



THE COURT OF APPEAL

[2021] IECA 358

Court of Appeal Record No. [242/2019]

**The President
McCarthy J
Kennedy J**

BETWEEN

**THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)**

PROSECUTOR/RESPONDENT

AND

ERICK MUKOKO

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 10th day of December 2021 by McCarthy J.

1. This is an appeal against the severity of sentence imposed in the Central Criminal Court by White J on the 21st of October 2019 on Bill No: CC0062/2018. E.M, the appellant herein, pleaded guilty on the 13th of May 2019 to one count of rape contrary to section 2 of the Criminal Law Rape Act 1981 as amended by section 21 of the Criminal Law Rape (Amendment Act) 1990. A headline sentence of 11 years imprisonment was identified by the trial judge and a term of eight years imprisonment dated from the 15th of July 2019 when the appellant first went into custody was ultimately imposed. The sentence also contains a post release supervision order, in accordance with section 29 of the Sex Offenders Act 2001, of two years from the release date of the sentence imposed.
2. The appellant in this case was a citizen of the Democratic Republic of Congo who came to Ireland some eight months before the offence as part of the family reunification scheme to reunite with his brother who had successfully acquired asylum in 2013; a sister is now resident in this jurisdiction also. At the time of the offence on the night of the 10th of October 2017, the appellant was aged 29 and his victim was aged 21. The victim was out with her friends and had several drinks over the course of the evening at a park. They came upon the appellant and some of his friends who were already drinking there and playing soccer. Over the course of the evening, the two groups became one and at around 11pm a friend of the appellant invited the company to go back to his apartment. The appellant's group and the victim and her friends then went to this apartment where socialisation

continued. As time went on the numbers dwindled leaving just four people in the apartment: the appellant, the apartment owner, the complainant, and a friend of the complainant.

3. Later on the injured party's friend was feeling unwell and went to a bedroom to sleep. The apartment owner went out to get food. It was during this window that the victim ended up alone in the sitting room with the appellant. She was sitting on a couch when the appellant *"came over and kneeled down on the floor in front of her with his face near her face, leaned in and asked for a kiss"*. The complainant responded *"no, get away"* to this proposition but the appellant did not stop there. He then proceeded to remove her clothes beginning with her jacket, pushed her shoulder with his right hand and forced her back onto the couch. The appellant managed to remove one leg of her trousers. The complainant was shouting and telling the victim to stop throughout but the appellant opened his own trousers and inserted his penis into the complainant's vagina, without a condom, whilst holding the victim down with both hands. He used considerable force throughout.
4. The victim ran to the bathroom to clean herself, producing tissues to the appellant thereafter to show a discharge due to bleeding caused by the offence and which continued afterwards. The victim tried to wake her friend in the bedroom but she did not succeed in doing so; the apartment owner returned and he was made aware of what had occurred by the complainant. He then asked the appellant to leave but the appellant got down on one knee and repeatedly said: *"I'm sorry, I'm very sorry"*. The complainant was still bleeding quite heavily at this stage and used a towel to contain the blood.
5. In the hours after the rape, the complainant turned on her phone to find she had received a number of messages from the appellant who had sent her a "friend request" on Facebook the night before. These messages asserted the appellant was sorry and wanted to offer her a present. Later the appellant had changed his Facebook name in an attempt to evade connection to these messages thereafter.
6. The victim made a complaint to the Gardaí at some time between 3pm and 3:30pm on the 11th of October and attended a Sexual Assault Treatment Unit ("SATU") where DNA was extracted from semen on various vaginal and intimate swabs of the victim for the purpose of the investigation. It was further found that there was no injury or bruising noted anywhere, on any part of the body of the victim.
7. On the 17th of May the appellant was arrested and over the course of the garda inquiry he was interviewed on four occasions. The appellant denied all accusations at all stages of interview going as far as to deny knowing the complainant or having ever had sex in Ireland since his arrival. This was despite the fact that a compelling and growing amount of evidence against him was put to him. This evidence included a large amount of CCTV footage which recorded the movements of the various parties and from which the appellant could be identified. There was also an identification by the victim of the appellant at an informal identification parade. Furthermore, the Facebook communications were compiled by the Gardaí. After procuring a bodily sample from the appellant, DNA was extracted therefrom and matched the DNA extracted from the semen retrieved from the victim during her SATU investigation.

8. The appellant's trial was fixed for the 27th of May 2018. However, a fortnight prior to the trial on the 13th of May a plea of guilty was entered to the sole count on the indictment.
9. The complainant in her victim impact statement provided a traumatic account of the effect that the rape has had on her life which was read out at sentencing. We refer to it here: -

"On the night that this happened, my life became a living nightmare. A lot of things have changed since I became a victim of a rape. I am no longer the person I was before this happened. I cannot sleep at night. I was in fear of my life. I slept on the couch for weeks, with my mother on the other couch across from me. I can't be on my own, or go out and socialise. I had nightmares and flashbacks every day. It was like reliving a nightmare over and over again. My life stopped when this happened, and I still find everything hard to do. I now suffer from anxiety, depression, and panic attacks on a daily basis. I tried to take my own life on more than one occasion. I have cried myself to sleep many of nights. I turned to alcohol to black out, and to try and forget what had happened. I lost confidence in myself. This has not just affected me, it has affected my whole family. I am not going to allow what he did to me control my life anymore. I know I will never be the same person I was, but I hope I can get back to myself, slowly but surely. It will be a long road to recovery, but I know with the support from my family and close friends I will get there. I didn't realise how upsetting writing this would be. I tried to move on with my life, and do things I used to do, and got a job, but I couldn't cope. I am not able to face crowds. It's been a hard, long two years, and it still feels like yesterday. I also had two jobs I could not hold, my head was so messed up. I find it very hard to trust anyone. I have lost trust in everybody around me."

