July 2013, outlines the physical injuries suffered by the victim already alluded to above, namely the 5-6cm internal laceration to the left vaginal wall into the abdominal cavity and the burns across the buttocks. In terms of psychological injuries, the statement indicates that the victim was treated by a psychologist on three occasions to date in St Luke's hospital and that *"this treatment is now only beginning"*. The statement further states that *"a counsellor is also being arranged now that the trial is complete and a programme of counsellor is beginning."*

13. Since the incident, the victim is unable to reside alone for fear of her personal safety. She buys clothes specifically for the purpose of hiding the injuries to her back and the surgical scarring and buttocks injuries. She is very self-conscious that her body shape has changed and finds it impossible to become intimate with a male person and, as a result, has had no personal relationships since this incident occurred. Due to the stress of the whole ordeal, she has lost her nails and hair, something which has caused her a great deal of further distress.

14. The victim also states that she still has nightmares about what happened to her, waking up in the middle of the night screaming. She finds it very difficult to trust anyone for anything, including old friends and family members, as a consequence of which she has distanced herself from friends and family.

15. Attached to the victim impact statement was the medical report of General Surgeon Mr. Paul Balfe. Mr. Balfe states that the victim was brought to St Luke's Hospital at approximately 20:30 on the evening of the 8th of December 2011. It further states that *"an earlier gynaecological examination had revealed a vaginal laceration and a CT scan had revealed large pelvic and retroperitoneal collections of pus. Percutaneous drains had been placed by one of the Consultant Radiologists to help drain these collections. The CT scan also revealed diffuse infiltrates in both lungs with bi-basal atelectasis. In addition, [the victim] had, on admission, a large area of tissue necrosis over her gluteal (buttock) area. Although it is possible that these were as a result of a pressure sore it is believed that they are more likely to have been caused by trauma e.g. sitting or being forced to sit in hot water or on a hot heater or stove."*

16. The report went on to state that the victim underwent an EUA (Exploration Under Anaesthesia), which disclosed the following findings:

- i) grossly swollen labia
- ii) full thickness laceration, approximately 6cm in length on the left lateral wall of the vagina.
- iii) large volume of malodorous, viscous pus in the peri-vesical space, in the intra-peritoneal pelvis and in the retroperitoneum posterior to the left and right colon.
- iv) necrotising fasciitis of the sub-cutaneous tissue of the right lower abdominal wall.

17. The report concludes by stating that *"the injuries sustained by [the victim] were of the gravest nature and posed a serious threat to her life. To date, she has required the input of the surgical, medical, gynaecological, radiological, anaesthetic/intensive care, microbiology, nursing and physiotherapy services. She continues to make good, steady progress."*

18. The medical report also provides a breakdown of the victim's medical expenses thus far, which have all been paid for via her medical card. The report states that the victim spent a total of 98 nights at St. Luke's resulting in a total cost of €71,540 to the HSE.

#### **Appellant's personal circumstances**

19. The appellant was born on the 7th of May 1943, making him seventy-years of age at the time of sentence. He originates from Co. Tipperary. He spent a lot of his life in the United Kingdom where he worked at buying and restoring old properties and renting them out in the Manchester Area. In the 1990's this form of employment fell into difficulty and it appears that the local authority in Manchester compulsorily purchased a lot of his properties.

20. The appellant returned back to Ireland in 2003, following his release from serving a prison sentence in the UK. Indeed, the evidence at the sentence hearing was that the appellant had accumulated a significant number of previous convictions. The court was told that his first conviction was recorded on the 19th of December 1996 at Stratford Magistrate Court where he was fined £20 for receipt of stolen goods and there were apparently other convictions recorded in 1971 and 1973 for crimes that are not directly relevant to the present offence, i.e. crimes that did not involve offences against the person. On the 14th of January 1999 at Bolton Crown Court, he was convicted of seven counts of indecent assault on a female under 16 years of age and was sentenced to five years' imprisonment. The evidence at the sentence hearing was that this conviction arose out of circumstances very similar to the present case, that is the insertion of objects and hands into the vagina. On the 13th of February 1997, in Bolton Crown Court, he was convicted of taking a child out of the UK without the appropriate consent, and of abducting an unmarried girl under the age of 16, in respect of which he received a sentence of two years and five years respectively. On the 4th of September 1980, at Liverpool Crown Court, the appellant was convicted of the offence of threat to kill. On the 6th of June 1984 at Bolton Crown Court, he was convicted of possession of firearms when prohibited and on the 15th of October 1984, he was convicted of a wounding offence as well as four counts of dishonesty.

