

Judgment Title: Director of Public Prosecutions -v- Byrne & ors Neutral Citation: [2017] IECA 136 Court of Appeal Record Number: 236, 237, 239, 240 & 244/15 Circuit Court Record Number: TYDP0045/2014 Date of Delivery: 05/05/2017 Court: Court of Appeal Composition of Court: Birmingham J., Edwards J., Hedigan J. Judgment by: Birmingham J. Status: Approved THE COURT OF APPEAL Birmingham J. Edwards J. Hedigan J. No. 236/15 237/15 239/15 240/15 244/15 The People at the Suit of the Director of Public Prosecutions Respondent V Dean Byrne, Thomas Flynn, Patrick Joyce, Patrick Gately and John Joyce Appellant JUDGMENT of the Court delivered on the 5th day of May 2017 by Mr. Justice Birmingham 1. These are appeals against the severity of sentences imposed in the Circuit Court in Clonmel on 1st October, 2015. The sentences under appeal were imposed on one count of aggravated burglary. In the case of Dean Byrne, the sentence imposed was one of 20 years imprisonment with the final 4 years suspended for a period of 10 years subject to conditions. Patrick Gately received the same sentence. Thomas Flynn received a sentence of 12 years imprisonment with the final 3 years suspended. In his case the sentence was to commence on the legal expiry of a sentence of 3 years and 6 months imprisonment that the appellant was already serving for a firearms offence. John Joyce received a sentence of 15 years imprisonment with the final 4 years suspended while Patrick Joyce received a sentence of 14 years with the final 4 years suspended. In each case the terms on which the sentences were part suspended were the same i.e. that the sentence would be suspended on condition that the accused be of good behaviour, keep the peace, remain alcohol and drug free, engage with the Probation and Welfare Service for a period of 2 years and not enter the County of Tipperary without the consent of the Chief Superintendent during that period. For the sake of completeness, it should be noted that there were in fact seven co-accused before the Circuit Court and two, Michael McDonagh and Donal O'Hara, received sentences of 12 years imprisonment with 7 years suspended. These sentences were not the subject of an appeal. Mr. McDonagh came before the Court as a person without any previous convictions and in the case of Mr. O'Hara, the Court was prepared to proceed on the basis that he had not entered the dwelling that was the subject of the burglary. 2. The background to the case is to be found in an aggravated burglary that occurred at the family home of Mark and Emma Corcoran at Burnchurch, Killenaule, Co. Tipperary. Mr. and Mrs. Corcoran resided there along with their three children, all girls, aged 8, 6 and 2 years old at the time. The Corcorans were involved in a business supplying home gym equipment around the State. On 20th November, 2013, all seven accused travelled from Dublin in order to commit the burglary at the Corcoran home which is a bungalow situated in a cul de sac in a rural area outside of Killenaule. Gang members entered the Corcoran home at around 3 a.m. on 21st November, 2013. On that occasion, Mark Corcoran was sleeping in a secluded room at the rear of the house because he had an early start the following morning and did not want to disturb the rest of the household. Mr. Corcoran describes going to sleep about 12.30 a.m. but being woken by a man wearing a black balaclava and brandishing a machete. There was also another taller man there who appeared to have a black handgun with which he struck Mr. Corcoran in the face causing him to bleed extensively. At this stage those men were shouting "where is the safe and where is the money?" There was extensive shouting, screaming, roaring and remarks of a threatening nature. It is to be noted that there was in fact no safe on the premises and the raiders were told that but refused to accept that was the situation. As the men were told that there was no money or safe they became increasingly agitated. Mr. Corcoran was led into another room and there he noticed a third man, also wearing a balaclava, and this individual had a sawn-off shotgun. 3. At this stage, Mr. Corcoran became aware of the presence of his eldest daughter, an 8 year old, who had become

aware of what was happening and was at the doorway trying to come in. Mr. Corcoran was visibly dazed as a result of being struck in the face. It is to be noted that Mr. Corcoran sustained significant injuries and in particular nasal injuries which necessitated four separate surgical procedures. In the course of the incident he was pinned to the ground and his hands were tied behind his back with cable ties. One raider knelt on his back between his shoulder blades, even though he was restrained by cable ties. The daughter who had come to the door and his other children became very distressed and were screaming. The two eldest children had a clear view of what was going on, the youngest was in a cot, and could hear the threats that were being made.

