THE COURT OF APPEAL

Appeal No. 150/22

Edwards J.
Whelan J.
Donnelly J.

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

RESPONDENT

AND

C.S.

APPELLANT

JUDGMENT of the Court delivered on the 1st day of December 2022 by Ms. Justice Donnelly

BACKGROUND

1. The accused was convicted by a jury of one count of sexual assault. He was sentenced to eighteen months imprisonment with the final three months of the sentence suspended on entering into certain conditions. He appealed his conviction and sentence, and this judgment covers both his conviction and his sentence appeal.

2. The sole ground of appeal filed in relation to his conviction was that in all the circumstances of the case, the verdict was perverse and/or contrary to the weight of the evidence.

SUMMARY OF FACTS

3. The appellant went on trial on indictment in respect of two counts. The first count alleged another serious offence of which he was acquitted by the jury.

4. The appellant was a man in his thirties at the time of the incident giving rise to the conviction. On the evening before the incident, the appellant and the victim had been socialising with mutual friends at an event in the Dublin city centre and later, in a pub. They talked and kissed before they left by taxi to go to the home of the appellant. Both the appellant and the victim had consumed alcohol during the evening.

5. In the flat, the kissing continued and thereafter consensual sexual contact occurred in the bedroom of the appellant, including digital and oral penetration of the victim by the appellant. The victim gave evidence that the appellant asked her to perform oral sex on him, but she had refused. She gave further evidence that the appellant indicated that he wished to "ejaculate inside [her]". She said "I made it clear even though he asked again, that he wanted to have sex, and I made it clear that I didn't want to. I suggested at one point that

we would wait until the morning where if we decided to, that we could get condoms, I suppose, at that stage in the morning".

6. The victim gave evidence that she then fell asleep in the bed. She woke up "to the weight of [the appellant] on top of [her] and he was at that point groping [her] breasts". When asked if she consented to him lying on her or groping her in that way, and moving his hand around her body, she answered "[a]bsolutely not. [She] was asleep". The victim asked the appellant to stop and to get off her, and he did so.

7. She also gave evidence during the trial that she had fallen back to sleep and had again been woken by an incident in respect of which the first count was laid.

8. The appellant gave a voluntary statement to the Gardaí under caution. He agreed that he engaged in the consensual sexual activity outlined above. His statement did not acknowledge the conversation about not having sexual intercourse. He said that the victim was attempting to masturbate him, but he could not get an erection. He said he "fell asleep but awoke later and wanted to resume the sexual activity we were engaging in before we went asleep. She was asleep so I attempted to wake her. I started to kiss her and got on top of her but still didn't have an erection. She then asked me to stop and I did." He denied any activity occurred which formed the basis of the first count laid against him.

9. After the victim dressed, the appellant drove her home. On returning home, the victim immediately told her friend and housemate what had occurred. This friend gave evidence of the state the victim was in when she arrived home and described her as upset and shaking.

10. During that day, a number of phone calls were made, and text messages were sent and received between the victim and the appellant, where the victim expressed her upset at what had occurred. The appellant was invited to the house of the complainant later that evening where they discussed the matter for an hour alone in her bedroom. Further text messages followed that evening. Thereafter there was no further contact between the appellant and the victim.

11. Evidence was given of the victim's attendance at counselling and her subsequent report to An Garda Síochána approximately eleven months after the incident.

The attitude taken at the sentence hearing

12. It is of some significance that at the sentence hearing, senior counsel on behalf of the appellant, having referred to the appellant's statement to the Gardaí, submitted the following as part of the plea in mitigation:

> "He put before them his understanding of the events of that evening, the jury took their view, we respect the verdict of the jury, and that is an important aspect in the sentencing process…"

Counsel went on to rely on letters where the appellant had expressed remorse and regret for the matter.

13. At the end of the plea in mitigation, the trial judge adjourned the matter for sentence. On the adjourned date, the trial judge did not deliver sentence, but she sought a Probation Report. It was only when this was received that it became apparent that the appellant was not accepting the verdict but was expressing regret that the incident had caused upset and unhappiness.

