THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2020] IECA 179

[11/20]

The President.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GABRIELE FICARELLI

APPELLANT

JUDGMENT of the Court delivered on the 3rd day of July 2020 by Birmingham P

1. This is an appeal against severity of sentence. The sentence under appeal is one of two and a half years' imprisonment that was imposed in the Dublin Circuit Criminal Court on 13th January 2020 in respect of one count of sexual assault. A sentence was imposed on that day in circumstances where the appellant had pled guilty at the arraignment hearing on 4th December 2019 and subsequent to that a sentence hearing had taken place on 20th December 2019. On that date the judge had adjourned matters to the start of the new term to allow him time to consider the case fully.

2. By way of background, it should be explained that the injured party is a Dutch national, aged 26 years, who had come to Ireland in February 2018 to take up employment

with a multinational company. The appellant meanwhile is a 27-year old Italian national who, at the time of the events in question, had been living in Ireland some four or five years.

3. When the injured party came to Ireland, she sublet a room in the apartment in the Parkgate Street area of the city where the offence occurred. She shared the apartment with two young men, one of whom was the appellant.

4. The events in issue occurred on 27th April 2018. The 27th April is a national holiday in the Netherlands, known as "King's Day", and the injured party went out with her boyfriend to socialise and mark the occasion. While socialising, she had consumed alcohol. She returned to the apartment and fell asleep on the couch. Having fallen asleep, she awoke to find someone pulling at her tights, pulling them down towards her thighs, and then there was penetration of her vagina and her anus. The sentence hearing dealt with the matter on the basis that what was involved was digital penetration.

5. In the aftermath of the incident, there was an exchange of WhatsApp messages between the parties. In one such message, the appellant said "I am so sorry, I meant to bring it up today, to tell you and apologise. I don't know what came over me and I'm so ashamed of myself. I haven't been able to concentrate on anything all day. I understand and respect your decision [to have nothing more to do with me] I really wish I could undo my actions". However, the injured party reported matters to Gardaí who came to the apartment in possession of a search warrant. The relevance of Garda intervention is that the appellant attended at Kilmainham Garda station in the company of a solicitor on 10th July 2018. He had with him a prepared statement which he handed over. The statement accepted that there had been sexual activity, but suggested that what had happened was entirely consensual, and indeed, that it had been initiated by the injured party.

The Sentencing Hearing

6. Counsel on behalf of the appellant was reluctant to proceed with the sentence hearing. She indicated that she required a Probation Report and/or a report from a psychologist. However, the judge did not accede to the request for an adjournment. He indicated that he was disposed to take up the matter, and would, if necessary, adjourn to obtain any report that he felt to be required. Ultimately, he proceeded to sentence, indicating that he did not need a report because he was going to operate on the basis that the appellant was a person of previously good character who had never offended before and was very unlikely to ever offend again.

7. The sentence hearing heard a very powerful victim impact report which was read to the Court by the complainant. It is clear that this incident had a very profound effect on her. At its most basic, it involved her having to leave her apartment, stay in a hotel, initially, and then spend a period to time in emergency accommodation. More fundamentally, she explained that her trust in everybody was gone along with her sense that there was something good left in the world.

8. In terms of the background and personal circumstances of the appellant, he was, as stated, a 27-year old Italian with a fine work record. He had been living in Ireland some four or five years at the time of the offence. He had no previous convictions, either in Ireland or Italy or anywhere else. A number of very positive testimonials were put before the Court which referenced, among other things, his involvement in the scouting movement in Italy. Some of those testimonials referred to his respectful and entirely appropriate relationship with a number of females.

9. While the judge heard the evidence and submissions in relation to sentence on 20th December 2019, rejecting the appellant's application for an adjournment so that a Probation Report and/or a psychologist's report could be obtained, he deferred his decision until the start of the new term. For some reason or other, there does not seem to be a transcript of his

sentencing remarks available. However, counsel on both sides have prepared an agreed note of what the judge had to say. From that note, it emerges that in the course of his sentencing remarks, the judge referred to the offence as falling at the midrange of severity. In response to an invitation from prosecution counsel, he indicated that he saw the headline or pre-mitigation sentence as being one of five years' imprisonment. Also, in the course of his remarks, he spoke of the appellant having "perfect mitigation".