AGGRAVATING FACTORS

10. Firstly, the trial judge was cognisant of the fact that the appellant took advantage of a window where both the apartment owner and the complainant's friend were absent to ensnare the victim into his dark desire that being to have sex with her regardless of her rejection to kiss him or have any such advances. This is something the judge felt he was quite determined to do and advantage was taken of the fact that she had consumed a considerable amount of alcohol.
11. The judge further highlighted that this was "*quite a forceful rape in the Court's view, because he used what force was necessary in respect of the crime*". He took into account his strength and "*that she resisted, she tried to hit him, she couldn't get him off her*"; the fact of the vaginal discharge was consistent with this.
12. Furthermore, the trial judge viewed the impact on the victim as a very serious aggravating factor and considered in the light of her victim impact statement that the effect was "*devastating*".

MITIGATING FACTORS

13. The Court was willing to accept the appellant's guilty plea, albeit reluctantly, as a mitigating factor. The judge, however, felt that the lack of remorse during the investigatory period

was a factor which diminished the guilty plea. He outlined his view in that regard as follows:

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"Mr Mukoko's plea of guilty and I mean there are obviously aspects to that which the Court has a little bit of concern about. It came late, there was no acknowledgement at the interviews about the nature of it was a complete denial and I mean to the extent that the Probation Service report indicates there is a full acknowledgement. But the probation report really echoes the difficulties which the Court has had in relation to that. But it's a plea of guilty and Mr Mukoko is entitled to discount for that, not as much as the Court would normally apply in relation to these circumstances."

14. The Court took into consideration that he had no previous convictions, at least in this jurisdiction, and he had a very difficult background in the Congo. This was referred to in the probation report conducted on the 14th of October 2019. The trial judge in any event was also aware of the probation report's finding that the appellant was in the moderate to high range risk of sexual reoffending.

JUDGMENT OF THE COURT AS TO SENTENCING

15. In respect of these factors, the trial judge ruled as follows: -

"Now, the Court considers that the headline sentence is one of 11 years' imprisonment. And the Court considers that the proportionate sentence is one of eight years' imprisonment. The Court doesn't feel it appropriate in the circumstances to suspend any portion of that eight years. But will direct two years post release supervision, if Mr Mukoko remains in Ireland."

Grounds of Appeal

16. The grounds of appeal relied upon are as follows: -
- a) *That the learned sentencing judge erred in fact and in law in assessing the offence before the court as being of such severity that it warranted a sentence of eleven years imprisonment before any mitigating factors were taken into consideration.*
 - b) *That the learned sentencing judge erred in fact and in law in inadequately balancing the aggravating factors and the mitigating factors in the case which resulted in an excessive and disproportionate sentence.*
 - c) *That the learned sentencing judge erred in fact and in law in that he failed to attach sufficient weight to the mitigating factors in the case, in particular the Appellant's guilty plea and lack of previous convictions*
 - d) *That the learned sentencing judge erred in fact and in law in that he failed to attach sufficient weight to the personal background of the Appellant and his status as a foreign national.*

17. Counsel correctly said that these grounds amount, in substance, to the proposition that the headline or pre-mitigation sentence as excessive, which by definition had the consequence that the actual or post mitigation sentence was in turn so. Reliance was placed primarily on *DPP v F.E.* [2020] I.L.R.M. 517. It was submitted that the offence, notwithstanding its nature, and in particular the violence used, was a case which did not fall into what Charlton J described as "*a category of rape cases which merit a headline sentence of 10 to 15 years imprisonment [and] what categorises these cases is a more than usual level of degradation of the victim or the use of violence or intimidation beyond that associated with the offence, or the abuse of trust*".
18. We however are not convinced by this argument or that the sentencing judge erred in his classification of the offence herein as a "*very very serious rape*" and "*a very serious, forceful violent rape*". We think that a number of factors made this rape a particularly serious one – the appellant took advantage of a window where both the apartment owner and the complainant's friend were absent to abuse the victim. There was a significant degree of force involved in that the victim was forced down and thereafter held down by the strength of the appellant; further to this there was bleeding and discharge from the vaginal area as a result of the rape. We are mindful also of the fact that the appellant took advantage of the fact that the victim had consumed a level of alcohol.
19. In coming to this decision, we are mindful that the gradation or classification of an offence is not an exact science. Moreover the judge must be afforded a margin of appreciation in his sentencing. In this respect, we feel that the headline sentence was appropriate and well within the discretion of the judge. Furthermore, having regard to the significant consideration by the judge of the appellant's difficult background, his lack of previous convictions, the room for rehabilitation, and the absence of other mitigating factors, we feel that mitigation was given the requisite weight in determining the post-mitigation sentence of eight years. We accordingly reject the contention that the trial judge fell into an error of principle.
20. Accordingly, we dismiss this appeal.