THE COURT OF APPEAL

[127/22]

The President
Kennedy J.
Donnelly J.

BETWEEN

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

RESPONDENT

AND

IOAN LINGURAR

APPELLANT

JUDGMENT (*Ex tempore*) of the Court delivered on the 27th day of April 2023 by Birmingham P.

Introduction

1. This is an appeal against severity of sentence. The sentence under appeal is an aggregate sentence of 17 and a half years imprisonment that was imposed on 20th December 2021 in the Central Criminal Court. That aggregate sentence was imposed in respect of two counts of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997, as amended, a count of rape contrary to s. 48 Offences Against the Person Act 1861 and s. 21 of the Criminal Law (Rape) (Amendment) Act 1990, and a count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended.

Background

2. The background to this sentence hearing, and now to this appeal, is that the accused had originally been charged with two counts of false imprisonment and two counts of rape. It was a case involving two complainants, two young women, and one charge of rape and one charge of false imprisonment related to each of the two complainants.

3. In the Central Criminal Court, there was an application for severance to the judge in charge of the list. That application was unsuccessful. In the aftermath of this, a count of sexual assault was added to the indictment in relation to one of the complainants by the prosecution, in relation to which the accused entered a plea.

4. When a judge was assigned to preside over the trial, there was a renewed application made for severance. At that stage, the situation was that, in the case of one complainant, a plea of guilty to the count of sexual assault was proffered by the appellant, and we infer that the decision to add a count of sexual assault and the decision to accept the plea to it were related to a perceived difficulty in proving penetration. In circumstances where it was clear, as a result of the

plea of guilty that had been entered, that untoward sexual activity had taken place, and where there had never been any question – indeed, it was beyond question – that whatever had taken place in the car, took place at a time when the complainant was not in the car willingly, the logic of pleading to one count, while continuing to contest the other, was not immediately apparent. This second application for severance was equally unsuccessful.

5. In the course of the trial, the Court heard from the complainant in respect of whom both counts were being contested. The jury returned unanimous guilty verdicts in relation to these counts. In relation to the second complainant, she gave her direct evidence, but before she was cross examined, a plea of guilty was entered in relation to the remaining account, that being the count of false imprisonment. The sentence hearing took place on 13th December 2021; by that stage there had been a change of legal representation on the part of the appellant, and in the usual way the sentencing Court heard a summary of the evidence that was given at trial. By reference to what was said in that regard, it can be said that the background facts to the trial and the sentence hearing are as follows.

The First Incident

6. The first incident occurred on 14th February 2016, and the incident was said to have occurred on the Old Bawn Road in Tallaght. The injured party in relation to these offences was a Canadian, she was twenty years of age, and she was on a short visit to Ireland to visit a friend who was studying here. On the evening of 13th February, the complainant, the friend she was visiting, and some other young women, some Canadian and some Irish, decided to go into the city centre to socialise there. The group involved visited several bars in the Temple Bar area. Around closing time, which was 2am, the injured party became separated from her friends – at that point her phone was low on charge – and she decided to get a taxi to bring her back to the student accommodation in University College Dublin, where her friend was staying.

7. At that stage there is a period of time of which the complainant cannot remember; in fact, her next memory was waking up in backseat of car, with a man sitting beside her. That man was the accused, now the appellant, and he was naked from the waist down; his trousers and underpants were around his ankles, and the injured party realised she did not have her own underwear on. She tried to find them, but she could not, and she tried to get out of the car, but the door was locked. She shouted to be let go, but the appellant said he wouldn't let go when she was angry. He climbed on top of her and was rubbing his penis on her crotch area. She tried to scratch his face, but he penetrated her vagina with his penis, and he ejaculated. At one point when all of this was going on, the accused called her a bitch. He indicated something along the lines of that he was unhappy with the way she was behaving. Prompted by this, she came up with a strategy: she stated that if he wanted her to be happy, he should let her ring or text her mother, and that strategy worked to the extent that the appellant let the complainant out of the car.

8. The complainant made her way to the nearest road, which turned out to be Old Bawn Road in Tallaght. There she hailed a taxi. Her first thought was to ask him to bring her to where her friend was staying, but the taxi driver, Mr. Gerard Wilson, very responsibly indicated that a more appropriate course of action would be to bring her to a Garda station, and this is in fact what happened. They went to Tallaght Garda Station. It was 7am when they arrived at the Garda station. At Tallaght Garda Station, an investigation commenced, contact was made with the Sexual

Assault Treatment Unit, swabs were taken, and a DNA profile was obtained. At that stage, the profile was recorded as being that of an unidentified male.