THE APPEAL AGAINST CONVICTION

Written Submissions

14. The written submissions of the appellant were directed towards establishing that the verdict was perverse. It was accepted that exceptional circumstances were required before a jury verdict may be regarded as perverse. A good synopsis of the law is found in *DPP v Cecil Tomkins* [2012] IECCA 82 (MacMenamin J.) at para 21:

> "Thus, this court will be very slow to intervene where it is satisfied that a judge has placed all relevant matters before the jury, and has fully and properly instructed them as to the burden and standard of proof. However, an appeal court may intervene if the judge's direction to the jury is inadequate either concerning witness credibility, or some matter of law. This is entirely distinct however, from finding fault with the verdict of the jury (see O'Malley, The Criminal Process, Roundhall 2009 para 23.12 and 23.13). This court will only quash a decision as being perverse where there are very serious doubts about the credibility of evidence which was central to the charge, or where a guilty verdict, even by a properly instructed jury was against the weight of the evidence. (See DPP v Quinn 23 March 1998 CCA; DPP v Morrissey CCA 10 July 1998). In assessing this point the court will look at all the evidence which was before the jury, not selected portions of that evidence."

15. The appellant's written submissions were entirely directed at attempting to establish that the jury's determination (beyond a reasonable doubt) that the appellant did not honestly believe that the complainant was consenting was, in all the circumstances, perverse and/or contrary to the weight of the evidence. These written submissions were filed by the same solicitor and junior counsel that had represented the appellant at the trial, and by a different senior counsel who was representing the appellant at the conviction/sentence appeal. These submissions reflected the manner in which the trial had been run.

16. At trial, senior counsel for the appellant had raised with the jury the question of whether the appellant had an honest belief that the victim was consenting at the time he woke her up. The trial judge was requisitioned by the prosecution, which requisition was adopted by the defence, to recharge the jury on the issue of honest belief. The trial judge duly did so and there is no complaint about that aspect of her charge.

Submissions made at the hearing of the Appeal

17. At the oral hearing of the appeal, senior counsel for the appellant raised for the very first time an entirely different issue. He submitted that because of the course of conduct between these two individuals, there was, in fact, no assault because there was an implied consent

for the appellant to engage in sexual activity with the victim, even while she was asleep. In presenting this new argument, counsel sought to characterise it as a basis for arguing that there was a "perverse verdict", although he acknowledged it was not an argument made at trial. Counsel for the DPP objected to this course of action and submitted that this was an entirely new ground of appeal, raised for the first time in oral submissions and without any opportunity for the DPP to prepare. Counsel for the DPP submitted that this was a case in which the principles set out in *People (DPP) v Cronin (No.2)* [2006] 4 IR 329, [2006] IESC 9 applied.

18. The Court rose to consider that point. On return, the Court gave a ruling that in accordance with the *Cronin (No.2)* jurisprudence, it was not disposed to allow the point that counsel for the appellant now sought to raise. This was not raised at trial, on the contrary it was accepted at trial that there could have been no consent if she was asleep and, furthermore, it was not a ground raised in the notice of appeal. The Court was not satisfied to exercise its discretion to admit this ground. The Court said it would expand upon this reasoning in its judgment.

The rejection of the new submission at the hearing of the appeal

19. In order to understand the ground originally raised as well as the argument sought to be made for the first time at the hearing of the appeal, it is necessary to make reference to s. 9 of the Criminal law (Rape)(Amendment) Act 1990 and to the specific amendments brought about by the enactment of s.48 of Criminal Law (Sexual Offences) Act 2017 by which the following was substituted for section 9:

(1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.

(2) A person does not consent to a sexual act if—

(a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,

(b) he or she is asleep or unconscious,

(c) he or she is incapable of consenting because of the effect of alcohol or some other drug,

(d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,

(e) he or she is mistaken as to the nature and purpose of the act,

(f) he or she is mistaken as to the identity of any other person involved in the act,

(g) he or she is being unlawfully detained at the time at which the act takes place,

(h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.

(3) This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.

(4) Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.

(5) Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.

