



THE COURT OF APPEAL

[108/20]

[2021] IECA 357

The President

Edwards J

McCarthy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MU

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered (by remote hearing) on the 15th day of June 2021 by Birmingham P

Conviction

1. The appellant stood trial in the Circuit Criminal Court in Clonmel in March 2020. He stood charged with three counts of sexual assault. The jury returned verdicts of guilty in respect of counts one and two on the indictment, and a verdict of not guilty in respect of the third count. Subsequently, on 28th May 2020, a sentence hearing took place and the appellant was sentenced to a term of five years imprisonment, with 18 months of the sentence suspended in respect of the first count where there had been a conviction, and to a sentence of five years, with three years of the sentence suspended in respect of the second count, the second sentence on the second count being consecutive to the sentence on the first count. The appellant has appealed against conviction and sentence and this judgment deals with the conviction aspect.
2. By way of background, it should be explained that the complainant was, at the time of trial, a 20-year old woman. She and her family came from Lithuania. The appellant was the partner of the complainant's mother, and at trial, the complainant gave evidence of three instances of sexual assault at a dwelling in Tipperary. In respect of the first count, which was laid as having occurred between January and April 2015, the complainant stated that she was in bed, she was aged about 15 years at the time, with her mother, and that the accused was in the bedroom. The complainant was watching a film and her mother fell asleep. According to the complainant, the accused put his hand under her shirt, then moved it up, undid her bra and fondled her breasts for a couple of minutes.

The evidence at trial was that there was a confrontation within the family in the aftermath of this incident in circumstances where the complainant revealed what had happened. However, the accused was allowed to stay in the house, and, it seems, was supported by his partner.

3. So far as the second count is concerned, and this was laid as occurring between 1st May 2016 and 31st July 2016, the complainant and accused went to a public house some distance away with a view to purchasing alcohol from the off licence. According to the complainant, on the way home, he asked her to "show me your tits". According to the complainant, he stated "I know I'll see them someday, anyway". After they returned home, the complainant went to bed, but she woke up during the night to find a hand on her hip, under the blanket, and the hand was then moved under her T-shirt and fondled her breasts again. According to the complainant, these were the actions of the appellant.
4. The third alleged incident was dated as having occurred on 20th August 2016, and in respect of this alleged incident, a verdict of not guilty was returned.
5. Following conviction and sentence in the Circuit Court, the appellant changed his legal team. Grounds of appeal of a very general nature were delivered which were in these terms:
 - (i) In relation to conviction, the appellant believes that the verdict of the jury went against the weight of the evidence which did not support his conviction.
 - (ii) The appellant reserves the right to include, or to apply to include further grounds of appeal against conviction in circumstances where the legal advisers now acting for him on appeal differ from those acting for him at trial and they are not in possession of the trial transcript and cannot yet advise him as to all appropriate grounds of appeal against conviction.

While not relevant to this stage of the proceedings, there were also grounds that addressed the severity of sentence.

6. Written submissions dated 22nd February 2021 were delivered on behalf of the appellant which raised three issues. These involved contentions that the judge erred in three different rulings at trial, these being:
 - (i) A ruling that refused the defence access to counselling notes arising from the fact that the complainant had attended for five counselling sessions with a counsellor.
 - (ii) A decision by the trial judge to permit the complainant's elder sister to give evidence in respect of untoward conduct on the part of the appellant on two occasions, once in Lithuania and once in Ireland.
 - (iii) The refusal of a request on behalf of the appellant, then accused, that the judge should give the jury a corroboration warning.

7. When the Court convened this morning, counsel on behalf of the appellant acknowledged that the paperwork in respect of arguing these grounds was not complete, but the Court indicated that we would hear arguments on such grounds as remained live, and we did that in a situation where the grounds had been identified in the course of the written submissions and had been addressed by the prosecution, so there was no question of anybody being disadvantaged or taken short. At that point, counsel indicated that the ground in relation to counselling notes was not being pursued. This was in circumstances where the case would probably have had to be adjourned to facilitate access by Court members to the counselling notes which had been read by the trial judge. Thus, the situation is that the appeal hearing was confined to the issue in relation to the evidence of the elder sister and the absence of a corroboration warning, these being the two issues that remained live when the question of counselling notes was not pursued.
8. So far as the evidence of the complainant's sister is concerned, the prosecution was anxious to adduce evidence from her that at a time when she was living in Lithuania with her family and the appellant, she had woken up one evening and had heard her mother and the appellant talking outside her room and that the appellant had wanted to take photographs of her, particularly of her breasts, while she was sleeping. The photograph was not in fact taken. The prosecution was also anxious to adduce evidence that on an occasion while in the dwelling in Tipperary, at a time when she had been in the shower, off the bedroom of her mother and the appellant, she had stepped out to get a towel and then noticed that the appellant was watching her through a large keyhole in the door of the bedroom.
9. At trial, there was discussion in terms of the evidence sought to be adduced in terms of background evidence and system evidence. The appellant says that, seen in terms of background evidence, the proposed evidence did not meet the McNeil threshold of relevance and necessity, and that if the issue is addressed through the prism of system, no system was in fact disclosed, that the matters alleged at trial involved the physical touching of the breasts on a number of occasions, whereas the sister's evidence did not allege any physical touching. The judge ruled on the matter as follows:

