



THE COURT OF APPEAL

[241CJA/22]

The President
Edwards J.
McCarthy 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 (DPP)

APPLICANT

AND

S.A.

RESPONDENT

JUDGMENT of the Court delivered on the 18th day of May 2023 by Birmingham P.

Introduction

1. Before the Court is an application brought by the Director pursuant to s. 2 of the Criminal Justice Act 1993, seeking to review a sentence on grounds of undue leniency. The sentence sought to be reviewed is one of five years imprisonment, with the final 20 months of that sentence suspended for a period of two years with provision for supervision by the Probation Service. The sentence was imposed in respect of a count of aggravated sexual assault contrary to s. 3 of the Criminal Law (Rape) (Amendment) Act 1990, and two counts of sexual assault, contrary to s. 2 of the same Act, were taken into consideration. The matter was dealt with in the Central Criminal Court following the entry of a plea of guilty to the count of aggravated sexual assault. It was dealt with on a full facts basis with the other sexual assaults being taken into consideration. The sentence sought to be reviewed was imposed on 16th November 2022, and it was backdated to 19th November 2020, the date upon which the respondent first went into custody.

Background

2. By way of background, it should be explained that the respondent to this application and the complainant had been in a relationship from May 2018, had married in January 2019, and had had a baby girl together in May 2019. The relationship broke down, and in May 2020, the parties ceased to live together; however, there continued to be some contact between them in relation to their daughter. At the time of the offence, the respondent was 25 years of age, and the complainant was 23 years of age. The respondent was originally from Lagos, Nigeria, but came to live in Ireland when he was approximately eight years of age.

3. On 19th November 2020, the respondent had contacted the complainant when she told him about a problem she was experiencing with her car; there was an issue with a burst tyre. He offered to come around and fix it but was told her father was going to do this. Later that morning, the respondent came to the house where the complainant was living, along with her parents and daughter. He enquired about their daughter and was told that she had been taken out for a walk. At this stage, the Court was told that the respondent pushed the complainant up against a wall in the hall area, that he pushed himself against her, kissed her neck, and put his hands inside her underwear. This incident was the subject of the first of the two sexual assault counts on the indictment. Following this, the complainant went into the kitchen area. She was followed there by the respondent, who caught her, kissed her neck, and pushed himself up against her, putting his hands around her waist. This incident in the kitchen formed the basis of the second of the two sexual assaults on the indictment.

4. At that stage in the proceedings, the respondent went upstairs. The complainant stayed on the stairs and proceeded to contact the respondent's mother by phone, asking her to contact the respondent and tell him to leave. The complainant passed the respondent on the stairs and stayed in the doorway of the bedroom. The complainant recorded some of the interaction between the parties on her phone, and this was shown at the hearing. The complainant was heard on numerous occasions begging the respondent to leave. The respondent was recorded as saying that as long as they were married and not divorced, he could do as he pleased. After a number of minutes during which the complainant begged him to leave in order to allow her to continue working, the respondent came towards the bedroom and pushed the complainant down onto the bed. At that point, he started to take down her leggings and underwear, while she was screaming, and he took her phone from her. The Court was told that the respondent pushed the complainant face down onto the bed. She was struggling, and she could hear the respondent take his belt off. The complainant continued trying to fight her assailant, but he then took his trousers down and tried to insert his penis into the complainant's anal area or vagina. This bedroom incident formed the basis for the count of aggravated sexual assault.

5. At this point in time, the complainant managed to grab her phone and pressed a button that got her through to Emergency Services. Gardaí arrived, and when they did, they could see the complainant at an upstairs window in a distressed state. The respondent opened the door to Gardaí, and, it has to be said, made immediate admissions under caution. In the course of the appeal hearing, the video recording of the interaction between the parties was played to the Court, as was the telephone recording of the complainant's contact with the Emergency Services. The material was quite disturbing and leaves no doubt about the extent of the complainant's distress.

Personal Circumstances of the Respondent

6. In terms of the respondent's background and personal circumstances, he was 27 years of age at the time of sentence. The sentencing Court heard that he had one previous conviction from Carlow Circuit Court on 31st July 2015, in relation to an offence committed on 13th December 2013. On that occasion, he was sentenced to a term of three years and six months imprisonment

in respect of an offence of assault causing harm, with the final 18 months of the sentence suspended. It appears that incident involved a punch to the victim's head on a night out, causing left-threatening injuries. The victim needed rehabilitative treatment and support in its aftermath.

7. When the present matter came into the Central Criminal Court list, initially there was a concern on the part of the defence legal team as to whether an issue arose as to fitness to plead. When that issue was resolved after a report was obtained, a plea was duly entered. The sentencing Court heard that the respondent had, in the past, suffered a significant traumatic brain injury when falling from a height of around 30 feet from a hotel balcony in December 2017.