(6) In this section—

'sexual act' means—

(a) an act consisting of—

(i) sexual intercourse, or

(ii) buggery,

(b) an act described in section 3(1) or 4(1) of this Act, or

(c) an act which if done without consent would constitute a sexual assault;

'sexual intercourse' shall be construed in accordance with section 1(2) of the Principal Act.".

20. Per this legislation, the trial judge was specifically asked by the prosecution to tell the jury that a person does not consent if they are asleep or unconscious. Counsel for the appellant submitted that "[he did not] have any difficulty with section 9, it is what it is." Counsel for the appellant went on to say that the specific defence in relation to sexual assault, the honest belief defence, arose, and he asked the judge to specifically indicate to the jury that a person who holds an honest belief is not guilty. As stated above, the trial judge acceded to that request.

21. At the hearing of the appeal, the current senior counsel submitted that there could be no question, *as a matter of law*, of an honest belief arising because the belief had to be that the complainant was actually consenting at the time of the sexual activity. His submission was that as the appellant was aware that she was asleep, he could not have an honest belief that she was consenting because the law was clear that she could not consent. This submission, in so far as the Court understands it, appears to be based upon the maxim "ignorance of the law is no excuse". It is not necessary for the Court to decide if that represents the true position at law because it was, at most, a submission made in explanation as to why counsel was contending for an entirely different ground on which to find "perversity". This Court will later in this judgment deal with the written submissions placed before the court in respect of the perverse verdict but first the Court will give its reasons for refusing to hear this new argument.

The Judgment in *People (DPP) v Cronin* (No 2)

22. The principles identified in *People (DPP) v Cronin (No. 2)* are by this time well known to criminal legal practitioners. In his judgment, Kearns J., in addressing the situation where a point not taken at trial was sought to be argued for the first time on appeal, stated:

> "It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial and the rulings made therein, and not with other suggested errors or oversights which may pre-date the trial or have been amenable to remedy in some other manner.
>
> Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J when this case was in the Court of Criminal Appeal, this court should abhor the practice and strongly discourage it." (para 24-25 of [2006 IESC 9, para 46-47 of [2006] 4 IR 329)

Decision and Analysis

23. The importance of the relationship between the trial and the appeal was stressed by both the Court of Criminal Appeal and the Supreme Court in *People (DPP) v Cronin (No 2)*; the appeal must not be disconnected from the reality of the trial. The reality of this trial was that no argument was made to the trial judge (nor to the jury) that it was open to them to consider that there was no assault because the course of conduct between the victim and the appellant earlier had given implied consent to the appellant to engage in activity of a sexual nature with her (short of vaginal penetrative sex) even if she was asleep. There was also no explanation given to this court as to why this argument was not made at trial, and no criticism was made of counsel at the trial during the course of the appeal hearing (indeed the solicitor and junior counsel acted in both the trial and the appeal). This was a novel point that was only identified by the new senior counsel after he had settled written submissions but was preparing for the appeal hearing. It is a proposition that bears no relationship with any defence ground advanced at the trial. Such belated reconstruction of the grounds of appeal is not to be encouraged.

24. This Court has, however, an overriding duty to ensure that there was no oversight of substance that would risk an injustice being done. There are a number of examples of cases where despite a point not being raised at trial, the appellate courts have overturned the conviction. An example is that of *People (DPP) v Forsey* [2018] IESC 66, where the issue was a fundamental one relating to the core constitutional principle of the presumption of innocence. For the purpose of ensuring that there is no risk of an injustice being done and

for that purpose only, it is necessary to look in a little more detail at the issue being raised by the appellant to see if it comes into a category where it ought to be considered.

