NILQ 66(3): 289–95

Case notes and comments—*DPP v Hustveit*: suspended sentence for rape in Ireland – an appropriate response?

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Introduction

DPP v Hustveit[1] is the second case since the introduction of s 2 of the Criminal Law (Rape) Act 1981 (section 2 rape) to impose an outright non-custodial sentence for an offence of rape in Ireland.[2] The case concerns the repeated rape and sexual assault of a woman by her partner as she slept, often while she was under the influence of prescribed medication which had a sedative effect. The behaviour of the defendant first came to light during the relationship when he admitted to the assaults following a confrontation with the victim and later during an email exchange where the victim asked him to explain his actions. The emails from the defendant detailed how he had raped the victim up to 10 times and touched her in her sleep up to three times per week throughout their relationship.

The defendant received a suspended sentence of seven years' imprisonment, having pleaded guilty at the Central Criminal Court to one count of rape and one count of sexual assault between 2011 and 2012. In suspending the sentence, McCarthy J described the circumstances as very exceptional.

Context

A brief summary of the relevant sentencing law and practices in the Irish jurisdiction will inform the analysis of the case that follows. Unlike the position in England and Wales under the Sentencing Council,[3] the Irish appeal courts have not adopted the practice of indicating starting points for the sentencing of particular offences, but rather rely upon the discretion of the judiciary. Judicial discretion, as guided by precedent, is a constitutionally protected power under the doctrine of proportionality, whereby the judge must impose a sentence

1 CCDP0049/2013 *DPP v Magnus Meyer Hustveit*. The case is reported in the *Irish Times* and *Irish Independent* newspapers and so any account should be approached with caution as the accuracy of such reports cannot be guaranteed; 'No Jail Term for Man (25) who Raped Girlfriend while She Slept' *Irish Times*, 13 July 2015; 'Woman Raped by Partner as She Slept Criticises Sentence' *Irish Times*, 14 July 2015; D Brennan and D Conlon, 'Face of Man who Raped Girlfriend while She Slept' *Irish Independent*, 13 July 2015.

2 Under s 2(1): 'A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it . . .'.

3 For a recent summary, see, A Ashworth and N Padfield, 'Five Years of the Sentencing Council' [2015] 9 Criminal Law Review 657.

proportionate to the gravity of the offence but is obliged to mitigate or aggravate that sentence if required by virtue of the circumstances of the particular offender at the time of sentencing.[4] There is no one, overarching sentencing priority in Irish jurisprudence; however, leading cases appear to favour a consequentialist approach, i.e. the deterrence of future offending on the part of the offender, and this approach is, to some extent, evident in the more lenient sentencing decisions for the offence of rape.[5]

Though few empirical studies have been conducted,[6] it is widely accepted that the majority of rape offenders in Ireland are given immediate and substantial prison sentences.[7] In the landmark case of *DPP v Tiernan*,[8] the Supreme Court held that a non-custodial sentence for rape is 'wholly exceptional', though it did not elaborate upon the circumstances that might amount to such a designation. *Tiernan* was affirmed more recently in *DPP v Keane*,[9] where it was held that the 'starting point' for any court imposing sentence for the offence of rape is a 'substantial custodial sentence'.[10] Research conducted by Charleton J in *DPP v WD*[11] found that the majority of cases reviewed imposed a sentence in the area of five to seven years. Punishments below that median were considered exceptional, and fell within the 18 months to two years' imprisonment range.[12] Ó Cathaoir's follow-up study does not take into account cases prior to 2007 and so excludes from its analysis the two cases where outright suspended sentences for rape were imposed; the case at hand and the earlier case of *DPP v WC*.[13]

In *WC*, Flood J deemed the defendant's remorse, plus a manifest intention to seek to rehabilitate himself into society, as conditions precedent to a consideration of the possibility of a non-custodial sentence. As O'Malley points out, however, the presence of these factors does not preclude a custodial sentence where the gravity of the offence demands an immediate sentence of imprisonment, albeit of a short duration.[14] *WC* is somewhat exceptional in a different sense, however, in that at the time it was heard prosecution appeals against unduly lenient sentences were not available.[15]

Related cases are instructive in terms of assessing the exceptional quality of cases of serious sexual offence. In *DPP v McCormack*,[16] relevant factors which warranted a

4 *Deaton v Attorney General* [1963] IR 170; *State (Healy) v Donoghue* [1976] IR 325; *People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351; *People (Attorney General) v Poyning* [1972] IR 402; *State (Stanbridge) v McMahon* [1979] IR 214; *DPP v McCormack* [2000] 4 IR 356 confirms this approach in the context of sexual offences.