"As regards the background evidence, the defendant admitted in the Garda interview the incident with regard to V (using the abbreviation rather than the full name of the potential witness) concerning the bathroom and the photographs and he did apologise as regard to the incident concerning the bathroom, but it does show an interest or a proclivity in females, and indeed, in their breasts, even though he has provided an explanation as regarding the photographing of these breasts, I think that this evidence is evidence of disreputable behaviour and I think if it was to be excluded, it would render the whole dynamic in the house incomprehensible and somewhat unreal, and I consider it relevant and necessary and I allow that also."
10. In the view of this Court, it was open to the judge to admit this evidence. The evidence sought to be tendered established that the appellant had an inappropriate and unhealthy

interest in his two teenage stepdaughters, and specifically, in their breasts. There were two factors that strengthened the case for the admission of evidence. The appellant was making the case, he had done so at interview, that the complainant bore a grudge against the appellant because he disapproved of her boyfriend because of the fact that he wore earrings and had coloured his hair. In considering whether the complainant might have fabricated the narrative in relation to the fondling of her breasts, the evidence of the appellant's interest in the breasts of her slightly older sister was clearly relevant. Again, this is a case where the evidence was that, throughout, the appellant continued to be supported by his partner. He advanced the case, again, he did it first at the interviews, that if there was any truth in the allegation, his partner would not have stood by him and would have put him out of the house. In these circumstances, there was much to be said for the argument that the evidence was relevant towards explaining the family dynamic. Being of the view that the trial judge was justified in admitting the evidence, that it was evidence he was entitled to admit, we dismiss this ground of appeal.

The Corroboration Warning

11. At trial, counsel on behalf of the accused had sought a corroboration warning. She had done so in these terms:

“So, I say, here, the evidence makes out that the complainant has a reason to bear a grudge towards the accused insofar as she agrees in her own evidence that she did not like the way the accused treated her friend, C (again, we use the initial by way of abbreviation), and it was after this arose that the complaints were made. Though, I say based on the evidence itself, there is evidence in front of the jury which clearly makes out that the complainant bears the defendant some grudge, and I will also refer to my suggestion that the Court gives a corroboration warning because of the complainant's determination to lead evidence before the jury in relation to matters she was told not to lead evidence on, matters which she said she was not allowed to speak to here, so I say it is clear that the complainant bears the defendant a grudge, and I say on that basis, that a corroboration warning should be given.”

12. The reference to the complainant leading evidence that was not permitted is a reference to the fact that the prosecution had apparently agreed not to lead evidence relating to the fact of violence within the family home. However, when the defence pursued a particular line of questioning relating to why and in what circumstances the complainant had left home, the complainant made reference to this fact.
13. The Court draws attention to the reference in the application for a corroboration warning to a grudge alleged to have been triggered because of the attitude of the accused to C, the complainant's boyfriend, and, again, we reiterate our view that this is relevant when considering whether the evidence of the sister or of a pattern of behaviour involving both teenage stepdaughters was admissible.

14. The application for a corroboration warning was opposed by the prosecution and the judge then ruled on the matter as follows:

“Well, the first thing to be said is that there is obviously a discretion conferred by statute to this matter, and in exercising that jurisdiction, the Court has to have regard to a number of factors, and I think the first is the fact that the content and manner of the evidence given by the complainant. In that regard, I found the complainant’s evidence clear and credible. She was 15 at the time of the first incident, her mother said they were all in the bed, the defendant said he was sitting at the foot of the bed. The interview and the evidence given by the defendant only highlight that point. The report of this incident to the complainant’s mother and her different version of it, also, I think, assist in confirming the credibility of the complainant’s evidence. As regards the second incident, the defendant offered a number of explanations, saying he was not in the bedroom, then he said that he may have been there, he talked about possibly opening a window, he talked about putting out a cat, he said that he may have gone to the bathroom, there could have been fighting on the street and he contradicted himself here in evidence this morning in respect of that. He was saying there were different dates, even though in the Garda interview, he was clearly asked about the second incident, and the evidence of V was that he was in the bedroom and he was kneeling beside D, the complainant’s bed, which implicates him in the offence, and indeed, his lies at interview are also corroborated. In respect of the third incident, the third count, the statement heard by her brother, V, ‘he touched me’ and ‘get away from me’ are part of the res gestae. I will not give a corroboration warning.”

15. It is the situation that the mandatory corroboration warning, which was long part of our law, has long ceased to be part of our law at this point and it is now a matter for the discretion of the trial judge as to whether to give a corroboration warning or not. In our view, there was nothing in the circumstances of this case to oust that discretion or to give rise to a situation where there was a discretion that it could be exercised only in one way, that in favour of the giving of the warning.
16. In the circumstances, where we are satisfied that the judge was, as a matter of discretion, entitled not to give the warning, we are not prepared to uphold the ground of appeal relating to the judge’s refusal and so this ground of appeal is also dismissed.
17. In summary, having dismissed both grounds of appeal that have been argued, we will dismiss the appeal against conviction.