25. It is immediately apparent that the point raised by the appellant was an entirely novel one; that the course of conduct between parties prior to the impugned sexual conduct could amount to an implied consent to sexual activity despite the clear wording of s.9 of the Criminal Law (Rape)(Amendment) Act 1990 as amended. It does not relate to a failure to apply the correct burden of proof or to ensure that the jury were warned of fundamental issues such as the presumption of innocence. Instead, it was a submission that was entirely based upon the following excerpt from Charleton, McDermott et al, *Charleton & McDermott's Criminal Law and Evidence* (2nd Ed) (2020, Bloomsbury Professional):

> "An assault occurs where the accused, intentionally or recklessly, causes force to be applied to the body or clothing of the victim. The force to be applied to the victim does not have to be violent. Kissing or touching another, who does not invite such conduct, expressly or by their behaviour, is an assault.[106] Traditionally the protection of the law, in tort and crime, has been against the least trespass to the person.[107] This is misleading. Life would be impossible if every trifling contact constituted a crime. Every person is, by living and moving about in society, taken to consent to such minimal contact as is necessary and usual to perform the tasks of everyday life. Hence, it is not an assault to seek the attention of another by tapping his or her shoulder.[108] Robert Goff LJ in Collins v Wilcock put the boundary where social contact ends and an assault is committed in these terms:
>
> [M]ost of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped.[109]
>
> While these may be regarded as examples of 'implied consent', he noted that it was more common to 'treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life.[110]

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106 And may be an indecent assault; Leeson (1968) 52 Cr App R 185. See further paras [11.147]– [11.154]
107 Power v Cook (1869) IR 4 CL 247; Dullaghan v Hillen [1957] Ir Jur Rep 10.
108 Donnelly v Jackman [1970] 1 All ER 987, Phillips (1971) ALR 740, 746.
109 Collins v Wilcock [1984] 3 All ER 374, 378.
110 Collins v Wilcock [1984] 3 All ER 374, 378."

26. The passage above clearly refers to the type of everyday interactions that occur as a matter of course in ordinary life. The examples given are all interactions of an everyday physical type where people move about in the course of their daily lives. None of the examples relate to a sexual assault, which is an assault in circumstances of indecency. Counsel for the appellant failed to identify any relevant authority for the proposition he advanced nor any case in which his argument had even been considered. Therefore, this was an entirely novel point being advanced for the first time on appeal and, it must be said, one which was stretching the concept of trifling contact beyond established precedent and principle.

27. Counsel for the appellant submitted that there was no assault (or at least that the jury should have been told that it was possible to conclude that there was no assault) because what occurred here was to be treated as falling within a general exception embracing all physical (and sexual) contact which is generally acceptable in the conduct of "adult daily life". His submission was to the effect that, by engaging in consensual sexual behaviour short of vaginal penetrative sexual intercourse and by falling asleep in bed together, subsequent sexual activity of a lesser nature than vaginal penetrative sexual conduct fell into that general exception. Therefore, the subsequent sexual touching of her by the appellant while she was asleep could be considered, if so viewed by the jury, contact which is generally acceptable in the ordinary conduct of daily adult life and which could not amount to an assault. This is, to say the least, a startling submission. If taken to its limit, it is difficult to see how any person could be convicted of any sexual offence in a previously consummated long-term intimate relationship; if correct, there would be an implied consent to all further sexual activity even when asleep (in the absence of a specific instruction to the effect that there was no consent). On its face, it seems to ask this Court to ignore the clear terms of the amended s.9 of the 1990 Act. Counsel submitted however, in pointing to features of this case such as the prior sexual contact, the expressed intention to revisit the issue of intercourse in the morning and that the sexual contact was with a view to waking her, that the exception would be very fact specific; the fact specific nature of the submission only highlights how divorced this appeal point is from the reality of the trial. If the factual situation could ever have reached a point where no assault could be said to have been committed because of an implied consent, this was a point that ought to have been made at trial where judge and jury were in a position to assess all the evidence having heard all the witnesses. It is not a matter which can or ought to be entertained on appeal.

28. It is not necessary for this Court to make a determination that the point raised is one that has no merit. The Court is satisfied however that it is not a point that raises any real risk of an injustice in this case. It is a speculative point of law being raised now for the first time; indeed, perhaps it was not raised at the trial for the very good reason that it might have damaged the appellant's defence overall. We have been given no reason as to why it was not raised. It is certainly not a point of substance to which this Court could say that the verdict was perverse on the evidence before the trial court (and that, after all, is how the appellant has chosen to argue this point). Indeed, counsel's submission was that the law should encompass an implied consent in circumstances like this, but it was a matter for the jury to assess in the overall context of the facts. Clearly if it was a matter for a jury it could not in any way be said to be perverse. We are satisfied to reject this point of appeal.

