THE COURT OF APPEAL

[89/18]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PAUL FLAHERTY

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 24th day October 2019 by Birmingham P.

1. This is an appeal against severity of sentence.

2. The background is to be found in the fact that following a trial, which took place between 21st November 2017 and 12th December 2017, the appellant was convicted of the offence of sexual assault. Subsequently, on 9th March 2018, he was sentenced to a term of five years imprisonment. He appealed against conviction and against the severity of sentence. This Court, in a judgment delivered on 31st July 2019, dismissed the appeal against the conviction.

3. The factual background is dealt with at some considerable length in the course of that judgment and that exercise will not be repeated now. Sentence was imposed in a situation where a sentence hearing had taken place on 7th March 2018. The sentence hearing was slightly unusual, in that the emphasis was not so much on a plea for leniency, though that was of course present, but invited the Court to address the difficulties in sentencing that arose from a victim impact report and the need to identify and then sentence specifically in respect of that for which Mr. Flaherty was convicted. The issue in relation to the victim impact report arose in circumstances where the appellant had stood trial on a number of counts, and in respect of the counts, other than the sexual assault count, the jury had either acquitted or disagreed. However, the point was made that the victim impact report was based on the account that the complainant had presented to the jury which encompassed both the matter which resulted in a conviction and the matters where there was not.

4. The evidence adduced through the investigating member, Garda Aisling O'Connor, at the sentence hearing, referred to three matters as relevant to the sexual assault: the

removal of the trousers of the complainant, against her will; the “strangulation” for a period of time and the “genital touching”.

5. The Court heard that the accused, now appellant’s date of birth is 2nd October 1987. The Court heard that he had six recorded previous convictions. These were for driving without insurance, three in the nature of driving while over the alcohol limit and one for being drunk and a danger to traffic. Before the sentencing Court was a psychologist’s report from Dr. Lambe and there were also a number of positive testimonials from persons who had interacted with the appellant over the years.

6. The judge’s sentencing remarks were somewhat lengthier than usual, reflecting the complexities that had emerged at the sentence hearing. The Court referred to the fact that the defence submissions were that the Court would have to make a finding that there was some consent on the part of the complainant to some form of intimate sexual conduct, and the judge commented that in his view, that would be an actual perverse finding, not in accordance with the weight of evidence given to the jury. In relation to the offence itself, the judge commented that in his view, it was self-evident that this was a very serious sexual assault, and certainly could not be described as any sort of minor sexual assault. The Court accepted that this was not a premediated action on the part of Mr. Flaherty.

7. In the course of the appeal against severity of sentence, a number of issues have been canvassed. Thus, the difficulty that the judge faced in identifying precisely what the appellant had been convicted of has been rehearsed once more. The question has been raised as to whether a single count of sexual assault could encompass more than one form of sexual activity, in this instance, three forms of untoward activity, the removal of the clothing, the “strangulation” and the genital touching. If the Court was to address all the issues that were raised in the course of the sentence hearing, that would be a major task and would inevitably be a fairly lengthy process. Some of the issues were being couched in unusual and somewhat provocative terms and would not be readily resolved.

8. However, in the Court’s view, while the judge’s task in this case in sentencing against a background of a conviction for one offence and acquittals and disagreement for other and more serious offences was a difficult one, the difficulty was not unique. In any case where there are a number of counts on the indictment and a jury has heard a narrative that addresses all of them and then convicts only on one or more of the less serious offences on the indictment, the judge’s task is a difficult one. The judge must be careful to sentence only in respect of the activity which resulted in the conviction, and the judge must be careful to avoid a situation where the activity alleged in respect of which there was no conviction permeates into the case and influences, or indeed appears to influence the sentencing process.

9. In this case, the judge approached his task of sentencing with particular care. We have already referred to the fact that his sentencing remarks are longer than usual and the Court was clearly conscious of the need to avoid the danger of sentencing in respect of unconvicted activity. Careful as the judge was, we are still left with a sense of unease.

The sentence was a significant one. While we agree with the trial judge that by no stretch of the imagination, that even if the activity in respect of which there was either a disagreement or an acquittal is stripped out, could this be described as any form of minor sexual assault, we have a concern, however, that the sentence ultimately imposed was the sort of sentence that one might expect to see imposed for a sexual assault as part of wider and greater sexual misconduct.

10. Given the difficult and sensitive situation that the jury verdicts had created, we feel that the sentence imposed should have been one which left no room for doubt about the fact that the unconvicted allegations had any influence. We feel that that would have resulted in a lower sentence. We recognise it might indeed result in a sentence lower than, on one view, the misconduct engaged in merited, but we nonetheless believe that is appropriate if justice is to be seen to be done.

11. In resentencing, we have regard to the fact that the case was contested and what the outcome was. The considerable mitigation that is available following a plea of guilty in a sex case is not available. However, on the other hand, one cannot lose sight of the fact that in a situation where an indictment was presented which contained a number of more serious counts, the options available to the appellant were limited. On one view, his decision to contest the case has been endorsed by the verdicts of the jury. Thus, the case is to some extent distinguishable from one where a case is fully contested and convictions are recorded on all counts.

12. We have regard to the information that was put before the sentencing Court and updated before this Court about the appellant's background and personal circumstances. We attach significance to the fact that there are no previous convictions of a similar nature and have regard, too, to the positive testimonials that have been provided. Absent the mitigating factors present, we would have seen an appropriate sentence as being in the range of three and a half to four years. However, to reflect the significant mitigating factors that are present, the Court will impose, instead, a sentence of two and a half years, which will of course date from the same date as the sentence imposed in the Circuit Court.