9. Just a word more about the first incident, it is the case that the footage from the Temple Bar area showed the appellant walking 30 seconds behind the injured party in the Essex Street area before approaching the injured party.

The Second Incident

10. In relation to the second incident, this occurred on 24th February 2019, some three years after the first incident. In this case, the injured party went to the Temple Bar area with a friend, and they did so with the view to meeting up with other friends. There was some discussion among the group about going on to a house party, but the injured party made the decision not to do so. She was the mother of a young child and wanted to get back to him, so she parted company with the group, making her way to the Christchurch part of the city. Of note is CCTV footage that was obtained which showed her walking briskly through the city centre. At Christ Church, she got into what she thought was a taxi, and she asked the taxi driver to take her to an inner-city south Dublin suburb, where she was living. At a point in the journey that followed, she became anxious, it appeared that a turn she indicated should have been taken was not taken, and it became apparent to her that the lock on the door had been put down. At that point, there is a period of time that the injured party cannot remember. It is a concerning feature of both cases, that both complainants experienced a period of time from which they have no memory. That concern is heightened in the case of the second complainant, by reason of the fact that there is CCTV evidence that shows her walking briskly and confidently through the city centre area.

11. The complainant is in a position to say that the car driver was out of the car, and indeed, it appears at this stage the complainant made an attempt to start the car and drive it, but was unsuccessful in that regard, as at that stage she was an inexperienced driver. The driver got back into the car, climbed on top of her and proceeded to fumble with her clothes.

12. At the sentencing hearing, the fumbling of the clothes was not the sexual assault with which the Court was concerned, and, ultimately, the complainant succeeded in getting out of the car at a location close to a south Dublin inner city suburb, an area close to her home, and arrived there at 7am, having separated from her friends around 3am.

13. The complainant, encouraged by her mother, reported the incident to the Gardaí. Once more, DNA evidence was obtained upon taking a swab from the vulva area and also from the area of the lips and mouth of the complainant. The DNA profile was obtained, and at that stage it was recorded that the profile matched that of an unidentified male, but, very significantly, the profile matched that that had been obtained in the incident three years earlier. There was a development in 2019, when the two matching profiles were identified as matching a profile on record in Austria.

The Appellant's Background

14. In terms of the appellant's background and circumstances, he was a Romanian national, who had been living in Ireland since around 2009; it appears upon arrival in Ireland he had experienced a period of homelessness and had sold 'The Big Issue' newspaper for a period.

15. Five convictions in all were recorded, and four of these took place in Ireland, none of which were of any real significance as all but one were offences under the Road Traffic Act 1961, as

amended, and the other one was for a theft matter. However, there was a conviction recorded from 2011 in France, in the Beziers area, in respect of the offence of sexual assault. In relation to this, a sentence of six months fully suspended was imposed. Somewhat unfortunately, no further information was put before the Court as to the surrounding circumstances relating to this offence.

The Sentence

16. In the course of the sentence hearing, two extraordinarily powerful victim impact statements were put before the Court. In the case of the Canadian injured party, that statement was read to the Court by Gardaí on her behalf, while the Irish injured party read her own statement. It is clear from both statements how profoundly affected both victims were.

17. During her sentencing remarks, the judge in the Central Criminal Court addressed what she felt were the aggravating factors and mitigating factors. As far as aggravating factors were concerned, she referred to these as being the serious nature of the offence involving the intimate violation of the victims; the circumstances of the offending behaviour whereby the victims were locked into a car; their phones were taken from them for the purpose of perpetrating sexual acts upon them, and, she considered, the length of time both of the women were detained. Another aggravating factor was that the two women were preyed upon when they were by themselves late at night in Dublin city centre. Finally, she referred to the previous conviction for the sexual assault in France.

18. As far as the mitigating factors were concerned, she referred to the fact that it was asserted that the plea of guilty to the charge in respect of the second complainant was a mitigating factor; however, the judge said that the second victim had little recall of the sexual assault that had been perpetrated upon her, and the plea of guilty alone, prior to the commencement of the trial, was of very little benefit to this complainant, as she was never going to be challenged about her assertion as to what occurred about the sexual assault as she had no recollection of this. She said that the plea of guilty in relation to the false imprisonment charge came at the conclusion of the complainant's direct examination; it was at a very late stage, but the consequence was that the complainant was relieved of having to be cross-examined about these matters, and, accordingly, she felt that some credit should be given in relation to this, but that it was of a very small degree.

19. Now, in relation to the offences towards the first complainant, the judge felt that the false imprisonment was in the mid-range of seriousness. In relation to the offence of rape, the judge made reference to the decision of the Supreme Court in *DPP v. FE* [2019] IESC 85 and drew assistance from it. The Director had submitted to the Court that the case fell within the second category referred to, and that therefore a headline sentence in the range of 10 to 15 years would be expected. The sentencing judge indicated that she agreed with the Director in relation to where the offence should be placed and proceeded to nominate a headline sentence of 13 years imprisonment. The judge was of the view that there were no mitigating factors in relation to the offences committed against the first complainant.

