



THE COURT OF APPEAL

Record Number: 31CJA/23

The President.

McCarthy J.

Kennedy J.

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

DEAN HAIG

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 31st day of October 2023 by Ms. Justice Isobel Kennedy.

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act, 1993, seeking a review on grounds of undue leniency.
2. On the 17th June 2022, the respondent pleaded guilty to one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990. On the 12th January 2023, he was sentenced to a period of 18 months' imprisonment which was wholly suspended.

Background

3. The injured party was a non-national working in this country. At the sentencing hearing, the applicant outlined the background of the offending as follows; in the early hours of the 10th March 2019, the injured party had been socialising with the respondent and his partner. They later returned to the couple's house. After some drinking and dancing in the house, the injured party fell asleep on the couch fully clothed. At approximately 6am, she awoke to find that her clothes had been removed and the respondent was lying naked on top of her. The injured party pushed the respondent away and told him that if he touched her again, she would kill him. She attempted to

replace her underwear and tights which she had found on the floor of the kitchen but was unable to do so as she found that her tights and underwear had been cut off while she was asleep. Subsequent forensic examination confirmed that those items of clothing were cut with a sharp object like a knife or scissors.

4. The injured party ran from the respondent's house to her friend's house who contacted the gardaí, she then attended a SATU for examination and later made a statement.

5. At the sentencing hearing, the court heard that the injured party had returned home. She attended counselling but indicated that she did not wish to make a victim impact statement.

6. The respondent was arrested by appointment, detained and interviewed. During the course of interview, he indicated that he had performed consensual oral sex on the injured party. However, he ultimately pleaded guilty on a full facts basis.

7. The respondent gave a different version of events to the probation officer and to a psychologist, he explained that it took him a long time to deal with the situation, that he was ashamed and only after counselling did he realise the gravity of his actions.

8. The garda stated during cross-examination that it was the respondent's recollection that he apologised three times to the injured party upon her waking to find him sexually assaulting her. The respondent also read his own letter of apology to the court wherein he stated that he felt utterly ashamed of his actions.

Personal Circumstances of the Respondent

9. The respondent was 39 years of age at the time of sentencing. He has no relevant previous convictions but has several convictions under the road traffic legislation. The court heard evidence of his family situation and personal circumstances.

10. The psychologist's report states that the respondent's father was absent in his early years, that the respondent left school early and entered the navy. Dr Lambe states that the respondent started problematic drinking around the time of his father's death.

11. The Probation Report *inter alia* outlines that the respondent informed the service that he has experienced periods of low mood, has a history of self-harm and suicidal ideation following the breakdown of a previous relationship.

Sentencing Remarks

12. The sentencing judge considered as aggravating factors that the injured party was a guest in the accused and his partner's home, the effect on her, and the cutting of the underwear and tights.

13. In mitigation, the judge took account of the respondent's age, plea of guilty, the absence of relevant previous convictions and that he had not come to the attention of the gardaí since the offence. He noted that there was alcohol consumed by the accused and that he had an alcohol problem at the time. He took account of the apologies, the Probation Report, and that he had attended a community addiction treatment service. He took account of his mental health issues, work history, current situation with his child and that he had found full-time employment. Further regard was had to the psychological report and that the respondent had attended Saoirse Addiction Treatment Centre for 12 to 18 months.

14. The judge nominated a headline sentence of two and a half years' imprisonment, which he reduced to 18 months'. In view of his personal circumstances, mental health difficulties, the

Probation Report, that he has no relevant previous convictions and has not been in trouble since March 2019, the sentence was wholly suspended on terms.

Grounds of Application

15. The three grounds of application are as follows:

"1. That the sentence imposed as set out above was unduly lenient in all the circumstances of the case.

2. That the learned sentencing Judge failed to have regard for the aggravating factors in the case, including that the offence was perpetrated while the victim was asleep, that a knife or other object was used to cut off her clothes and underwear so as to gain access to her private parts, and that the assault included the respondent climbing upon the victim and at least attempting to penetrate her vagina with his penis.