5 *People (Attorney General) v O'Driscoll* (n 4); *State (Stanbridge) v McMahon* (n 4).

6 Key empirical analyses include the work of Charleton J in *DPP v WD* [2007] IEHC 310, followed up by the Judicial Researchers' Office in K Ó Cathaoir, *Recent Rape Sentencing Analysis: The* WD *Case and Beyond* (Judicial Researchers' Office 2012).

7 Cathaoir (n 6) 3. See also T O'Malley, *Sentencing Law and Practice* (2nd edn Thomson Round Hall 2006) 264.

8 *DPP v Tiernan* [1988] IR 250.

9 *DPP v Keane* [2007] IECCA 119.

10 Ibid.

11 *DPP v WD* (n 6).

12 See also Ó Cathaoir (n 6) 6.

13 *DPP v WC* [1994] 1 ILRM 321.

14 T O'Malley, 'Resisting the Temptation of Elegance: Sentencing Discretion Re-affirmed' (1994) 1 Irish Criminal Law Journal 1, 10.

15 Criminal Justice Act 1993, s 2. For a comprehensive account of the legislation, see T O'Malley, 'Prosecution Appeals against Sentence' (1993) 11 Irish Law Times 121.

16 *DPP v McCormack* (n 4). The accused was sentenced to three years' imprisonment with two years' suspended for aggravated sexual assault and attempted rape. The Court of Criminal Appeal held that in light of the exceptional circumstances a custodial sentence was unnecessary.

suspended sentence were deemed to be the defendant's extreme youth, loss of control, a blameless record, the display of genuine remorse, a full apology to the victim in court, a good response to counselling and a likelihood of rehabilitation. Similarly, in *DPP v NY*,[17] where the Court of Criminal Appeal was precluded from giving a full suspension,[18] it pointed to the accused's remorse, cooperation and previous good character as significant factors. In imposing a suspended sentence in the case of *DPP v D(G)*,[19] the judge took account of factors such as the youth of the offender, his early guilty plea and cooperation with the police, his previous good character, that he was drunk at the time and confused about his sexual orientation, and that the offence was an isolated event.

Given the rarity of rape cases which qualify as 'wholly exceptional' for the purposes of imposing a non-custodial sentence, it is likely that, as O'Malley points out, 'the best that can be said with any certainty is that a combination of strong mitigating factors may justify a non-custodial sentence'.[20] Furthermore, the factors in question are apt to be related to the offender, as opposed to the circumstances of the offence itself,[21] though it is noteworthy that the case of *DPP v Leech*[22] found that this practice is not to be imposed in a manner which overlooks the seriousness of the crime.[23]

With the above in mind, then, what makes the circumstances of *DPP v Hustveit* 'wholly exceptional' so as to break with general principle and impose a suspended sentence for a rape offence?

Commentary

This section considers the factors that appear to have influenced the court in coming to its decision, as well as those factors which, arguably, could have been afforded greater weight.

Circumstances of the offender

According to reports, the offender wrote to the victim and confessed to using her body for his own gratification for up to one year.[24] McCarthy J, prior to suspending the sentence, said that '[i]n truth this case comes here today out of his own mouth'.[25] It is a common presumption that an early guilty plea signifies remorse on the part of the offender and spares the victim the supposed trauma of testifying at trial.[26] And though the practice of mitigating sentence due to an early plea of guilty may be an established sentencing principle;[27] is a reduction an absolute requirement and does it constitute a 'wholly exceptional' circumstance?

17 *DPP v NY* [2002] 4 IR 309.