Sentence

18. This is an appeal against severity of sentence. The sentences under appeal are sentences of five years imprisonment, with the final 18 months of the sentence suspended, imposed

in respect of the first count of sexual assault that saw the appellant convicted, and a sentence of five years imprisonment, with three years of that sentence suspended, imposed in respect of the second count of sexual assault where a conviction was recorded. Thus, the net sentence is one of five and a half years custodial element to be served and the suspended element of four and a half years in addition.

19. In the Court's view, this had to be regarded as significant and serious offending. Among the factors that we would identify as aggravating the offending was the element of breach of trust involved. In this case, the relationship of the appellant and the complainant was effectively one of stepfather and stepdaughter, the fact that the offending occurred in the family home, which should be a place of safety, and indeed, in the case of the second offence in time, the fact that the offending actually occurred in the complainant's own bedroom. We attach significance, too, to the fact that the appellant offended again after being confronted in relation to his behaviour following the first incident. Also aggravating the offence is the fact that this offending has had a very significant impact indeed on the victim, something that emerges with real clarity from the victim impact report. As a result of this offending, the complainant was forced to leave the family home and she has effectively found herself in a situation where she has been cut off from contact with members of her family.
20. So far as the appellant's background and personal circumstances are concerned, he was born in 1980. He was married in Lithuania and had a daughter there and he remains in contact with his former wife and daughter, in particular, he is in regular communication with his daughter. It also emerged during the trial and sentence hearing that he is in contact with a number of members of the family that were based in Ireland.
21. So far as the question of previous convictions is concerned, he has none that are directly relevant, in the sense that he has no convictions relating to any form of sexual offending. However, he has some offences recorded from 2012, 2015 and 2016 and these are not without significance because all of them would appear to be drink-related. The trial judge identified them as an offence of being intoxicated in public, an offence of failing to provide a sample and an offence of attempting to drive while intoxicated. At trial, there was clear evidence that alcohol was a factor in the offending behaviour. At the sentence hearing, it was said on behalf of the accused, and more significantly, it seemed to be accepted that, by that stage, he had given up drink and was sober.
22. At the sentence hearing, it was submitted on behalf of the appellant that the offending fell at the lower end of the scale. The trial judge's response to that was to say he thought it was a little more than that, he thought it was at the lower end of the midrange and then said, that being so, he thought the appropriate sentence would be five years imprisonment.
23. In the Court's view, the factors that we have identified by way of aggravation would certainly see the case placed as midrange offending. It is true that in terms of the physical actions that constituted the offences, that might not see the offending placed in the higher range, but the factors that we have identified in terms of the location of the

offending, the breach of trust and the repeat offending would certainly justify a view that this was to be regarded as in the midrange.

24. The trial judge opted to impose consecutive sentences. The jurisprudence of our courts has been to say that resort to consecutive sentences is something that should occur sparingly. In this case, if there was an argument in favour of consecutive sentencing and a justification for consecutive sentencing, it was to be found in the fact that the appellant had reoffended, having been taxed with his initial misbehaviour. The factors that would militate in favour of concurrent sentences are that it was not a case where there were multiple victims, it was not a case where there was more than one victim, that the offending was over a relatively limited time period and that the offending involved repetition on two occasions of conduct of the same character.
25. Looking at the sentence that was imposed, a sentence of ten years, albeit with a significant element of that suspended, leaving a net sentence of five years, it does seem to us that that sentence is significantly out of kilter with other sentences in other cases and that it requires intervention on the part of this Court. The Court has to decide whether to choose the route of consecutive sentences or to go down the route of concurrent sentences. If the consecutive route is to be taken, then it would be necessary to step back and address the totality of the sentences that were being imposed as a result of that exercise so as to arrive at a sentence that would be just and proportionate. If the concurrent route is taken, then it is necessary to identify a sentence that reflects the overall level of offending and the overall scale of the offending. In our view, the concurrent route is the more appropriate in the circumstances of this case, though we understand what prompted the trial judge to opt for the alternative route. We can say that we do not see this as a case for a part-suspended sentence, but rather, for the imposition of a direct custodial sentence.
26. What we have decided to do, being of the view that intervention is required, is that we will impose a sentence of two years imprisonment in respect of the first offence in time, and a sentence of three and a half years imprisonment in respect of the second offence. We feel that the greater sentence is appropriate in respect of the second offence, firstly, because it was committed after the appellant had been taxed and challenged about his misconduct on the first occasion, and secondly, because it would seem that it was this second offending that gave rise to the significant impact that this offending has had for the complainant, resulting in her departure from the family home at a time proximate.
27. Therefore, the sentence will be one of two years on the first count, three and a half years on the second count, both sentences to run concurrently and both sentences to date from the same day as in the Circuit Court.