THE COURT OF APPEAL

[2021] IECA 359

Court of Appeal Record No. [8/2020]

The President
McCarthy J
Kennedy J

BETWEEN

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

RESPONDENT

-AND-

KEVIN CORCORAN

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 22nd day of November 2021 by Mr Justice McCarthy

1. This is an appeal against the severity of sentence imposed in Galway Circuit Criminal Court by his Honour Judge McCabe on the 11th of December 2019 on Bill No: GYDP0060/2017. K.C., the appellant herein, was convicted of a single count of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by section 37 of the Sex Offenders Act 2001. He received a sentence of six years imprisonment backdated to the 8th of November 2019.

2. The appellant, then aged 21, committed the offence of sexual assault against one victim at a public house and guesthouse. On the night of the 21st of November 2015, sometime after 7pm, the complainant, then sixteen years old, went there to play pool and socialise with her friends. At some time between 10pm and 11pm, the appellant entered the public house to celebrate his birthday. The complainant described herself as familiar, even friendly, with the appellant because of a friendship with a family member. The appellant conversed with the complainant in the public house and offered her alcohol numerous times but which she declined.

3. At around 4am the complainant realised the time and left to walk home but the appellant followed her out onto the street and encouraged her to come back in, which she did. They then returned together briefly to the bar and thereafter she went to the upstairs of the premises with him to her friends where the party was continuing. People were mixing in different bedrooms and the complainant states she was sober at this point and spent most of her time in one of the rooms with one of the appellant's friends from Dublin. Sometime in the early hours of the morning, whilst the complainant was chatting with a friend of the appellant's, he entered the room and told them that a fight was taking place downstairs. The friend of the appellant then left the complainant on her own with the appellant and he used the opportunity to assault her.

4. The appellant closed the door of the room and when the complainant tried to leave, he took her phone from her. At this point, as the complainant was distressed as to what was happening, he proceeded to place his two hands on her shoulders and pushed her backwards towards and across a double bed in the room. He then tried to kiss her, and the complainant told him to stop. She describes that "*he was on me so I couldn't move, and he was trying to pull my jeans off, and he got them to about my knees. And my knickers. He was still trying to kiss me. He was still trying to force me to the middle of the bed but because I was fighting he couldn't.*" The appellant began to digitally penetrate the complainant's vagina with his hand and with his other hand he zipped down the complainant's jumper and placed it underneath her bra onto her breast. Despite the complainant's screams and demands that he stop, he repeatedly responded "*it's only my fingers*". She struggled and he eventually just got up and left. The complainant pulled up her jeans, although they had been damaged in the course of the assault, and ran out of the building. She proceeded to journey on foot to where her mother worked and spoke briefly to her but she was too distressed to tell her what had actually happened to her. When she was taken home taken home thereafter, she noticed that she was bleeding. She informed her mother what had occurred when she returned from work at 4pm that day.

5. After the complainant had informed her mother of what had happened, a complaint was made to the Gardaí. She was examined as part of the criminal investigation and during the course of this examination, damage to the wall of the victim's vagina was found. There was further evidence also of damage to the zip of the complainant's jeans.

6. The complainant provided an account of the effect that this sexual assault has had on her life in her victim impact statement which was read out at sentencing. We refer to it here:-

> "*I had no idea how this would affect me since. I was once a happy, outgoing, confident, bright girl but over the last four years it destroyed me to the point of taking my own self-worth, my innocence, becoming mentally ill, self-harming over 50 times, attempting suicide several times, spending multiple times in a psychiatric unit. You were my first sexual experience, which is so, so wrong. I now hate being alone. I lost every friend I had. I find it very hard to trust people. I never feel safe. You took me out of me for your own gratification. I trusted you as a friend. Memories of that night, your voice, your words, your weight on top of me, will never leave me. I have been*

through a lot in my short life and how can one short incident define me, but from now on I will try my very hardest to get happy, confident, outgoing, bright Emily back and I will leave you in the past. You might have made me a victim, but now I am a survivor."