29. We take this opportunity to draw attention to the recent decision of *People (DPP) v Masznicz* [2022] IECA 237, which was delivered on the 18th October 2022subsequent to our decision to refuse to permit this ground of appeal to be argued on the basis of the principles in *Cronin (No. 2)*. In *People (DPP) v Masznicz*, this Court also applied *Cronin (No 2)* to refuse to allow new grounds to be argued, in circumstances where there was a failure to engage on the appeal with the reality of how the trial was run. We wish to stress that the decision in *Cronin (No 2)* must be addressed by any person who wishes to raise a ground of appeal that does not relate to the reality of what occurred at the trial.

30. We have referred above to the fact that senior counsel for the appellant made a concession that there could never have been a defence consisting of "honest belief in consent" where the appellant was sleeping. He therefore did not move the appeal on the basis of the written submissions. We do not comment on whether this represents the law and we have taken the opportunity of considering in full the written submissions furnished on that issue by the appellant and the replying submissions of the DPP. We are entirely satisfied that there was evidence before the jury that the victim was asleep when the appellant initiated sexual contact with her. This evidence came from the victim herself and from the evidence of the statement made by the appellant to the Gardaí where he accepted that he had engaged in sexual activity (even if he disputed that he was "groping her breasts") with the victim with a view to waking her up. The appellant's state of mind was left as an issue to the jury who were asked to consider whether he had an "honest belief" that the victim was consenting. The jury were entitled to come to the view that they did; that he was guilty of sexual assault. There is no basis upon which it can be said that this verdict was perverse.

31. The appeal against conviction is dismissed.

THE APPEAL AGAINST SENTENCE

32. Evidence was heard at a sentence hearing on the 16th of May 2022. After a further adjournment, to obtain a probation report, the appellant was sentenced on the 26th of July 2022 to a term of imprisonment of eighteen months, the final three months of which were suspended for a period of twelve months on conditions including that the appellant remain under the supervision of the Probation Service for a period of twelve months, that he keep the peace and be of good behaviour for a period of twelve months, that he should follow all directions given to him in relation to therapeutic supports, and that he should participate in and cooperate with offence-related assessment and treatment as deemed appropriate by the Probation Service, to include a therapeutic programme for sexually harmful offending, and that he should cooperate with any recommended vocational development service.

33. The appellant relied on a number of grounds of appeal against severity of sentence. The primary focus in the appeal was on the "headline" sentence, i.e. the sentence that the offence would attract pre-mitigation. Allied to this were submissions that the offence was one which was at the lower end of the scale and which ought not to have attracted such a severe sentence and that, furthermore, that the personal circumstances of this appellant were such that his mitigating factors ought to have resulted in a greater reduction in the sentence also imposed. In written submissions, there was also a significant emphasis on the unfairness of the introduction into evidence of the victim impact report.

The Victim Impact Evidence

34. At the sentence hearing counsel for the appellant took issue with some portions of the victim impact report but submitted that it was the DPP who was putting him in the invidious position of being seen to interfere with victim's rights. Counsel submitted that it was for the DPP to marshal her evidence "within the four corners of the indictment". The appellant was concerned that in describing the impact upon her, the victim was going further than the offence for which the appellant was convicted.

