



**THE COURT OF APPEAL**

**Record Number: 106/2023**

**The President.  
Edwards J.  
Kennedy J.**

**BETWEEN/**

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

**RESPONDENT**

**- AND -**

**D.H.**

**APPELLANT**

**JUDGMENT of the Court delivered (*ex tempore*) on the 29<sup>th</sup> day of February 2024 by Ms. Justice Isobel Kennedy.**

**1.** This is an appeal against severity of sentence. On the 1<sup>st</sup> February 2023, the appellant was sentenced to 4 ½ years' imprisonment with the final 18 months suspended in respect of one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990.

**Background**

**2.** On the 7<sup>th</sup> June 2020, the victim was in attendance at a party at his girlfriend's house where the appellant, who was a housemate of the victim's girlfriend, also resided.

**3.** In the early hours of the morning, the appellant suggested to the victim that they might continue drinking in his bedroom. The victim's girlfriend had gone to her own bedroom to sleep at this stage and the appellant offered the victim cannabis, which he accepted. The victim describes that due to the combination of cannabis and alcohol he fell asleep, fully clothed, in the appellant's bedroom and he awoke to his girlfriend shouting and shaking him.

**4.** The victim's girlfriend awoke alone at approximately 6am and found the victim asleep on the appellant's bed, the appellant kneeling beside him holding the victim's penis in his left hand. The appellant looked shocked, ran out of the room and downstairs.

**5.** The victim's girlfriend described the difficulty she experienced in waking the victim up and that when he did awake, he did not know what had happened. They went to their local Garda

Station to report the matter. A forensic examination of the victim's underwear revealed the presence of the appellant's DNA in the form of saliva.

6. The appellant was arrested and interviewed and denied the offence. He pleaded guilty two days after a jury was empanelled but before the trial commenced and before evidence was heard.

7. A victim impact statement was before the sentencing court detailing the physical and mental effect of the offending on the victim, the fear, confusion, hopelessness and embarrassment he faced in the aftermath of the offence and that he continues to face and the effect on his professional development and his studies.

8. A Probation Report was before the sentencing court which stated that the appellant accepted full responsibility for not obtaining the appropriate level of consent and that he has struggled to accept his sexual orientation. He expressed his shame and a high degree of remorse. He had reflected on how the offending impacted on the victim and the victim's partner and deeply regretted the emotional pain he inflicted. He attended counselling on a weekly basis for a period of 4 months.

#### **Personal Circumstances of the Appellant**

9. The appellant was 31 years of age and working as a marketing manager at the time of sentence. He has no previous convictions. His mother has ongoing health issues, and he had provided care for her on weekdays when his father was working.

#### **Sentencing Remarks**

10. The sentencing judge noted the aggravating factors to include that the appellant took advantage of the victim's vulnerability, the breach of trust involved in the offence and the significant impact on the victim.

11. In terms of mitigation, the judge inter alia accepted that the appellant had a clean record, and that the plea of guilty although late was of assistance. She took account of his cooperation, remorse, and the expression thereof by a significant financial gesture, being savings for a mortgage and borrowed from his parents, which in accordance with *People (DPP) v Duffy* [2023] IESC 1, constituted an acknowledgment by the appellant of his part in the wrongdoing and an acceptance of the hurt and pain caused.

12. The sentencing judge nominated a headline sentence of six years and six months' imprisonment for the offence. Taking mitigation into consideration, she reduced this sentence by 24 months, leading to a sentence of four years and six months' imprisonment. In order to incentivise rehabilitation, she suspended the final 18 months of the sentence, leading to an effective sentence of three years' imprisonment.

#### **Grounds of Appeal**

13. The appellant relies on four grounds in his appeal against severity of sentence but the real issue rests with the nomination of the headline sentence. Consequently, it is said that the ultimate sentence was excessive.

#### **Submissions of the Appellant**

14. It is submitted that the following factors are relevant to the assessment of gravity of the appellant's offending:- that the complaint related to a single incident, that there was no element of

force, threat of force and/or violence during the commission of the offence and that the offence stopped upon the victim's girlfriend entering the room.

**15.** The appellant relies on the decision of this Court in *People (DPP) v DH* [2023] IECA 203, where a headline sentence of 4 years and six months' imprisonment was imposed for a single incident of sexual assault wherein the accused was 44 years of age, and the complainant was 12. That was reduced on appeal to one of 2 years and 6 months' imprisonment.