4. Emma Corcoran was threatened that a screwdriver would be put up her nose and threats were made to her that the raiders would shoot or kill the children. A threat was made to Mr. Corcoran that his feet would be cut off and given the presence of the machete type implement, this threat was taken very seriously. At one stage the raiders sought a key to the family motor vehicle which was a Kia Sorrento jeep. While the incident was in progress Emma Corcoran, with great presence of mind, managed to make two separate 999 calls. As a result Gardaí were dispatched to the scene. For Emma Corcoran this was a particularly distressing experience. Unfortunately she had cause to witness the assault on her husband and she herself was dragged through the house by her hair. In the course of the incident, a sum of cash was handed over in the amount of €490 which represented the previous day's business takings and had been attached to a clipboard. In that regard, it appears that the raiders had wrongly believed or assumed that the Corcoran business was a cash business but in fact that was not the nature of the business. All told, a sum of some €1,300 was handed over and also taken was a substantial quantity of jewellery, including jewellery which Emma Corcoran had inherited from her late mother and which was of considerable sentimental value and included an engagement ring valued €3,500. While some of the jewellery was recovered later as a result of an anonymous tip-off in August, 2015 to go to a particular location, the engagement ring has never been recovered.

5. Subsequent Garda enquiries established that the men had left Dublin in two vehicles which travelled in convoy, one a Volkswagen Passat and the second a Saab. The Saab broke down south of the Midlink Toll Plaza. At that point all seven travelled in the Volkswagen to the village of Castlecomer in Co. Kilkenny, leaving the motorway for that purpose and there they stole a vehicle, a Subaru. The Volkswagen Passat in which the men travelled was owned by John Joyce and the Saab had been purchased using a false name on the day prior to the incident. The finger print of Thomas Flynn was recovered from the vehicle license certificate. Enquiries established that at the stage the gang members were travelling in two vehicles and that there was regular mobile phone contact between them.

6. The Subaru stolen in Castlecomer was found abandoned about half a mile from the Corcoran home. In the aftermath of the burglary, the jeep which was taken from the Corcoran home was encountered by Gardaí in Port Laoise. They chased that vehicle. In order to evade the Gardaí, the vehicle was driven at very high speeds, leaving the motorway network. It drove through the village of Ballybrittas at speeds in excess of 200 km an hour. At that stage the Kia Sorrento succeeded in losing Gardaí. At about 4 a.m., Gardaí from the Organised Crime Unit who were travelling south on the M7 observed the Volkswagen Passat travelling north at a high speed followed closely by the Kia Sorrento. The Gardaí noted that the Passat was tucked in tightly behind an articulated truck as if to hide itself.

7. At approximately 4.20 a.m. / 4. 25 a.m., Gardaí came up behind the Volkswagen Passat. Initially the Volkswagen Passat accelerated but then the occupants realised that the vehicle could not outrun the Garda vehicle and pulled into the hard shoulder. When stopped there were five males in the vehicle. The driver was John Joyce, the front seat passenger was Patrick Joyce his brother, and seated in the rear seat were Donal