21. In terms of convictions in this jurisdiction, on the 29th of March 1977, he received a sentence of four years' imprisonment in the Central Criminal Court for a double manslaughter in which he drove over a man and the man's four-year-old son. He apparently believed that the man was having an affair with his wife. We infer that he had been charged with their murders but successfully relied on the partial defence of provocation and in the circumstances was found guilty of the manslaughter of both.

22. The appellant was not legally represented at the time of the sentence hearing, having sacked his legal team mid-trial. However, he did give evidence on his own behalf at the sentencing stage. The only evidence relevant to the appellant's personal circumstances was that he was apparently trained as an *"advanced first aider... I'm a cardiac first-response trained AED defibrillator. I also had training in UI although I do not practice this any more"*. The appellant, although argumentative in his evidence with respect to the verdict of the jury, and seemingly not prepared to accept it, stressed that he had tried to help the victim. He said he was pleased to see her in court. He stated that he did call an ambulance for her, that he did call the doctor, and that he did try to help her in every way possible. He added *"And I'm very pleased that she's recovering, this young lady. She's a lot of years in front of her."* The appellant also handed in a number of documents to the sentencing court. However, after adjourning the matter in order to read this documentation, the sentencing judge observed that *"the bulk of it seems to me not to be relevant to a sentence hearing, insofar as it really addresses your version of events and as I say what has happened has been conclusively determined by the jury"*.

#### **Sentencing judge's remarks**

23. In sentencing the appellant, the sentencing judge made the following remarks:

*"....in this case, the accused was convicted of two counts by the jury, one of aggravated sexual assault and one of intentionally causing serious harm. The convictions by the jury, let it be said at the outset, were based on overwhelming evidence. The victim in this case was a particularly vulnerable young woman with a background of chronic alcoholism and serious drug abuse. In circumstances that were described this morning during the evidence of Sergeant McKenna, a relationship developed between the accused and the victim and in the course of that relationship, they became sexually intimate. The complainant has made the case that there was no free and voluntary consent on her part and that, rather, she went along with having sex only because she felt she had no choice and had nowhere else to go. For my part, I should make it clear that this is not a matter to which I have had regard and rather I propose to sentence by reference to events occurring within the time window referred to in the indictment only.*

*The two offences of which the accused was convicted are offences of the utmost gravity. The aggravated sexual assault involving the infliction of excruciating pain described by the complainant as "pain worse than childbirth" would itself, even absent significant physical injuries, be an offence falling at the upper end of the spectrum. In that regard, I agree with the submissions on behalf of the DPP. However, I hasten to say, this was not an aggravated sexual assault that was not accompanied by serious physical injuries. The accused [WM] inflicted life-threatening injuries. That she survived is a tribute to the skill and professionalism of the medical consultants and all the members of the medical team in Kilkenny. Anyone who was present in court for the description of the medical injuries is unlikely to ever forget the experience. That a doctor would indicate that in his long years of practice in this country, he had never encountered such injuries and that the only reference point he could offer was rapes by machetes in sub-Saharan Africa, tells it all. The account given by the two consultants of how their hands met in the course of an operative procedure, one working from above and one, the gynaecologist, working from below, something which should never have been able to happen, was chilling in the extreme.*

*I have to say that I've formed the clear view that the accused is cunning, devious and manipulative and that he represents a very significant threat to the public. There is much in the accused's background and his extensive list of previous convictions that gives concern. I would instance in that regard his conviction for a double manslaughter in this jurisdiction and a number of convictions in the United Kingdom. Disturbing as the offences of taking a child out of the State without consent and the offence of abducting an unmarried girl under 16, but particularly disturbing was the conviction on the 14th of January 1999 at Bolton Crown Court involving seven counts of indecent assault on a female under 16. I've been told that the facts of that incident were very similar indeed to the present case, involving as they did penetration of the vagina with fists or objects. On that question of penetration, the complainant [named] doesn't suggest that any object was involved. The doctors, however, feel it unlikely that injuries of the severity that resulted would have occurred without the involvement of an object, a sharp-edged object, pointing out that the fist is essentially a blunt object. Insofar as this uncertainty exists, it seems to me appropriate to take the view more favourable to the accused and accordingly I will approach sentence on the basis that the penetration was with the fist. In part arising*

from that, it seems to me proper to approach the section 4 assault as one involving recklessness as distinct from intent. However, even if one has doubt as to the existence of an intent to cause serious injury and accordingly prepared to approach the case on the basis that that was not the intent, it is clear that the recklessness that was present has to be of a very high order indeed.