10. The appellant sought to appeal his sentence on the following grounds:

(i) That the sentence imposed was excessive in the circumstances of the case;

(ii) That the sentencing judge erred in law in refusing to direct or to allow time for the preparation of a psychological report in respect of the appellant;

(iii) That the sentencing judge erred in law in failing to order a Probation Report in respect of the appellant;

(iv) That he judge erred in law in identifying a headline sentence of five years' imprisonment;

(v) That the sentencing judge erred in law in placing excessive weight on aggravating factors in the case;

(vi) That the sentencing judge erred in law in failing to take any or adequate account of the appellant's personal circumstances and mitigating factors, particularly in circumstances where the judge described the appellant's mitigation as "excellent, if not perfect";

(vii) In particular, the sentencing judge erred in law in failing to attach any or adequate weight to the fact that the appellant:

(a) made an immediate admission of guilt to the appellant and apologised to her directly;

(b) Pleaded guilty at an early stage;

(c) Cooperated with the Garda investigation;

(d) Had no previous convictions;

(e) Had an excellent work record and was in employment;

(f) Was a non-national; and

(g) Was unlikely to reoffend, as found by the sentencing judge.

(viii) The sentencing judge erred in law in refusing to suspend any portion of the sentence on the basis that the appellant did not require rehabilitation.

11. There is a degree of overlap or repetition in the grounds of appeal as formulated, but in the course of the oral appeal, which was heard remotely, they were narrowed, and essentially, three grounds were relied on, these being:

(i) That the headline sentence of five years was too high and that, consequently, the ultimate sentence imposed was also too high;

(ii) That the judge erred in failing to allow time for the preparation of various reports; and

(iii) That the judge erred in failing to agree to suspend a portion of the sentence.

The Headline Sentence

12. In support of the argument that the headline sentence identified by the trial judge was too high, the appellant draws attention to a number of comparators and says that by reference to these, that the headline sentence should have been in the order of three to three and a half years, and certainly no more than that. In particular, reference is made to the case of *DPP v. Stewart* [2016] IECA 369, *DPP v. Krol* [2017] IECA 205, and *DPP v. MC* [2015] IECA 313. The case of *Stewart* had seen the appellant receive a sentence of three years' imprisonment, but entirely suspended in respect of one count of sexual assault. The background to the

offence involved a group of cyclists from Northern Ireland staying in a hotel in Cavan. A patron had consumed alcohol to the extent that she was asleep, or certainly not conscious, on a couch in the hotel foyer. The respondent in the undue leniency review was seen to approach the comatose young woman, and when asked what he had done to her, he put the two fingers of his right hand to his nose and sniffed them and then offered his fingers to a companion. He then made the same gesture to another companion, asking him did he want to "smell her". The respondent then stuck his index finger into his mouth and sucked it. The appellant's interest in the case stems from the fact that the judgment of the Court of Appeal refers to the fact that the sentencing judge had determined that the offence, before any allowance for mitigating factors, merited a headline sentence of three years' imprisonment, and that the Court of Appeal, in the course of its judgment, had observed "we would not quarrel with that, having regard to the appellant's culpability and the harm done". The Court of Appeal felt that where the trial judge had fallen into error was in believing that it was an offence that could be dealt with by means of a wholly suspended sentence. The Court was of the view that it was a case which, on any view, required the imposition of a custodial sentence to be actually served, at least in part. The Court of Appeal substituted a sentence of three years' imprisonment with one of two years' imprisonment and the final three months of the sentence suspended. The Court was very clear in saying that the sentence it was imposing was one which was less than the Court would have imposed if it had been dealing with the matter at first instance. While the appellant's interest is primarily in what the Court of Appeal had to say about its attitude to what was indicated in regard to the headline sentence, it is of note that the review application was dealt with some four and a half years after the offence. Since the original sentence hearing in the Circuit Court, the appellant had married and he and his wife had a young daughter who, unfortunately, had Hydrocephalus. He had been in employment at the time of the offence, working as a bus driver, and had been let go as a

result of his involvement in the incident. The Court was very clear in saying that the sentence it was imposing, following the undue leniency review, was one which was less than the Court would have imposed if it had been dealing with the matter at first instance.

13. *DPP v. Krol* was also a case where the DPP sought to review a wholly suspended sentence on grounds of undue leniency. In that case, the injured party had been socialising with friends from whom she had become separated. Gardaí became involved when they received a call from a member of the public who had concerns about the safety of a female. The Gardaí who came on the scene noted that the female appeared to be passed out and slumped over and that the male was caressing her, kissing her, and kissing her neck. When, at a later stage, CCTV footage from the scene was viewed, it indicated that the incident had been more serious than had at first been realised. The CCTV footage showed that the male had opened the female's pants, had his hands inside her pants and was touching her. The trial judge dealt with the matter by way of a suspended sentence of two years. The approach of the Court of Appeal was to conclude that the sentence was unduly lenient, did not interfere with the headline sentence, but it required seven and a half months of the sentence to be served.