3. That the said sentence was not in keeping with sentences for these type of offences as dealt with by sentencing courts and the Court of Appeal."

16. In written submissions, the Director indicates that she does not proceed with Ground 2 insofar as it includes the suggestion that there was evidence given during the course of the sentencing hearing that the respondent *"at least attempted to penetrate her vagina with his penis."* It is conceded that the transcript does not disclose any such evidence.

17. Notwithstanding this concession, it is the Director's view that the sentence imposed was unduly lenient, the headline sentence was insufficient to mark the gravity of the offending and notwithstanding the mitigation available, this was a case where a fully suspended sentence was inappropriate.

Submissions of the Parties

Sentencing for Sexual Assault Cases

18. It is submitted by the applicant that this is a case where the sentence imposed, being a fully suspended sentence, represents *"a substantial departure from what would be considered the norm in such cases."*

19. The Director cites *Sentencing Law and Practice* at para 13-31 where Prof. O'Malley lists the main aggravating factors identified by the courts in relation to sexual offences. Of these, the Director says that breach of trust and targeting or taking advantage of a vulnerable victim are present. At 13-42 Prof. O'Malley states that: *"the presence of several such factors will ordinarily place a sexual offence in the higher echelons of the scale of gravity."*

20. The Director says that two additional aggravating factors are present; the victim was asleep and the cutting off of her underwear and tights using a sharp blade.

21. The respondent submits that the sentencing judge was clearly cognisant of all factors and says that the sentencing judge did not fall into error and that there is no error of principle justifying this Court's intervention.

22. It is submitted that while the judge may not have specifically noted the injured party being asleep under the aggravating factors heading, he was clearly conscious of that fact and this was clearly an innocent oversight rather than a conscious ignoring of the ground.

23. It is submitted that as outlined in Prof. O'Malley's text, there are gradations in aggravating factors. Regarding sexual assault where the victim is asleep, Prof. O'Malley notes that: *"Obviously, an offence of this kind becomes even more serious where the offender has rendered the*

complainant unconscious or weakened her capacity to resist by surreptitiously administering a sedative drug or something similar.”

24. The respondent rejects the Director’s contention that the removal of the injured party’s clothes demonstrates significant, if any, premeditation. It is the respondent’s position that this was an opportunistic crime.

Sexual Assault While the Victim is Asleep

25. The applicant relies on *People (DPP) v CS* [2022] IECA 282. At para 50 this Court confirmed that despite there being no guideline judgment on the issue, as the maximum sentence for the offence of sexual assault is 10 years, if one divides the range into equal thirds, the lower range will carry a maximum sentence of three years and four months and the highest range between six and ten years.

26. It is submitted that there is nothing opportunistic about this assault, it was obviously carefully pre-meditated. It is further submitted that the offending is significantly aggravated on a higher level of gravity than that occurring in *CS* and should have resulted in a headline sentence significantly beyond the lower range.

27. The respondent maintains that the Director is exaggerating the amount of premeditation that could reasonably be attributed to him. The respondent relies on the case of *People (DPP) v Gierlowski* [2022] IECA 128 as a stark comparison in terms of the level of premeditation in the instant case.

28. It is emphasised that the appellant apologised to the injured party three times after she awoke, in other words, he did not engage in violence or further threats.

The Imposition of a Fully Suspended Sentence

29. The Director notes that while the respondent pleaded guilty, in his accounts to Dr Lambe and the probation officer, he appeared to resile from this position but later affirmed his remorse and guilt in evidence at the sentencing hearing.

30. While acknowledging the significant mitigation, the Director’s position is that notwithstanding the mitigation available, given the gravity of the aggravating factors in the case and the nature of the offender, this is a case which had to result in a custodial sentence.