35. At the sentence hearing, counsel for the DPP submitted the following to the trial judge:

> "The victim impact statement is a lengthy document and was originally 10 pages long. Instructions were taken from the Director in relation to the contents of the statement, and the view was that certain matters should be removed but the balance of the material fell on the right side of the Act, bearing in mind that ultimately it's for the Court to decide what weight to attach to the statement. And following a process of engagement with the victim, that redaction has taken place.
>
> I understand where [counsel] is coming from, because, in a case like this where the original allegation was one of [another serious offence] and sexual assault and the verdict of the jury is one of sexual assault, inevitably there was going to be a certain degree of tension between what the victim wanted to say in terms of describing the impact of the event upon her and the verdict of the jury. And ultimately the Court will have to decide what weight to attach to the statement, bearing that in mind. <u>But the position the Director takes is that there is no reality in asking the victim in this to, if you like, parcel out a particular aspect of the impact upon her as being exclusively referable to the sexual assault, because she obviously has a certain belief in her own mind as to what took place on the night in question, in respect of which she gave evidence at trial and stood firm on</u>. And we are all bound by the verdict of the jury, as is [the victim]. <u>But that's where the role of the Court comes in I think in deciding, you know, what the proper context for the statement is and what weight to attach to the statement</u>. But I don't believe anything would be achieved by seeking further redaction of the statement, Judge." (<u>Emphasis</u> added)

36. The victim gave evidence as to the impact upon her. She referred to the impact of the sexual violence inflicted upon her and said that she had been sexually violated while sleeping. She referred to the trauma she had suffered and that she wanted her victim impact statement to form an integral part of the sentencing process. She also referred to the impact of the court process upon her including the delay in the trial process (which was not the fault of the appellant). It is ultimately the appellant's case that the trauma which the victim talked of included trauma that was related to the offence which formed the first count on the indictment which was an offence for which the appellant was acquitted.

37. In her sentencing remarks the judge addressed the issue as follows:

> "I must stress that this Court is concerned with the allegation of sexual assault and the impact of that offence alone, that is the only offence of which the accused person,

[C.S] has been convicted, and this Court must confine itself to allegation of sexual assault and the circumstances surrounding that particular offence."

The Plea in Mitigation

38. Evidence was led that the appellant was now in his late thirties, with a strong work record and was co-operative as to procedural matters and with his bail. He had no previous convictions. He had now lost his job and would be affected by the conviction. It was submitted that this was an offence at the lower end of the scale and was without aggravating features that one might normally see. As referred to above, the sentencing court was informed that he respected the verdict of the jury. He relied upon a number of character references from certain people who stated that he demonstrated remorse. Others who had known him for many years spoke of his good character. Reference was also made to the publicity that would follow him and the serious impact that this would have on him. Submissions were also made in respect of the importance of a suspended sentence in the rehabilitation of an offender.

The Probation Report

39. The contents of the probation report confirmed that the appellant did not accept the verdict of the jury and did not consider that he had committed a sexual assault. It was the appellant's perspective that he did not engage in any further sexual activity with the victim that required her further consent. The assessment of the appellant's static offence related characteristics demonstrated that he was at medium risk of sexual offence re-conviction and low risk of (non-sexual) violent offence re-conviction. In relation to an assessment of dynamic risk factors he was said to have a low-moderate risk of reoffending. The trial judge gave him the benefit of the doubt when she said that there was a reference to low risk of sexual offending towards the end of the report and she would consider him to be such a low risk.

The Sentencing Remarks

40. In imposing sentence, the trial judge recited the facts of the case. She noted that the victim had been asked why she had not reported the offence for almost a year and gave an explanation that it was difficult to describe what she was coping with. She did not feel strong enough to report but that she had been told that the samples taken on the day of the assault would be retained by the Sexual Assault Treatment Unit for one year. She stated that the aggravating factors in the case were the impact of the offence on the victim, who had spoken to the court in a compelling manner about her trauma and her sense of being violated when she was asleep, and the fact that she was asleep in the appellant's home when the assault took place was a breach of trust.

41. The mitigating facts were the appellant's previous good character, his impressive work history and career trajectory, and the trial judge noted the termination of his employment as a result of the conviction. The trial judge noted the testimonials she had received from friends and family on his behalf. His behaviour had been described as out of character. She noted his co-operation with the authorities.

42. The trial judge noted that the probation report considered the appellant to be at a low risk of offending in the future, but contrary to the indication given at the sentence hearing, the probation report indicated that he did not accept the verdict. His remorse was in relation to the victim's sense of hurt and upset caused by her perception of what happened.