7. During the sentencing hearing, it was acknowledged that the appellant had 52 previous convictions. Twenty of these were for road traffic matters. There were another fifteen for theft, four for threatening and abusive behaviour, four for criminal damage, two for offences contrary to section 3 of the Misuse of Drugs Act, two for section 2 assault, one previous conviction for entering a building with intent, one for intoxication in a public place and one for failing to appear in court. Even if the previous convictions cannot be deemed aggravating factors, they mean that he did not come before the trial court as a person of good character and they gave rise to a progressive loss of mitigation.

8. It might also be noted that the fact that the victim in this matter was a child was a clear aggravating factor and account was also taken by the trial judge as to the significant impact of the assault on the victim's life.

9. The trial judge did not accept that there were any significant mitigating factors. The judge considered most fundamentally that the absence of a guilty plea removed the appellant's opportunity for any mitigation and whilst acknowledging that "*alcohol and drugs may form a backdrop to this offence*", the sentencing judge was only in a position to recommend that the appellant be offered such treatment as is available whilst he was in custody. The judge held as follows: -

   "*I'm placing this offence in the mid-range on the scale of gravity for similar offences. Unfortunately, there is little to offer by way of mitigation. The defendant doesn't accept the verdict of the jury. That's a matter that -- he's entitled to that view, but it denies him such mitigation that would otherwise arise. It seems clear that alcohol and drugs may form a backdrop to this offence and I would recommend that he be offered such treatment as is available while he is in custody. It's up to him whether he seeks it out or seeks to avail of it during this time. In circumstances where he doesn't accept the verdict of the jury or display any remorse, I'm unable to build in any period of suspension of this sentence, so the proper sentence in the circumstances is six years' imprisonment. He's entitled to credit for time served.*"

Grounds of Appeal

10. The grounds of appeal relied upon are as follows: -

    a. The headline sentence fixed by the Learned Sentencing Judge was excessive in all the circumstances of the case.

    b. The actual, or effective, sentence imposed by the Learned Sentence Judge was excessive in all the circumstances of the case.

c. *The Learned Sentencing Judge erred in determining that there was little mitigation in the case and what mitigation there was, was insufficient to reduce the headline sentence.*

We will deal with all grounds together.

11. The appeal was presented in very clear terms, namely, that no objection could be taken to the headline sentence of six years but that no or no adequate acknowledgment made for mitigation or provision for rehabilitation, and in particular counsel argued that the judge made an error in principle in failing to suspend part of the sentence. It was further submitted that none of the previous offences were sexual in nature and that they did not aggravate the offence. It was submitted that in the nature of the offences, all of which were dealt with summarily in the District Court, the loss of mitigation as a result thereof was relatively modest. It was submitted that there was no information as to whether or not sentences imposed in the District Court had assisted rehabilitation. It was said that it was the first time that the appellant had been before the Circuit Court and part suspension of the sentence to assist rehabilitation was appropriate. Emphasis was also placed on attendance of the appellant at a rehabilitation centre in Germany (for drug abuse).

12. Counsel for the DPP reiterated that the headline sentence was appropriate, that the trial judge must be afforded a significant margin of appreciation and it was submitted that the trial judge was properly entitled to take the view that no real mitigating factor existed.

13. We take the view that there was no remorse nor acceptance of guilt at the sentencing stage. It is now said to us, though this is not in strictness a factor which falls for consideration, that the appellant now accepts the verdict – we no doubt that counsel has these instructions but they remain just that. We think that, here, there was an evidential basis upon which the judge was entitled to take the view that there was little reality in the concept of rehabilitation. It does not follow from the fact that this was the first conviction on indictment that a portion of the sentence ought to have been suspended.

14. We are not persuaded that there was any error in principle here and accordingly we dismiss this appeal.