18 The appellant, on pleading guilty to raping a sleeping woman vaginally and anally, had been sentenced to three years' imprisonment with the last nine months suspended. The Court of Criminal Appeal affirmed the three-year sentence but suspended the balance of it.

19 Unreported, 13 July 2004. The case concerned a 'rape under section 4' offence under the Criminal Law (Rape) (Amendment) Act 1990, a gender-neutral offence which is defined as penetration of the anus or mouth by the penis, or penetration of the vagina by an object controlled by another person.

20 O'Malley (n 7) 265–6.

21 *DPP v NY* (n 17).

22 *DPP v Leech* unreported, *Irish Times*, 4 June 2003.

23 The Court of Criminal Appeal activated a four-year suspended sentence on the basis that the jury had given undue weight to the circumstances of the offender as opposed to the nature of the offence and its effect on the victim.

24 Brennan and Conlon (n 1).

25 Ibid.

26 *DPP v Tiernan* (n 8).

27 Ibid. See also *DPP v WC* (n 13); *DPP v NY* (n 17).

Ó Cathaoir's study found that '[c]ases with not guilty pleas did not necessarily impose strikingly different sentences to cases with similar facts where a guilty plea was entered'.[28] Though *WC* held that it is one of the two conditions precedent, *WD* confirmed that an early plea of guilty does not, of itself, constitute a wholly exceptional circumstance as to warrant a non-custodial sentence in rape cases.[29] In addition, Fennelly J, in *DPP v R McC*,[30] indicated that it would not be an error of principle to refuse to give credit for an early guilty plea in a rape case, in appropriate circumstances. It is arguable that such circumstances are present in the case at hand as, although it may be unusual for an accused to incriminate himself to the victim in writing; the victim was of the opinion that the defendant had less noble motives in confessing and was of the view that he did not think that she would go to the police.[31] Given the evidence against him, surely he had little choice but to plead guilty.

Psychological reports indicated that the offender felt genuine guilt and remorse for what he had done.[32] *DPP v Naughton* found that a truly remorseful offender is less likely to reoffend and may be more willing to take steps to deal with his own behavioural issues.[33] However, a display of this emotion does not automatically result in a non-custodial sentence, given that if an offender is on notice that a convincing show of repentance can reduce his sentence, he may easily feign it.[34] Arguably, in the case of a multiplicity of offences spanning a year, the defendant's remorse must be seen as less genuine than in the case of a one-off offence, as was the case in *D(G)*, for example.

The genuine nature of the defendant's remorse may be questioned further due to the apparent motives behind his actions, which do not appear to have been explored in detail by the court. For example, Groth alludes to the judicial perception that the rapist is simply unable to control his sexual desires, rather than rape being an expression of power and control in a situation where the defendant is sexually possessive and jealous.[35] According to the victim in this case, the defendant was a controlling and jealous partner.[36] Furthermore, the defendant stated by email that an explanation for his actions may be the fact that he thought the victim oppressed his sexuality because she asked him not to masturbate to pornography as she slept.[37]

As is the position in England and Wales,[38] a lack of previous convictions is treated, in general, as a significant mitigating factor, particularly when combined with evidence that the

28 Ó Cathaoir (n 6) 3.

29 *DPP v WD* (n 6).

30 *DPP v R McC* [2005] IECCA 71 (unreported, 12 May 2005).

31 She stated: 'He responded, not because he thought he was giving me evidence, because he didn't think that I would go to the police. He told me quite clinically what he had been doing . . . He showed no remorse, using the sentence – I'm not blaming you, but . . .' 'Today' FM radio broadcast, 14 July 2015 < www.todayfm.com/I-didnt-want-to-believe-I-was-raped>.

32 Brennan and Conlon (n 1).

33 *DPP v Naughton* [1999] 5 JIC 1808.

34 As Tudor remarks, '[r]emorse can also, of course, sometimes (perhaps often) be distorted, deluded, or faked'; S K Tudor, 'Why should Remorse be a Mitigating Factor in Sentencing?' (2008) 2 Criminal Law and Philosophy 241, 243.