43. The trial judge was of the view that there would have to be a custodial sentence in this case. She said that the offending was in the lower range of sexual assault offending but stated that "in the circumstances of this unusual case" the headline sentence was one of two and a half years or 30 months. She then said that having considered all the mitigation factors she would impose a sentence of 18 months with the final three months suspended.

Decision and Analysis

44. It is well established law that a victim may give evidence prior to sentencing of the impact that the offence had upon her. This was first given a statutory basis in s. 5 of the Criminal Justice Act 1993 which was later substituted by s.31 of the Criminal Justice (Victims of Crime) Act 2017. A judge is required upon application by the person in respect of whom the offence was committed to hear the evidence as the effect of the offence on that person. We agree with counsel for the DPP that, as a matter of law, the prosecution is required to draw to the attention of the sentencing court any evidence or submission received concerning the effect of the offence on the victim, including physical, mental or emotional harm, whether long term or otherwise, of the offence on the person in respect of whom the offence was committed.

45. It must be acknowledged that a difficulty can arise where a person is acquitted on certain counts but convicted on another; a difficulty which is only heightened when the count for which the person is convicted is considered, in law, as inherently less serious than the offence for which the person was acquitted. This is especially so where the main trauma is psychological in nature which can be contrasted with the situation where two separate physical assaults were at issue leading to two separate physical injuries. In the latter situation the victim would not be entitled, by law, to give evidence of the effect on her of the physical injury which resulted from the offence for which the person was acquitted.

46. In the present case, the trial judge, highly experienced in the sphere of the criminal law, stressed that she was only dealing with the conviction for the sexual assault. The appellant submits that the evidence of trauma and impact was infused by the victim's belief in what had occurred to her that night, i.e. that she was the victim of two offences, and counsel specifically pointed towards the following: "I know the absolute truth of what happened to me on the night in question." The appellant submits that the fact that in her acknowledgement of the impact and ongoing trauma endured by the victim, the trial judge failed to properly discount the irrelevant material contained in the victim impact evidence or gave excessive weight to it.

47. While we acknowledge that there may be difficulties in assessing the psychological impact of an offence on a victim where the victim believes that additional offences were committed, this does not mean that no evidence of impact can be given, or, if given, taken into account. Seeking to divide the psychological impact of one offence over the other events which were

not held to engage the criminal responsibility of an accused, could probably never be done to a mathematical certainty. What a sentencing judge must be alive to is the fact that it is important that the sentence reflects the culpability of the accused in respect of the offending for which he has been convicted. This judge was certainly alive to that. She carefully set out the facts in her sentencing remarks and the trauma she highlighted was quite limited. She took into account the trauma of the complainant, namely her sense of being violated while asleep and therefore at her most vulnerable. She said the victim described losing friendships and a loss of confidence together with the impact on her family and the fact that the impact was continuing. These were all matters which are to be expected when a person is sexually assaulted. This is particularly so when someone is assaulted while asleep which is, as this victim described, a situation of vulnerability.

48. In identifying the gravity of the offence, which included the effect on the victim, at the lower range of sexual assaults, the trial judge demonstrably limited her views of the offending behaviour and the impact of that behaviour solely to the sexual assault and its aftermath. Any other suggestion is not borne out by what the judge actually said and did in her sentencing remarks. She dealt with the impact evidence in an appropriate fashion. Therefore, we reject this ground of appeal.

49. We return to the main ground of appeal against sentence which is that this was offending behaviour on the low end of the scale of sexual assault offences and that fact, together with the mitigation offered, meant that both the headline sentence and the sentence imposed were too high. The primary contention of the appellant is that the identification of the headline sentence at two and a half years was in error because it did not have regard to the following factors:

    (i) the nature of the exact touching being the victim waking up to the appellant on top of her, groping her breasts and moving his hands around her body;

    (ii) the context of the touching being in the aftermath of consensual sexual activity was not taken into account by the trial judge.