14. Insofar as both of these comparators were undue leniency reviews, the Court reminds itself that it has, on a number of occasions, expressed doubts about the utility of referring to sentences imposed following undue leniency reviews when considering appeals against severity of sentence. Counsel on behalf of the appellant acknowledges the limitations of undue leniency jurisprudence and accepts that the ultimate sentence imposed may be quite different to what would or should have been imposed at first instance. Nonetheless he says that the cases to which he refers are of real interest, because in each case, the Court of Appeal did not take issue with the headline sentence. However, while the cases of *DPP v Stewart* and *DPP v Krol* involved reviews of non-custodial sentences on grounds of undue leniency, the case of *DPP v MC,* was an appeal against severity of sentence. This case, unlike *Stewart* and

Krol, did not involve the digital penetration of a sleeping or comatose woman, but it did involve an act of digital penetration accompanied by a degree of force and violence. In the course of resentencing, the Court of Appeal referred to the sexual assault offence as belonging in the low to medium range on the spectrum and regarded a headline sentence of three years and six months as appropriate.

15. A case which was not dealt with during the course of the oral hearing, but which perhaps bears mention, is the case of *DPP v Hustveit* [2016] IECA 271. Once more, it was an undue leniency review. In that case, the appellant had pleaded guilty in the Central Criminal Court to a count of rape and sexual assault committed against his girlfriend on a number of occasions while she was sleeping. The case was dealt with in the Central Criminal Court by way of a seven-year sentence, wholly suspended. In the course of the undue leniency review, the Court of Appeal accepted that the case was an unusual one, indeed, an exceptional one. Much of the offending behaviour occurred without the victim's knowledge and all of the offending was only known because of detained admissions made by Mr. Hustveit in an email he had sent to the victim following her request to find out what had happened to her. While acknowledging the unusual, indeed, exceptional factors, the Court of Appeal could not agree that the case was so wholly exceptional as to justify an entirely suspended sentence. The Court of Appeal was dealing with it in a situation where Mr. Hustveit, a Norwegian national, had returned voluntarily for the undue leniency review. This is significant as the Kingdom of Norway does not extradite its own citizens. In the course of the judgment of the Court of Appeal, it was indicated that such were the unusual factors present that the sentencing court might have required Mr. Hustveit to serve two and a half years or less, and that at that stage, the Court of Appeal would be requiring him to serve half of that two and a half year sentence.

16. It might fairly be said that there were factors that were present in both directions which made it an imperfect comparison. At one level, the offending was more serious than

what was in issue in the present case. The offences had occurred on a number of occasions and there was an actual charge and plea of guilty to rape. On the other side of the coin, the mitigation available to Mr. Hustveit was not diminished by reason of providing a false and untruthful account to Gardaí as occurred here.

The Failure to Adjourn and Direct the Preparation of a Probation Report

17. In contending that the judge erred in not directing a probation report, the appellant refers to the case of *DPP v Doolan* [2014] IECA 22. The appellant says that while the judge may have been in a position to operate on the basis that the appellant had not offended previously and would not offend again, and that therefore reports were not required addressed to that issue, that it remained the case that reports might have provided an insight as to how the appellant came to act as he did. Counsel for the Director says that the present case is distinguishable from *Doolan,* in that it was a case where the decision as to whether actual custody was necessary was finely balanced, whereas here, the imposition of a custodial sentence was inevitable in this case. As was pointed out in the judgment of the Court of Appeal in *Doolan,* the appeal there was firmly presented on the basis that it was a case that could and should have been dealt with by way of a suspended sentence or a community service order. Here, however, counsel on behalf of the appellant is forced to accept that it is hard to see how, on the authorities, custody could have been avoided. Nonetheless, he says the reports could have been very important in terms of the duration of any custody and in terms of how any sentence would have been structured as between the period required to be actually served and the period that might have been suspended.

The Failure to Suspend Any Portion of the Sentence

18. Finally, the appellant says that the decision not to suspend any element involved error on the part of the judge. It was a first time offender, of previously good character, being sentenced to a term of imprisonment, and the sentence, in those circumstances, ought to have been no longer than strictly necessary.