35 A N Groth, *Men who Rape: The Psychology of the Offender* (Plenum Press 1979).

36 Brennan and Conlon (n 1).

37 'Today' (n 31).

38 For example, see O'Bryan [2013] 2 Cr App R (S) 16 where good character was said to be 'very considerable mitigation'. For further discussion, see M Redmayne, *Character Evidence in the Criminal Trial* (OUP 2015) 225.

defendant is of good character.[39] There exists some controversy, however, surrounding the practice of allowing mitigation as to the character of the offender in cases of sexual offence.[40] The danger of allowing mitigation for character in this context has been addressed formally in England and Wales by the Sentencing Council Guidelines for the offence of rape: 'previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence.'[41] Here, the persistent nature of the sexual abuse scarcely entitles the defendant to make any great claim to good character, exemplary work record or otherwise.

In light of the above discussion, it is in no way certain that, together, factors such as an early guilty plea, a display of remorse, no previous convictions and evidence of good character, would constitute significant grounds for the designation of 'wholly exceptional' and, if they did, whether the defendant would be entitled to a non-custodial sentence.

Gravity of the offence

It is arguable that the court did not pay sufficient heed to the gravity of the offence at hand. From the available studies, pertinent aggravating factors might include multiple offences, engaging in a campaign of rape which is not necessarily mitigated by a later claim of remorse, abusing a position of trust, vulnerability of the victim, and especial harm to the victim.[42]

That the victim and the defendant were in a relationship at the time of the offence brings into play a number of significant factors. This circumstance accords with what is now accepted (academically, at least) as the 'norm' in terms of sexual offences.[43] As Burton points out, however, it is arguable that the 'proposition that "rape is rape" whatever the rapist's relationship to the victim has never fully been accepted by the judiciary',[44] despite judicial rhetoric evident in cases such as *Millberry*.[45] In respect of that case, Rumney's study shows how the judicial understanding of non-stranger rape is 'obscured and distorted by conceptions of harm and seriousness that fail to consider the full range of impacts experienced by rape victims'.[46] Though no empirical studies exist on the matter in the Irish jurisdiction, it is noteworthy, if just anecdotally, that the two cases of outright non-custodial sentences for section 2 rape occurred where the parties involved were in a relationship.

In the case at hand, there may have been the perception that the rape was less harmful given that the defendant was known to the victim and the fact that the victim was aware of what was going on, yet did not leave or report it. These circumstances go to the heart of

39 *DPP v O'Neill* [2012] ECCA 37.

40 For example, *Ryan v The Queen* [2001] HCA 21. For discussion, see T O'Malley, *Sexual Offences* (2nd edn Thomson Round Hall 2013) 591–2.

41 Sentencing Council, *Sexual Offences: Definitive Guidelines* (2013) 11. For further discussion, see A Ashworth, *Sentencing and Criminal Justice* (6th edn CUP 2015) 190.

42 *DPP v WD* (n 6); Ó Cathaoir (n 6).

43 See, Rape Crisis Network Ireland, *National Rape Crisis Statistics 2014*, which show that 93% of perpetrators of sexual violence are known to the person against whom they perpetrate the abuse, 20.

44 M Burton, *Legal Responses to Domestic Violence* (Routledge-Cavendish 2008) 69.

45 *Millberry* [2003] 1 WLR 546; See also *AG Ref No 44 of 2004 (Keith E)* [2005] 1 Cr App R (S) 59.

46 P N S Rumney, 'Progress at a Price: The Construction of Non-Stranger Rape in the Millberry Sentencing Guidelines' (2003) 66(6) Modern Law Review 870, 883. See also P N S Rumney, 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' (1999) 19 Oxford Journal of Legal Studies 243.

the especial harm that may be caused by relationship rape.[47] For, as Finkelhor and Yllo observe, '[w]hen you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist.'[48] In her impact statement, the victim described her life as being destroyed by the abuse. She gave up her job, moved in with her parents, attempted suicide and suffered from post-traumatic stress disorder, eating disorders and anxiety. Following *WC*, a sentencing court is obliged to take into account any effect (whether long-term or otherwise) of the offence on the victim.[49]