31. The respondent urges this Court to take a more favourable view of the respondent’s change of position in his probation interview and interview with Dr Lambe. It is said that engaging with his guilt and responsibility is something that the respondent will have to continue to do going forward regardless of the outcome of these proceedings.

Discussion

32. The jurisprudence on review of sentence is well-settled at this point. The onus rests with the Director to establish that the sentence was unduly lenient so that the divergence between the sentence imposed and the sentence which ought to have been imposed amounts to an error of principle before this Court will intervene. It is not sufficient if the sentence is shown to be lenient, the sentence must be one which was outside the scope of the discretion of the sentencing judge; this Court will not intervene unless it can be demonstrated that the sentence imposed constitutes a substantial departure from the norm.

33. We take the view that the sentence imposed was unduly lenient and the Director has shown that it was a substantial departure from the norm. This sexual assault fell within the mid-range of

gravity for the reasons identified by counsel for the Director. The most significant feature in our view being that of the cutting of the complainant's undergarments with a sharp object while she lay asleep. This, contrary to the respondent's suggestion, shows premeditation on the part of the respondent. It may well be that he took the opportunity which he felt was there, but this does not remove the element of premeditation; finding and using a sharp object to cut away her tights and undergarments to enable him to gain access to her body.

34. It is significant that the injured party was asleep, this elevates the gravity of the offence and of course, it is undoubtedly so, that the respondent could not have removed her undergarments in the manner he did without her being unaware of his actions.

35. Those factors bring this matter into the mid-range of gravity, thus rendering the sentence imposed unduly lenient and a substantial departure from the norm, justifying this Court's intervention.

36. Moreover, we are satisfied that the custody threshold was passed in this case and that in itself amounts to an error in principle justifying intervention.

37. Consequently, we will quash the sentence imposed and proceed to re-sentence *de novo* as of today's date on a consideration of the evidence adduced at hearing and on foot of the submissions received by this Court.

Re-Sentence

38. The aggravating factors are as stated by the sentencing judge; we include the factor that the injured party was asleep. As we have said the cutting of the injured party's undergarments while she was asleep is a significant aggravating factor. This demonstrates pre-meditation on the part of the respondent and elevates the gravity of the offending. A woman waking and finding a man naked on top of her is a significant matter. The respondent also accepted that he engaged in oral intercourse with the injured party. In the circumstances, we cannot see that the gravity is anything other than within the mid-range and we consider that the appropriate headline sentence could not be anything less than 5 years' imprisonment.

39. The judge properly identified the mitigating factors, the most significant being the plea of guilty. The respondent offered a different version of events to the probation officer and the psychologist where he contended for consensual sexual contact and active participation by the injured party and sought to apportion blame to her. He says he gave this version to the probation officer because she was female and he in effect, panicked. No explanation is forthcoming why a different version was given to the psychologist. The giving of different versions serves to diminish somewhat the plea of guilty.

40. Nonetheless, the plea of guilty was valuable and the respondent has additional mitigating factors available to him. *Inter alia* he apologised to the injured party in the immediate aftermath, he provided a letter of apology, he attended counselling to address his difficulties. He is a man without relevant previous convictions, but he is not of impeccable character. He has several convictions for road traffic matters which serve to lead to a loss of mitigation.

41. Applying the appropriate reduction for all mitigation, we reduce the headline sentence to one of 3 ½ years imprisonment. We are cognisant that this is the respondent's first custodial sentence, however, we consider this to be a most generous discount, being a reduction of 30% from the headline nominated.

42. It is understood from the Probation Report that the respondent is willing to undergo an assessment for suitability for the Safer Lives Programme. In order to foster and incentivise his rehabilitation and to assist him in reintegrating into society upon his release, we will suspend the final 12 months of his sentence for a period of 2 years on the condition that he remain under probation supervision for that period and comply with all directions from the Probation Service, that he attend the Safer Lives Programme or some other nominated program if considered suitable on assessment by the Probation Service and that he abstain from alcohol and that he provide his address to the Probation Service and remain at that address.