THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

119/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

M.K.

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 22nd day of July 2016

by Mr. Justice Birmingham

1. This is an appeal against severity of sentence. The sentence appealed is one of twelve years imprisonment that was imposed on the 1st May, 2015, in the Central Criminal Court. The sentences were imposed on that day in respect of offences of attempted rape and false imprisonment, threatening to kill and aggravated sexual assault. Sentences of twelve years were imposed in respect of the attempted rape and aggravated sexual assault and concurrent six years terms imposed in respect of the false imprisonment and threatening to kill counts.

2. The background to the case relates to an incident that occurred on the 16th and 17th June, 2014. To put the incident in context it is necessary to appreciate that the appellant is the brother of the injured party. On the evening of the offences, the injured party called to the home of the appellant, she had received a message from him to attend and it was her intention in going there to tidy it up the house. It was described as being "in a state". Mr. K was one of a large family, he was a person who needed support and within the family it was the victim who was the person who provided that support.

3. When the injured party arrived she noted that her brother had a lot of cuts on his arm and thought that this was due him engaging in self harm. He was sitting watching television at the time but he lunged forward and grabbed her by the back of the neck and threw her on to the couch. He then said that if she didn't do what he said, that he would stab her to death.

4. The appellant had a long kitchen knife in his hand. The injured party asked him what he wanted and he said "I want to be with you". She cried and screamed and pleaded with him, reminding him that she was his sister. He told her to take off her trousers, he then held a piece of broken plate to her neck and also said that he would cut her in the vaginal area if she didn't let him have his way.

5. Specifically he said "I'll cut the yoke out of you and let you bleed to death". He pulled her jeans down and pulled her towards him.

6. While all this was going on, the injured party had succeeded in dialling 999, apparently she was holding a phone in her hands behind her back. The appellant continued his activities, inserting two of his fingers into her back passage, two of his fingers into her vagina and he bit her in the vaginal area. Gardaí arrived at the scene on foot of the 999 call. The injured party attempted to scream, but the appellant put his hand over her mouth and told her to wait until the gardaí had left. He had another description for the gardaí.

7. The appellant was arrested by gardaí who had arrived and was detained and interviewed during the course of detention. As interviews progressed more admissions were forthcoming and by the end he was admitting that he had attempted to rape his sister on this occasion.

8. In terms of the accused's background and circumstances, he was born on the 22nd June, 1987. The accused had 21 previous convictions, mainly these were District Court matters, but they included a sentence of four years imprisonment for robbery, two of which were suspended. There was then an application to activate the suspended portion and eighteen months of the two years in question was activated. This sentence becomes relevant because the sentences imposed in the Central Criminal Court were consecutive to this activated sentence as they were required to be.

Grounds of appeal
9. On behalf of the appellant it is submitted that the judge in the Central Criminal Court erred in principle in six respects.

(i) That he failed to have adequate regard to numerous mitigating factors.

(ii) That he constructed the sentence in such a way that it is impossible to discern the factors to which he had regard in determining the appropriate penalty.

(iii) That he had excessive regard to the victim impact statement.

(iv) He referred to s. 4 Rape offences twice during the course of his sentencing remarks when the appellant was never charged with offence under s. 4 of the Rape Act.

(v) That the sentencing judge failed to address the issue of rehabilitation.

(vi) That the judge failed to give the appellant a higher level of mitigation for what was an early guilty plea.

10. At the original sentencing hearing a victim impact statement was read into the record by counsel for the prosecution. In the course of that statement which was prepared by the victim, she says that the night in question was the worst of her life and that she will never fully get over it and that it has left her emotionally scarred for life. It is entirely understandable that that should be so. She commented:-

> "He can blame drinks and drugs but that is no excuse I am his sister."

11. The judge took time to consider the matter and then proceed to impose sentence some days later. The written submissions have highlighted and criticised the fact that the judge referred erroneously to s. 4 offences. It is true that in the oral presentation today, there has been much less emphasis on that issue. However given the criticism in the written submissions of the judge for his inaccurate reference to s. 4 and the implicit suggestion that he may have confused cases or may not have had that particular case in mind, it is worth pointing out that he began his sentencing remarks by referring in some considerable detail to the procedural history of the case in terms of pleas being entered to certain counts initially and then subsequently entered to other counts, but that it was accepted by all concerned that this was to be dealt with as an early plea.