20. In the case of the second complainant, the Irish complainant, the Court considered the false imprisonment charge fell on the upper end of the midrange of seriousness and nominated a headline sentence of nine years and then proceeded to reduce this by three months, reflecting

what she described as a "very late guilty plea". In turning to the offence of sexual assault, the Court concluded that the offence fell at the upper end of seriousness on the scale. Despite the exact events not being known, the Court felt, by reason of the semen traces that had been located, that an inference could be drawn that the appellant had placed his naked penis against her vulva and also against her mouth. She nominated a sentence of nine years as being the appropriate headline or pre-mitigation sentence and then proceeded to reduce this by three months, once more reflecting the late plea.

21. She indicated that, given the offences had occurred three years apart, there was a clear case for consecutive sentences, but in order to address the totality principle she was going to impose a sentence of ten years imprisonment in respect of the rape count with regard to the first complainant, and lower the concurrent false imprisonment count involving that complainant. In respect of the second complainant, a sentence of seven and a half years imprisonment, again with a lower concurrent sentence for the false imprisonment account, was imposed.

The Appeal

22. Following the conviction and sentence, the appellant lodged an appeal against conviction and sentence, but when the matter was listed for hearing today, he proceeded only in terms of the sentence appeal, indicating that the conviction appeal was not being pursued.

23. The appellant contends that the sentence imposed was unduly severe and was one with which this Court should interfere. Counsel for the appellant suggests that, upon analysis of the cases referred to, namely *FE*, that the present case should have been placed in the lower of the two tiers, and if not the lower tier, could certainly be placed at a point on the scale less than the sentences imposed, in particular, less than the identified headline or pre-mitigation sentence of 13 years in respect of the rape case. He contends also that inadequate credit was given for the plea; while he acknowledges that it could not, by any stretch of the imagination, be considered an early plea, he says that it was deserving of greater credit. Again, he says, while the totality principle was addressed, that more could and should have been done in that regard.

Discussion and Decision

24. In this Court's view, this was offending of the utmost seriousness. Taking the view of the events most favourable to the accused, two vulnerable women were falsely imprisoned over a period of several hours, and during that period of false imprisonment, were subjected to sexual assault. In one case, the assault amounted to and was characterised as rape. In the other, the sexual assault was of a very serious nature indeed and has to be seen as right on the cusp of rape and s. 4 rape contrary to the Criminal Law (Rape) (Amendment) Act 1990. We have referred to the fact that both complainants have a lack of memory for a period during the incident and this is a disconcerting feature of the case. The incidents show a degree of pre-meditation; in the case of the earlier incident in time, the CCTV evidence had shown the accused walking behind the complainant and approaching her.

25. In these circumstances, the Court has to ask itself whether it is the situation that the headline sentences identified were erroneous, and this Court cannot conclude that they were. So far as the plea is concerned, it is the situation that a plea was entered in respect of sexual assault

of one of the complainants, but the entry of that plea was, as the trial judge pointed out of very little, if any, value. Notwithstanding the entry of the plea, the injured party had to prepare herself for trial, on the basis that at trial she would be required to give evidence. This is something which in fact proved to be the case, because it was only after the injured party had given her direct evidence that a plea was entered on the outstanding count.

26. Overall, it seems to us that it has not been established that any error in principle arises in relation to the identification of the headline sentences. It is clear that account was taken of the totality principle. We note that it is contended on behalf of the appellant that more could and should have been done in that regard, but it is clear that the sentencing judge was very conscious of the need to have regard to that principle and did in fact have significant regard to it. In relation to the plea, we have already pointed out the circumstances in which the pleas to the two counts in relation to that complainant were entered. The fact that, even after a count of sexual assault was entered, the complainant was still left in a situation where she had to prepare to come to court and then come to court on the basis that she would be required to give evidence.

27. It is undoubtedly the situation that the sentence imposed was a significant one but conduct of this nature is required to be met with a very significant sentence. We have often made the point that before that, for this Court will intervene, something in the nature of an error in principle must be established, and that it is not sufficient to trigger intervention on the basis that one or more members of the Court, or even the Court as a whole, would have been minded to impose a somewhat different sentence if called on to sentence at first instance.

28. In this case, we are satisfied that the sentence imposed was a severe one. However, while severe, it was one that it fell within the judge’s margin of appreciation. Accordingly, with no error in principle being identified, we must dismiss the appeal.