**16.** Prof. O'Malley's text on *Sexual Offences*, 2<sup>nd</sup> ed, at para 25-30 is referred to as follows:-

*"sexual assaults of a medium level of gravity, without any significant aggravating factors, sometimes attract sentences in the region of 18 months to 2 years."*

**17.** Reference is made to *People (DPP) v O'Driscoll* (1972) 1 Frewen 365-366:-

*"The objects of passing sentence are not merely to deter the particular criminal from committing a crime but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would best be served if the criminal could be induced to take the latter course. It is therefore the duty of the Court to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal."*

**18.** While it is conceded that the offence the subject matter of this appeal is serious, it is submitted that a headline sentence of six years and six months is excessive and the final sentence of 4 years and 6 months with 18 months suspended is, in consequence, excessive.

#### **Submissions of the Respondent**

**19.** The respondent submits that the sentence imposed was within the discretion of the judge. The Director highlights that this case involved the appellant offering the victim cannabis and when he was unconscious and patently not in a position to consent, sexually assaulted him. It is submitted that the breach of trust was manifest.

**20.** Reliance is placed on *People (DPP) v BO'S* [2023] IECA 84, which concerned a review of sentence where a headline sentence of 4 years was nominated. The Court observed that this was at the low end of the margin of discretion where the offence involved a young victim, who was asleep at the time and money was offered to her to buy her silence in the aftermath.

**21.** It is further submitted that this was a very generous discount for the mitigating factors and that the ultimate sentence is appropriate.

#### **Discussion**

**22.** The dicta of Walsh J in *O'Driscoll* remain as relevant today as they did in 1972. A court must impose a proportionate sentence in each case having regard to the offence and the offender.

**23.** There is no doubt that the offending in this case was serious with the aggravating factors including that the appellant took advantage of a person rendered vulnerable by the consumption of cannabis and alcohol; the cannabis having been provided by the appellant. He then proceeded to sexually assault his victim, while the victim was sound asleep, so much so, that his girlfriend had difficulty in waking him when she discovered him.

**24.** The victim poignantly describes the impact not only upon him, but also upon his girlfriend and his family. It is with some concern that we read that he blamed himself for the incident, when quite clearly the appellant took advantage of him.

**25.** While this was a serious assault, it was a single incident where the maximum penalty is one of 10 years' imprisonment. Some of the aggravating features which serve to elevate the gravity of such an offence were not present. Whilst there was a breach of trust, it was not in the same category as some offences of sexual assault, and there was no additional violence. We are cognisant of the trauma inflicted on the victim as a consequence of the appellant's conduct, but when we look to all the aggravating factors, we are of the view that the judge fell into error in nominating a headline sentence at the upper end of the mid-range.

**26.** While we consider the appropriate sentence to be within the mid-range, the nomination of 6 ½ years places the sentence significantly above the mid-point which is excessive in the circumstances.

**27.** Accordingly, we will quash the sentence imposed and proceed to re-sentence de novo as of today.

### **Re-Sentence**

**28.** Having assessed the evidence adduced in the court below, and on a consideration of the aggravating factors, we are of the view that 4 ½ years is the appropriate headline sentence and one which properly reflects the gravity of the offending. This places the gravity of the offending firmly at the mid-range which spans 40-60 months.

**29.** There is considerable mitigation highlighted earlier in this judgment. We are told that the appellant found it very difficult to settle into life in prison as a man in his early thirties and with no previous convictions. He has now settled and is doing well there, being an enhanced and trusted prisoner. He has signed up for the Safer Lives programme which is not available to him at the moment. In consequence of the mitigation, we will reduce the headline sentence to one of 3 years.

**30.** It is clear that rehabilitation is a realistic prospect in the appellant's case. The probation officer noted that he displayed a high degree of remorse and that he would benefit from the Safer Lives Program to assist him in gaining further insight into the effects of his offence. In order to continue with and incentivise his rehabilitation, we will suspend the final 18 months of his sentence for a period of 18 months on the same terms and conditions as imposed in the court below.

**31.** He remains on the sex offender's register.

### **Decision**

**32.** The sentence is now one of 3 years with the final 18 months suspended.