Having regard to the seriousness of the offence which I'll repeat I place at the upper end of the spectrum, having regard also to the very significant and disturbing prior criminal record and to my conviction that the accused represents a threat to the public, I have had to consider whether any sentence less than life would meet the situation. When I look for mitigating factors, I find very few. I can and I do give credit for the role of [WM] in calling the ambulance on successive days. I do so even though I strongly suspect that his motivation was simply that he wanted to extricate himself from the trouble in which he would find himself if he was left with a dead body. However, had [the complainant] not received medical treatment when she did, it's very unlikely indeed that she would have survived this ordeal and insofar as Mr [WM] played a role in getting medical treatment for her, this does inure to his benefit.

In a case such as this, one would be looking for signs of remorse, ideally expressed in a guilty plea. Sadly, no hint of remorse has been forthcoming and far from there being a guilty plea, notwithstanding the overwhelming nature of the evidence in the case, the defence that was mounted on Mr [WM]'s instructions involved a sustained attack on the victim. The time may not be far distant when the Courts will have to look again at the traditional legal view that the nature of the conduct of the defence and that a case is contested is not to be regarded as an aggravating factor. However, for the moment, that principle is deeply entrenched and so I cannot and will not regard the fact that the case was contested and the manner in which it was contested as an aggravating factor. It does, however, mean that the scope for leniency which might in other circumstances arise just does not exist.

As far as the accused's personal circumstances are concerned, the accused is now 70 years of age and I'll return to the relevance of that in a moment. The documents that he submitted indicated that he had put his paramedical skills and paramedical background to good use in coming to the assistance of a fellow prisoner who was taken ill. The assertion to that effect has not been formally proved but in a situation where the accused is not legally represented, albeit through his own choice, I am prepared to have regard to it. On that basis, I'm accepting that the incident as described occurred. It is to Mr [WM]'s credit that he came to the assistance of his fellow prisoner.

I have referred to the fact that Mr [WM] is 70 years of age. If these offences were committed by a person of ordinary offending age, if I can put it that way, and if it was felt that an indeterminate sentence could be avoided, it is hard to see that a sentence of less than 17 years or 18 years could even be considered. In a situation where Mr [WM] is now 70 years of age, I have to recognise that a significant sentence will mean that Mr [WM] is likely to spend a very significant portion of his remaining life expectancy behind bars. It seems to me that that permits the imposition of a lesser sentence than would be appropriate in the case of a younger offender. I am of that opinion, even though I recognise that there will be many who would make the point that in modern times 70 cannot and shouldn't be regarded as old age.

Balancing all these factors as I do, it seems to me that the minimum sentence that could be considered is 13 years' imprisonment and that is the sentence I impose. I'll date that from the date that he went into custody, which I'll be given in a moment."

(Redactions in square brackets by the Court of Appeal)

## Grounds of Appeal

24. The appellant relies on the following two grounds of appeal:

- i) The sentence imposed by the sentencing judge was excessive in all the circumstances
- ii) The sentencing judge erred in law or in principle in failing to impose a sentence proportionate to the offences.

## Discussion and Decision

25. From time to time this Court has to deal with shocking cases, and on each occasion it fervently hopes that it may have seen the nadir of depravity. Regrettably, the level of the appellant's depravity in this case plumbs new depths.

26. Counsel for the appellant in this case contends that the sentencing judge was in error in stating that but for the appellant's age the indicative or headline sentence would have been one of 17 or 18 years. He points out that few rapes would attract such a sentence and that it is significantly higher than the typical sentence for an attempted murder.

27. Counsel also points out that in so far as the offence of causing serious harm was concerned the appellant's moral culpability was reduced on the basis of the sentencing judge's finding that it was committed recklessly rather than intentionally. He says that, having regard to the *People (Director of Public Prosecutions) v Fitzgibbon* [2014] 2 ILRM 116, the indicative sentence was excessive in those circumstances.

28. In response, counsel for the respondent maintains that the case was within the wholly exceptional category of cases outlined in the *Fitzgibbon* case, i.e., in respect of offences meriting a sentence of 12.5 years and upwards.

29. We agree with this submission by the respondent. Moreover, although it was not strictly speaking a rape case, it is an aggravated sexual assault case of the most egregious sort, and it is noteworthy that cases falling into the category of offences attracting "condign sentences", as described by Charleton J in *People (Director of Public Prosecutions) v WD* [2008] IR 308, have attracted sentences of between fifteen years and life imprisonment. This case, in terms of its gravity, fits comfortably within that category.

30. We consider that it would have been open to the sentencing judge to have started at a point higher than in fact he did. His discount of four years from a starting point of seventeen years to reflect mitigation, the most significant feature of which was the age of the appellant, was generous in our view. We consider that the ultimate sentence of thirteen years imprisonment was in fact lenient, although it was within the sentencing judge's range of discretion. However, we see no error of principle and we dismiss the appeal without hesitation.