The Sentence Imposed

8. A victim impact report presented by the complainant made clear that the incident had a significant effect on her. She had arranged locks and doors in her home, including locks on her bedroom door, and also had installed a security camera.

9. Available to the sentencing Court were a probation report and a report from Dr. Catherine Norton, consultant neuropsychologist, who was of the view that the respondent was at low risk of reoffending **if** he engaged with services in relation to his acquired brain injury (emphasis that of Dr. Norton). By reference to the probation report, it appears that there was a pattern of what was described as unpredictable behaviour and domestic abuse following the birth of the parties' child in May 2019. The report refers to the respondent's behaviour towards the complainant and their child, resulting in his ex-wife securing a protection order before the courts and also seeking safety in a women's refuge. This reference in the probation report was not the subject of specific comment during the course of the sentence hearing and certainly was not challenged in any way at the sentence hearing. However, in the course of the oral appeal before this Court, counsel on behalf of the respondent indicated that her instructions were that the application for a protection order had been withdrawn.

10. In the course of sentencing remarks, the judge indicated that she was identifying a headline or pre-mitigation sentence of seven and a half years imprisonment, but given how the case had been met, the fact that the respondent had stayed at the scene, and that he had made immediate admissions from which he had not resiled, she felt that, with mitigation, the appropriate sentence was one of five years imprisonment. However, considering all of the mitigation present – in particular, the traumatic brain injury, and the difficulty to which that gave rise in a prison setting – she would suspend the final 15 months of that sentence.

11. Sentence was imposed and a bond entered into. However, unusually, the judge returned to Court on two further occasions, first to address the duration of the bond; it had originally been suggested the bond would be for three years, but the judge had intended in fact that it would be for two years. Perhaps more significantly, she returned a further time, on this occasion, after the complainant had left, and indicated that while she had originally suspended 15 months of the sentence, she had been reflecting on this and was actually going to suspend the final 20 months of the sentence.

The Application

12. On behalf of the Director, it is submitted that the headline sentence nominated in the case constituted a substantial departure from what would be considered appropriate in all of the circumstances of the case. It is said that the error in that regard was compounded when it came to the imposition of the ultimate sentence. The judge first reduced the headline sentence by one third, but then suspended one third of the reduced sentence. It is suggested that this involved a degree of double counting when it came to mitigation.

13. On behalf of the respondent to the application, it is essentially submitted that the judge approached the case with great care, that she had full regard to all the relevant facts, and the sentence she ultimately decided to impose was one that was open to her and was one with which this Court should not interfere.

Discussion

14. We approach our consideration of the appropriateness of the sentence imposed in the knowledge that there is no real dispute between the parties about the legal principles that are applicable when a Court is asked to review a sentence on grounds of undue leniency. Indeed, it might be said that the principles applicable have not really been in dispute since the first such case: *DPP v. Byrne* [1995] 1 ILRM 279.

15. While the submissions had suggested the headline or pre-mitigation sentence represented a substantial departure from what was to be expected, in exchanges with members of the Court, counsel on behalf of the Director appeared to modify his position somewhat. Counsel was asked to address the fact that, in the case of a number of offences, where a maximum penalty of life imprisonment was provided, this Court has approached matters on the basis that, save in relation to the most egregious offences, in practice, the maximum sentence is likely to be 15 years, which means that sentences of up to five years might be expected in the case of low range offences, sentences of five to ten years in the case of midrange offences, and sentences of ten to fifteen years for high range offences, always with the possibility of sentences in excess of 15 years, including sentences up to life imprisonment itself, for the most egregious offences. When counsel was asked where the offence would be placed in terms of low, midrange or high-end offending, he immediately indicated it was a midrange offence. When it was pointed out that the headline sentence nominated was seven and a half years – the midpoint for midrange offences – it was suggested that this offered little scope for challenging the nominated headline, and counsel appeared prepared to accept that his scope for doing so was limited. It is to be noted that these exchanges in relation to the nominated headline sentence took place without reference to the provisions of the Domestic Violence Act 2018 (“the 2018 Act”), and in particular s. 40 thereof. Against the background of those exchanges, the Director, to some extent, pivoted, and focused attention on the ultimate sentence imposed, submitting that the reduction from the nominated sentence was excessive, resulting in an ultimate sentence to be served which was clearly inadequate.

