THE COURT OF APPEAL

133/2019

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

B.M.

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 14th day of October 2019 by Ms. Justice Kennedy

1. This is an application brought by the applicant seeking review of sentence pursuant to s.2 of the Criminal Procedure Act 1993. The applicant pleaded guilty to a count of sexual assault contrary to s.2 of the Criminal Law Rape Amendment Act, 1990 and received a sentence of seven years' imprisonment with the final year suspended for a period of two years. This was subsequently varied on appeal to a period of seven years' imprisonment with the final two years suspended on terms.

2. The background to the case is that on the 29th April, 2014, the complainant EC arranged to meet the applicant BM, a former boyfriend of hers. EC was sixteen years of age at the time and the applicant was nineteen years old. He picked her up close to her home in his car and at that stage, he was accompanied by another male who was unknown to EC. They drove around to various locations for several hours and then she was dropped home. They made plans to meet up later at around 6pm at which point they drove around again. Eventually they went to a particular location and the complainant was given alcohol. She became increasing intoxicated and at this point the applicant attempted to have sexual intercourse with her on a number of occasions, but was unsuccessful due to her intoxication. The other man who was also present attempted sexual intercourse.

3. Later on, the applicant, BM, went to a location close to where he had collected the complainant and left her there. He pulled her out of the car and left her unconscious on the footpath and in a state of undress. He took her shoes and socks and items of clothing and threw them on top of her and then he drove off at some speed. The complainant EC was discovered by members of the public and she was in a hysterical state.

4. The applicant was interviewed on the night of the incident. He made no admissions regarding the sexual assault. A few months later, he was again interviewed and he admitted trying to have sexual intercourse with EC, but he stated that he did not force her. The applicant ultimately then pleaded guilty on the 24th November, 2015.

5. At the sentencing hearing of the 5th May, 2016 Detective Garda Caroline Keogh gave an account of the factual background. In cross examination she accepted that EC had

reverted from her original statement to the Gardaí in relation to several aspects of the incident: -

> "Q. Now just I mean Mr-- the defendant has admits and admits all of these sexual assault and all of the circumstances of, you know, in that respect, but isn't it correct that the initial account that was given in certain respects was a bit unclear by the complainant in that she initially said she was dragged into the car I think, isn't that correct?
>
> A. That's correct, yes.
>
> Q. And later that was changed to the fact that she had met by arrangement. Now, that was the initial complaint that she made at the scene?
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> A. It was.
>
> Q. And that -- then subsequently, also at the scene she said she had been given a can to drink and then when she told that the Gardaí and then when she went to the sexual assault examination, it was a bottle the size of red lemonade and then when it came to taking a statement it was a bottle, a large bottle of Coke which had the alcohol in it. So in certain respects she was a bit confused as to whether had actually gone on in various details?
>
> A Yes."

6. In imposing sentence, the sentencing judge placed the offence at the upper end of the scale of gravity and identified a pre-mitigation sentence of ten years' imprisonment. In mitigation the sentence was reduced to one of seven years' imprisonment with the final year suspended. The sentencing judge referred to the applicant's early plea of guilty and his lack of relevant previous convictions.

7. The applicant then successfully appealed against the severity of his sentence before this Court, and this Court varied his sentence on the basis that the sentencing judge did not have sufficient regard to the applicant's remorse in light of compensation offered by him as a person of limited means.

8. Before coming to this conclusion, the Court dismissed a number of other grounds raised by the applicant including that the sentencing judge had failed to resolve factual conflicts which arose during the course of the sentencing hearing. This ground related primarily to the conflict regarding who had provided alcohol to the complainant. The

Court dismissed the point in the following manner:-

> "There will be many cases where what is an issue is a difference of emphasis or where there may be nuanced differences present and it will, sometimes be the case, that an accused will not want to address those issues overly directly lest in so doing it undermines the value of a plea. In this case the judge had referred to the issue of

alcohol only as follows:-'The victim was given alcohol'. There is no indication whether it was the appellant or the other male who was present and no suggestion that the complainant was coerced into taking alcohol. In those circumstances the Court does not see this point about failing to resolve the controversy about alcohol as the point of major substance."

9. The Court also considered a reference to the sentencing judge of the touching of the vagina and digital penetration. This Court accepted the applicant's argument that there was no evidence of such in the case, but the Court noted that this was not a point of substance given that the assault involved repeated attempts at sexual intercourse. The Court stated that it was an inescapable conclusion that the incident involved touching and interference with the complainant's vaginal area.

Submissions of the applicant

10. The applicant submits:-

(i) If the sentencing judge had been aware of the newly-discovered facts listed above, this would have had a material and important influence on the result of the case.

(ii) If the sentencing judge or the Court of Appeal had been aware that the complainant had lied in her first statement to an Garda Síochána this would have greatly weakened her credibility and would have resulted in the factual disputes in the case being decided in the applicant's favour.

(iii) In particular, the applicant refers to the issue raised on appeal regarding the touching and digital penetration of the complainant's vagina and submits that the Court would have decided this point differently if the unreliability of the complainant's evidence had been apparent.

(iv) Sentence was imposed partly on inaccurate facts and should not be allowed to stand in the face of such inaccuracy.

(v) The applicant refers to several cases which highlight the importance of accuracy in the sentencing process including The People (DPP) v. Cambridge [2019] IECA 133 where the accused's sentence was reduced on appeal in circumstances where it transpired that the sentencing judge had been misled in respect of evidence adduced regarding the accused's convictions.

Submissions of the respondent

11. The respondent accepts that the account of the complaint given at the sentencing hearing regarding the provision of alcohol differed from the account given at the trial of the applicant's co-accused. However, it is submitted that this difference is neither material nor new ad this issue has been effectively considered in the judgment on appeal.