Relationship rape is rarely an isolated event.[50] Though there is evidence that the accused raped and sexually assaulted the victim on a regular basis between 2011 and 2012, the conviction relates to just one count of rape. It is questionable, therefore, whether the court has taken into account the systematic nature of the abuse that the victim was subjected to. Such actions are the result of a significant breach of trust, a factor not always given credence in the context of relationship rape.[51]

In his email to the victim, the offender stated: 'I convinced myself it was a victimless crime because you were asleep . . . I didn't want to hurt you.'[52] Far from simply indicating a supposed guilty conscience, the offender's actions and self-justifications in these statements point to a distinct lack of concern as to the dignity and autonomy of his partner, coupled with a callous determination to have sexual intercourse with her, repeatedly, regardless of her wishes. The lack of consciousness on the part of the victim in no way dilutes the potency of the offence of rape.[53] If anything, the violation of the victim as she slept in her own bed points to an innate vulnerability on her part, of which the defendant took advantage. Indeed, the Court of Criminal Appeal in *Keane* acknowledged the right of an individual to feel safe in their bed as they sleep.[54]

In light of the above, one must question whether there remains an unconscious tinge of the 'less serious' about this case, merely because the couple shared a bed. This is not an outlandish suggestion in light of the evidence discussed above, given that the marital rape exemption was abolished in Ireland only as recently as 1990.[55]

Conclusion

In exercising his discretion to impose a non-custodial sentence for the offence of rape, McCarthy J adhered appropriately to the principle of proportionality by taking account of the particular circumstances of the offender in mitigation. The fact that the judge saw fit to impose a seven-year sentence, which is at the high end of the median range according to *WD*, suggests he considered the offence to be of a serious nature. The fact that the judge suspended that sentence in its entirety warrants consideration of whether he gave undue weight to the circumstances of the offender over and above the gravity of the crime.[56]

47 For example, see D Russell, *Rape in Marriage* (Indiana University Press 1990).

48 D Finkelhor and K Yllo, *Licence to Rape: Sexual Abuse of Wives* (The Free Press 1985) 118.

49 Criminal Justice Act 1993, s 5.

50 Finkelhor and Yllo (n 48).

51 Burton (n 44) 70.

52 Brennan and Conlon (n 1).

53 *R v Bree* [2007] EWCA 256.

54 *DPP v Leech* (n 22).

55 Criminal Law (Rape) (Amendment) Act 1990, s 5. The abolition of the exemption in England and Wales came in 1991, following the case of *R v R* [1991] 2 WLR 1065.

56 Unreported, *Irish Times*, 4 June 2003.

Though the offence was not aggravated by 'additional' violent assault, (the offence of rape itself being inherently violent) it may be aggravated by the fact that the victim was raped by a person she trusted, in her own home, as she slept in her own bed (under the influence of medication) and on multiple occasions. That said, it was appropriate that McCarthy J considered the question of a 'wholly exceptional' designation, in light of the defendant's remorse and his intention to seek rehabilitation.[57] However, a 'wholly exceptional' case does not of necessity point to a non-custodial sentence.[58] Indeed, it is arguable that such a case would warrant a short (below median) prison sentence, as opposed to a long suspended sentence, given that a long sentence would indicate a more serious set of circumstances.[59] This approach appears to have been reflected in English jurisprudence prior to the introduction of Sentencing Guidelines.[60] Whether the Court of Appeal will share this view is another question.[61]

57 *DPP v WC* (n 13).

58 *DPP v NY* (n 17); *DPP v Keane* (n 9). For discussion, see O'Malley (n 40) 657.

59 See O'Malley (n 14).

60 For example, see *R v Taylor* [1983] 5 Cr App R (S) 241, where the Court of Appeal substituted a probation order for a three-year prison sentence where both parties had a learning disability and the offender was not considered to be a danger to the public.

61 At the time of writing, it is understood that the Director of Public Prosecutions has lodged review papers with the Court of Appeal on the basis that the sentence is unduly lenient.

Northern Ireland Legal Quarterly

Volume 66 Number 4

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