Discussion

19. In the Court's view, the judge's decision to proceed to embark on sentencing was not an impermissible one. It is true that the sentence hearing came on very quickly after the return for trial and the entry of the plea of guilty, but we see substance in the point made by the Director that the incident the subject matter of the proceedings had occurred more than a year and a half before, and if it was felt that a report from a psychologist was going to be of assistance, then there was nothing to prevent it being obtained during that period. Moreover, it seems to us the judge was entitled to take a view as to the extent to which he was likely to receive significant assistance from any reports, including probation reports, that might be obtained. We are, therefore not prepared to uphold this ground of appeal.

20. By the same token, we believe that this was a case where the judge was entitled to take the view that it was neither necessary or appropriate to incorporate a part-suspended element. That being so, it seems to us that the case turns on the question of whether the headline sentence was too high.

21. On one view, in a situation where the maximum penalty available was one of five years' imprisonment, it has to be the case that five years as a headline was not an inappropriate sentence for a midrange offence, and this was an offence, involving as it did vaginal and anal penetration, which was at least midrange. We see the force of that. However, we also recognise that there is some substance in the argument that the comparator cases that

appear most directly on point would suggest that a lower headline sentence might have been chosen.

22. The Director places emphasis on the fact that where a headline sentence of five years had been identified, that the sentence actually imposed was just half that, and says that this represents full, and, indeed, generous mitigation. The mitigation allowed, 50% in percentage terms, was certainly significant. However, in our view, it was a case where mitigation in excess of 50% from a headline could not be excluded, if one has regard to the immediate admissions and apology, albeit that those were undermined later by the contention to Gardaí that sexual activity had occurred, which was not only consensual, but initiated by the complainant, something which the appellant must always have known to have been false. Then there was the very early plea and the extremely positive testimonials, including testimonials directed specifically towards his appropriate and respectful attitude to women. In particular, it seems to us, that mitigation in excess of 50% might be considered if a headline sentence at the upper-end of the available range was being considered.

23. In considering this issue, we remind ourselves of the fact that it has long been the approach of this Court, and its predecessor, not to interfere with a sentence merely because it, or individual members of the Court, might have imposed a different sentence. We also recognise that while the principle that one will interfere only if there has been an error in principle or the sentence falls outside an available range is easy to state, that it will not always be possible to draw a clear blue line. There will always be sentences which might be viewed as severe, indeed, right at the cusp of the available spectrum, and sentences which are just too severe. The same can apply in relation to sentence which would be regarded as lenient, indeed, very lenient, but the question would be whether they were quite so lenient as to justify intervention.

24. We have given the matter very serious consideration. With considerable hesitation, we have concluded that the ultimate sentence imposed was excessive. We do so in circumstances where we begin our consideration by recognising that this was a most serious incident, involving a sexual assault of a victim who was vulnerable at the time, asleep, and was in her own home, having consumed alcohol. It is, however, the case that the sentence imposed diverged markedly from the sentences imposed in cases that might be regarded as broadly similar. The sentence diverges, though to a lesser extent, from sentences imposed in this Court following successful undue leniency reviews. The significance of that is much reduced by reason of the fact that this Court often makes the point that if somebody is incarcerated for the first time, following a successful undue leniency review, that this was something which would be particularly difficult to bear, and this is likely to see a sentence imposed that is less, perhaps appreciably less, than would have been imposed had the Court been sentencing at first instance.

25. In proceeding to resentence, we take as our starting point the seriousness of the offence, but we acknowledge that there are many mitigating factors present, as indeed, was very properly identified by the sentencing judge. We, too, are impressed by the testimonials offered on behalf of the appellant, in particular, those from female friends which speak of an emotionally-intelligent man, respectful of personal space. It is to be hoped that this was an event entirely out of character, and indeed, that does seem to be the case.

26. We will begin by identifying a headline or pre-mitigation sentence of four years' imprisonment. We believe such a headline sentence is fully justified, even if it is somewhat higher than headline sentences which were not criticised in cases such as *DPP v Stewart* or *DPP v Krol*. However, we believe that the reality of those cases was that the focus of attention was really on the issue of whether a fully non-custodial disposal was available.

27. In the circumstances, we will reduce the headline sentence that we have identified of four years to one of two and a half years' imprisonment, but we will suspend the final six months of that sentence on the usual terms, and we will also impose a condition that the appellant will stay away from the injured party for a period of four years. Further, we will make provision for a post-release supervision order for a period of one year. The appellant will be subject to the notification requirements of Part 2 of the Sex Offenders Act, 2001 for a period of ten years as required by s.8 of the 2001 Act.