12. The respondent submits:-

(i) The facts raised by the applicant were not material to his sentencing.

(ii) The culpability of the applicant remains the same in circumstances where it is accepted by him that he had been known to the complainant and had sexually assaulted her in the backseat of his car while she was intoxicated and had left her on the side of the road near her home afterwards.

(iii) The fact that the complainant had given differing accounts of what had happened had been acknowledged at the sentencing hearing and does not constitute new evidence.

(iv) That there has been no unfairness in the applicant's sentence as none of the matters of fact relied on by the applicant would make any material difference to the applicant's sentence.

Newly discovered facts

13. In October 2018, the trial of the co-accused concerning an allegation of sexual assault of EM commenced. EM gave evidence on the 30th October, 2018. It appears that the jury was discharged in that trial for a reason unconnected to her evidence and the trial then resumed in November, 2018. However, the basis for this application arises from the October trial and the contention of the applicant that several facts emerged during the course of the complainant's testimony in that trial. These include that the complainant lied in her first statement to the Gardaí, that the co-accused was the chief aggressor and the prime mover as regards the sexual assault and that it was the co-accused who provided the alcohol and forced her to drink it.

14. Specifically, it is contended in the statement grounding this application that the complainant described the co-accused as having instigated the sexual abuse and as being the first of the two men to have so engaged with her. We will now address the latter argument.

15. Section 2(1)(b) of the Criminal Procedure Act, 1993 makes provision for a review of sentence where a person alleges that a new or a newly discovered fact demonstrates that there has been a miscarriage of justice so that the sentence imposed is an excessive one. The issue for the Court to determine is as to whether there is a new or a newly discovered fact and if so, whether there has been a miscarriage of justice.

16. Firstly, we should say that in oral hearing, Mr Monroe SC for the applicant, quite properly, in our view, abandoned any suggestion that BM's culpability is lessened by the possibility that he was the second person to sexually assault EC.

17. The second argument is that the applicant states that the complainant alleged that she had never agreed to sex whereas the applicant had indicated the contrary. In furtherance of this proposition it seems that the applicant relies on the complainant's agreement in cross examination at the trial of the co-accused that she had lied in her first statement. However, on a careful scrutiny of the transcript of the 30th October, 2018, the lies in her statement to the Gardaí primarily concerned the question of the provider of the alcohol.

This conflict, that is as regards the provision of alcohol, was raised in the sentence hearing in July, 2016 and on appeal on the 9th May, 2017 where this Court found:-

"the areas where it is alleged that there is conflict of fact that were unresolved to be found primarily in the area of the provision of alcohol for the complainant and also in terms of who first raised the question of having sex."

Having considered this aspect of the sentence appeal, this Court said:-

"So far as the point about the fact that the complainant first raised the issue of sex is concerned, it is not clear just what the extent of the point being made here is. If it is suggested that the sexual activity that followed was consensual as seems to have been what was said by the appellant at interview at one stage, then this is inconsistent with the plea of guilty entered. If, on the other hand what is suggested is merely that a drunk sixteen-year-old raised the issue of sex then the Court would not see this as a matter of great significance".

18. There is nothing on the material insofar as this Court is concerned which has been produced before this Court today which has the effect of altering this position, and in fact Mr Monroe, on behalf of the applicant, accepts this issue was determined by this Court on appeal. The contention, as to who first raised the issue of sexual intercourse, was raised at the sentence hearing, it was argued in the course of the appeal before this Court, and there does not appear to us to be anything on the evidence disclosed of the 30th October, 2018 which alters that position.

19. Even if we are incorrect on this, we are very conscious that the applicant pleaded guilty to the offence of sexual assault and if the argument is being advanced that a drunken girl first raised the issue of sexual intercourse in some way lessens the gravity of this particular offence, we do not find this to be so. Moreover, it cannot be forgotten that this was a case of joint enterprise.

The Provision of Alcohol

20. The applicant argues that this is a newly discovered fact as the complainant altered her version of events in the course of giving evidence subsequent to the applicant's sentence and appeal. In this regard it is contended that she agreed that she lied, and that she placed the blame on the applicant's co-accused for giving her the alcohol. This is indeed the position considering the transcript of the 30th October, 2018. Mr Monroe argues the acceptance of lies impacts on the entirety of her evidence.

21. It is the position that there was no Newton hearing on this issue before the Circuit Criminal Court although it was raised at the sentence hearing. The matter could have been litigated by way of a Newton hearing and this was not done. Mr Monroe contends that the acceptance of lies distorts the entirety of the sentencing process and should be viewed in that particular respect. It must be noted that there was, and we repeat, a plea of guilty to sexual assault. The point now argued is that the issue of the provision of

alcohol is a newly discovered fact which is of significance so as to render the sentence imposed by the Circuit Court judge excessive.

22. This is an issue which was capable of being discovered at the sentence hearing, and the applicant cannot therefore satisfy the provisions of the 1993 statute.

23. It is also important to look at the words of the sentencing judge in the Circuit Criminal Court where he indicated that:- "the victim was given alcohol"

24. The fact that the complainant now says that the co-accused gave her alcohol must be viewed in the context of the situation where both men were involved in sexually assaulting this young girl, and where alcohol was provided to her on the evening in question, and so even if it were a newly discovered fact, it is difficult to see how this would reduce the culpability of this offender.

25. It is also the position that the trial judge referred to the provision of alcohol, as outlined above, in neutral terms and proceeded to sentence on that basis.

26. The issue as to who provided the sixteen-year-old with alcohol is not sufficient to demonstrate that there has been anything even approaching a miscarriage of justice justifying an intervention in sentence pursuant to statute, and accordingly this application is dismissed.