50. As was recognised in the court below, neither this Court nor the Supreme Court has established a categorisation in terms of sexual assault offending. It was also accepted that with respect to other offending the courts have utilised ranges in the form of upper, medium and lower ranges. Generally, the ranges divide up the sentencing possibilities into thirds. The maximum sentence for sexual assault is ten years when committed on an adult. If one divides the range in equal thirds, the lower range would carry a maximum sentence of three years and four months. Even if the highest range was to carry a sentence between six and ten years, this would leave a maximum sentence of three years. On any version, the judge clearly did not set the headline at the very top of the lower end of sexual offences.

51. We do not consider that the trial judge acted outside her discretion in fixing the sentence at two years and six months for this behaviour. It is in itself a matter going to the gravity of the offence to commit the sexual assault while the victim is sleeping. On the particular facts of this case, it cannot be viewed as a minimal or trivial sexual assault. Even without a victim

impact report, the experience of the victim can be readily understood as a terrifying event; the confusion of waking to that would raise in most reasonable people's minds a fear as to what had occurred while asleep or what might occur later. The fact that there had been earlier sexual contact is not a factor that mitigates against the seriousness of the offence; all persons have a right to feel safe while they sleep. Indeed, the recent amendment of the law to clarify, if there was any doubt before (and it would seem there was not), that a person does not consent to sexual activity if they are asleep. The sexual history between the parties cannot be used to reduce the gravity of that offending behaviour.

52. The appellant submitted that the trial judge gave inadequate and insufficient weight to the mitigating features including:

    (i) The lack of previous conviction;

    (ii) Previous good character being now in his late thirties);

    (iii) Loss of a good long-term job (as a result of this conviction) being a person who has always been in employment and had a positive career trajectory which is now gone;

    (iv) His cooperation at all times with the investigation into the offence.

53. The appellant submitted that the trial judge failed to take a sufficiently individuated approach to the sentence of the appellant and applied a sentence which was neither proportionate to the offence itself or proportionate to the particular personal circumstances of the offender. In the alternative, the trial judge suspended an insufficient portion of the sentence and the sentence imposed on the appellant was disproportionate in all the circumstances outlined. Furthermore, it was held in the cases of *The People (DPP) v. Alexiou* 2003 WJSC-CCA 2830 and *The People (DPP) v. Wallace* 2001 WJSC-CA 2212 that the adverse impact of imprisonment combined with mitigation may be sufficient to result in a wholly suspended sentence.

54. We do not consider that the trial judge failed to take into account relevant mitigation. She noted that the most significant form of mitigation is a plea of guilty but that this was missing here. She also noted that his remorse was limited to the sense of hurt and upset the victim felt because of her *perception* of the incident. Despite those two factors the trial judge gave a very generous discount from the nominated headline figure by reducing, on account of the remaining mitigating factors, by more than one third. We do not see any basis for saying that this was insufficient mitigation.

55. The appellant relied upon the previous acknowledgement by this Court that for a person of positive good character it is the concept of imprisonment that has the most impact, as opposed to necessarily the duration. In particular the appellant relied upon the *People (DPP) v. Durcan* [2017] IECA 3, where this Court referenced other decisions wherein it was noted that it is the chilling effect of the closing of the prison gates behind the individual that, in truth, has the impact, as opposed to the term of a tariff imposed upon a person who has

previously been introduced to such an environment where, in truth, the introduction of the sanction has little or no deterrent effect.

56. As this Court has repeatedly said, an appellate court should only interfere in circumstances where it has been established that there exists a sufficient error and an unjustified disparity in sentencing that requires the appellate court to intervene to correct an error in principle. A sentencing court must be afforded a margin of appreciation, and only when the margin has been exceeded should an appellate court intervene.

57. We are satisfied that the decision to impose a custodial sentence in this case was within the margin of appreciation of the trial judge. It cannot be said that this case of sexual assault, which having been contested (and continued to be contested) was one where the only proportionate sentence that could be imposed was one which was wholly suspended. Furthermore, we are satisfied that it was within the margin of appreciation of the trial judge to limit the suspended part of the sentence to one of three months. The sentence imposed was within the range of proportionate sentences available to reflect the gravity of this offence and the personal circumstances of the offender.

58. In all the circumstances, we dismiss the appeal against sentence.