12. That said it is true that the judge referred to s. 4 Rape and then because he was obviously uncertain in that regard indicated that he was going to read the details of the offences to which pleas were entered onto the record. But at that stage as he went to do so, realised that he had brought the wrong papers into court. Thereafter, the judge went to get his papers and returned shortly afterwards and continued his sentencing remarks which involved outlining the facts of the incident in considerable detail, referring in detail as well to the victim impact report, referencing the accused's pervious record and referring to reports that had been submitted, including a probation report and a psychologist report.

13. He commented that the psychologist report was particularly comprehensive and then went on to address its contents in very considerable detail. the judge referred to the accused's background, to the fact that he was one of ten children, the fact that he had been subject to violence by his father at an early stage, then that he was later abused by his mother's second husband, that he had taken alcohol from the age of nine years and therein became involved in the consumption of a wide range of drugs.

14. The judge was criticised for saying as he did, that the offence reached in or about "the very upper end of what one would describe as the scale of seriousness". When doing so the judge then referred to another case that he had dealt with that involved false imprisonment and violence directed at the victim and with a child abduction linked to the offence. The appellant says that this was an altogether different case and that the link between the offences was an inappropriate one. However, if the judge's remarks are read in full, it is clear that what he was saying was that this was an offence at the top end of the range of offending, but that there are other cases which would fall into what might be seen as the worst conceivable class of case, such as the case to which he was drawing attention. The judge then went on to indicate that he saw the appropriate range of sentence before mitigation as being in the range of sixteen to twenty years imprisonment. Having identified that range he identifies the mitigating factors referring specifically to the plea of guilty. Having identified the range requiring consideration as being that between sixteen and twenty years, he said he was taking as his starting point eighteen years absent mitigation. He made the point that while the plea of guilty was an early one and therefore required credit that the higher level of mitigation that is sometimes applied in the case of a plea was not appropriate because of the crushing and overwhelming level of the evidence.

15. Accordingly he indicated that taking all relevant factors into account that he was going to impose a sentence of thirteen years imprisonment, but then reduced that by a further year given that it would have to be served consecutive to the activated Circuit Court sentence and indicated that he was doing that in order to address the issue of proportionality.

16. The focus of the appeal today has been on the appellant's very difficult background his dysfunctional background, his limitations as referenced in the psychologist's report. It is said that the judge erred in selecting too high a starting point and then erred again in failing to reflect adequately the mitigating factors that were present. The appellant has drawn attention to the case of *C.O'R.* [2015] IECA 72. That was a case where the appellant had been convicted of the rape of his mother and the appellant relies on the case because there a sentence of twelve years imprisonment had been imposed, but in that case it was imposed after a contested trial and after the complainant had been subjected to cross examination.

17. However, it must be noted that there are aggravating factors present here that were not a feature in *C.O'R.* In *C.O'R.* there was no question of a use of a weapon, no question of threats to kill and the factors that have already been outlined were not a feature of the case.

18. There is no doubt that this was a very serious offence. It was a high end offence and it was one that was always going to have to be met by a substantial sentence. The sentence that was imposed was a severe one and the likelihood is that if the judge had decided to impose a somewhat less severe sentence either by selecting a sentence that was somewhat less severe or by suspending some limited portion of the sentence that it is unlikely that the sentence would have been interfered with, indeed it is unlikely that it would have been the subject of an application to review. But that is not really the point, sentencing does not really permit of precise mathematical or scientific precision.

19. With the exception of cases where sentences are fixed such as mandatory life sentences for murder, there would usually be a range of sentence available within which an appropriate sentence will fall. The long established jurisprudence of this Court and of its predecessor is that an appeal court will intervene only if the sentence imposed falls outside the available range.

20. The fact that had the appeal court been the one to impose sentence at first instance or if it was the case that the sentence was being imposed by one of the individual members of the court, that the sentence might have been somewhat different would not of itself justify intervention.

21. As the court has already said, this was a severe sentence and a marginally lesser sentence might have been contemplated. However, while acknowledging that, the court feels that for an offence of this gravity, with so many aggravating factors present, the court cannot conclude that the sentences actually imposed fell outside the available range. No error in principle is identified and the court must therefore dismiss the appeal.