16. In the Court’s view, this was a very lenient sentence, indeed, an exceptionally lenient one. However, leniency *per se* is not a vice and the Court’s concern is only with sentences that are not just lenient, but unduly lenient. In this case, the care with which the sentencing judge approached her task was obvious, as evidenced by the fact of returning to Court, not once, but twice. We have

often made the point that, before this Court will intervene, it is necessary that something in the nature of error in principle must be established. We have frequently commented, both in the context of severity appeals and, indeed, applications to review on grounds of undue leniency, that even if it is the situation that the Court, had it been called on to sentence at first instance, would have imposed a sentence different to the one imposed by the trial Court, this does not provide a basis for an intervention.

Section 40 of the Domestic Violence Act 2018

17. In this case, we can say that we regard the sentence imposed as very lenient indeed. We make that observation fully cognisant of the evidence in relation to the acquired brain injury, a factor to which the trial judge properly paid a great deal of attention. We can say that, had we been called on to sentence at first instance, we think it likely that we would have imposed a sentence greater than that ultimately imposed. Indeed, we make that observation even without having regard to s. 40 of the 2018 Act, the relevant provisions of which are as follows:

“(1) Where a court is determining the sentence to be imposed on a person for a relevant offence, the fact that the offence was committed by the person against a relevant person shall be treated, for the purpose of determining the sentence, as an aggravating factor.

(2) Subject to subsection (3), where subsection (1) applies the court shall impose a sentence which is greater than that which would have been imposed if the person against whom the offence was committed was not a relevant person.

(3) Subsection (2) shall not apply where the court considers that there are exceptional circumstances justifying it not applying that subsection.

(4) The sentence imposed as a result of the application of subsection (2) shall not be greater than the maximum sentence permissible for the relevant offence concerned.”

18. It is the case that we arranged for this case to be listed this morning for mention with a view to drawing the parties’ attention to the above section and indicating that we would provide them with an opportunity to make submissions. We understand the Director’s position to be that this section reinforces her view that the sentence was unduly lenient and that an intervention is required. On behalf of the respondent, it is said that this is a case where subsection 4(3) is applicable; that is the section that provides for disapplying the general provision in exceptional circumstances justifying that course of action. We, for our part, acknowledge that there are issues that arise for consideration as to whether this sub-s. 4(3) applies.

19. We have to say that we think it is unfortunate that the section was not drawn to the attention of the judge in the Central Criminal Court. Where the Oireachtas has addressed questions of sentencing policy, it is appropriate that the attention of a judge imposing sentence should be specifically drawn to that fact; though, in making that comment, we are conscious of the fact that a stage will be reached that there is such familiarity with a section that that will no longer be required. Examples that would come to mind in that regard would include situations where

offences are committed while on bail, and situations in relation to the sentencing regime applicable under s. 15A of the Misuse of Drugs Act 1977.

20. We note and see the force of the comment made by counsel on behalf of the respondent that the section is declaratory of what has always been the law, in that the courts have traditionally regarded offences committed in a domestic context as being ones that have to be regarded with particular seriousness. In that regard, she refers to the judgment of Charleton J. in *DPP v. FE* [2019] IESC 85 which makes that point.

21. In our view, it is not possible in the context of this case to completely disapply the provisions of s. 40 of the 2018 Act. It seems to us that it has to be the situation that the sentence to be imposed would be somewhat greater than would be the case if it was not an offence committed within a domestic context. However, there is the background of the acquired brain injury, and it seems to us that the aggravation that is present by reason of the context of the offence is less than it would have been absent that consideration.

22. We have already indicated that, if called on to sentence, we would have been minded to impose a sentence greater than that already imposed; though we appreciate that, at this stage, this is a somewhat different exercise. Had we been called on to sentence at first instance, we would have been thinking in terms of a headline or pre-mitigation sentence in the range of eight and a half years to nine years.

Resentencing

23. In circumstances where it seems to us that the sentence that was imposed by the trial judge was not just very lenient but actually at and beyond the outer limits of leniency so as to fall outside the judge's margin of appreciation, we are obliged to resentence. Conscious as we are of the factors that were present by way of mitigation, which saw a reduction in the nominated sentence in the Central Criminal Court, and conscious in particular of the issue in relation to the acquired brain injury, we will identify a headline or pre-mitigation sentence of eight and a half years. As the trial judge did, we will reduce that by one third, giving rise to a sentence of five years and eight months. The trial judge then proceeded to suspend twenty months, and, while we have considered whether a shorter period of suspension would have been more appropriate, we will leave in place the suspension of twenty months.

24. In summary, we quash the sentence imposed in the Central Criminal Court, and we will impose a sentence of five years and eight months, but with the final twenty months of the sentence suspended. The terms and conditions of the suspension and the provisions in relation to involvement by the Probation Service will remain as in the Court below.