O'Hara, Thomas Flynn and Michael McDonagh. At the stage when Gardaí succeeded in stopping the Passat, the Kia Sorrento was not in company with it. In the car was a distinctive rose gold brooch, which was later identified as a brooch that Mrs. Corcoran had inherited from her late mother and there were also a number of Chinese currency notes in the car. The significance of this is that some Chinese currency was taken in the raid as Mrs. Corcoran had visited China on occasions and retained some notes as a souvenir of her trips. 8. Some hours later, at around 8 a.m., Jason Corcoran, who is a brother of Mark Corcoran and his cousin, Edwin Corcoran, were driving vehicles on the M7. They were aware that an incident had occurred earlier that morning and were keeping a look out. In particular they were aware that the Corcorans' family vehicle had been taken during the course of the incident. They spotted the vehicle at Killaglish in County Laois and contacted the Gardaí. Shortly after, some Gardaí came across the Kia Sorrento on the northbound motorway. Initially they drove behind the Kia Sorrento as it headed north towards Dublin and made contact with other units. At one stage the occupants of the Kia became aware that they were being followed and attempted to escape. That involved weaving in and out of the rush hour traffic that was heading to Dublin. As they encountered heavier traffic closer to Dublin they drove on the right margin of the motorway where there were loose stones and also road work signs. The vehicle was driven through any obstacles that were there, clipping off cars which were stopped, knocking down road signs and knocking mirrors off vehicles. The Kia Sorrento was brought to a stop at Newlands Cross. There were two occupants in the vehicle. A false name was given by the driver of the vehicle but it was later established that the driver was in fact Patrick Gately and the front seat passenger was Dean Byrne. Mr. Gately was brought to Thurles Garda Station where he was searched and he was found to have a sum of €510 in cash in his sock. He was also in possession of a ticket for the then forthcoming Ireland v. Sweden match which had Mark Corcoran's name and address on it. Dean Byrne was also searched and he was found to be in possession of €490 in cash in his socks. That sum corresponds to the specific sum that was attached to the clipboard that was handed over by Emma Corcoran. 9. Each appellant was arrested and detained and during the course of detention interviewed. In the case of John Joyce, he was interviewed on nine occasions but nothing of evidential value emerged from those interviews. In the case of Thomas Flynn, in the last of nine interviews conducted with him, he made an admission that he was outside the Corcoran property commenting "I am sorry but it is nothing to do with me". 10. In the case of Patrick Joyce nothing of evidential significance emerged from nine interviews. 10 interviews were conducted with Patrick Gately where he said that he had got a call at 6.30 a.m. on the date in question to pick up a jeep that was down in the country in part payment of a drug debt that he owed. He said that he was driven there in a red Honda by a traveller known as "Scotch Paddy" and when asked to account for the match ticket of Mark Corcoran that was found on his person, he said that it was already in the jeep when he got into it and he said that the cash of €510 found in his socks was from the sale of a Piebald horse. In the course of interviews, Dean Byrne said that he was thumbing a lift from down the country when he was picked up by the Kia Sorrento. In the course of the second interview conducted with him, Gardaí asked "can you picture the kids?" To this he responded "if you're going to be evil, I'll be evil. I don't give a fuck about kids. If they're not mine I don't give a fuck. I didn't do it. I can sleep easily out there." 11. The sentencing court was provided with victim impact reports in relation to Mark and Emma Corcoran and their three children as well as medical reports detailing the injuries sustained by Mark Corcoran. The Court was told that the Corcorans had, since the incident, invested very heavily in security for their home. The Court was also provided with a lengthy report from a psychotherapist in respect of

Emma Corcoran. That report concluded as follows:- “She has suffered enormously as a result of this incident, both at the time of its occurrence and in the 15 months that have passed since. She legitimately felt in fear of her life and such dread persists in modified form. She is assailed by anxiety concerning the effects of this ordeal on her children and generally distrustful of the world. She has endured injuries to her physical, emotional and intellectual selves and these effects cannot be easily reversed.” 12. The statement of Mr. Corcoran, which was read to the Court, was as follows:- “On the morning of the 21st of November, 2013 my life, as I knew it, was completely turned upside-down. The actions of a number of people that night will haunt me for the rest of my life. I wake up every morning, look in the mirror and still see the scar on my face from where I was assaulted on that night. It is a constant reminder of what happened. I have had surgery to try to repair scar tissue and I still require a number of operations to try to get my eye back to normal. I have an enormous sense of guilt, being the man of the house, that I could not do anything to protect my wife and kids on that night. Being tied up face down on the floor, covered in blood, to have my eldest daughter stand over me crying that her daddy is dead, I can only describe as being at my own funeral but being fully awake. My kids saw and heard things that night that no child should ever go through. I often have nights when I am afraid to go to bed and have spent hours just sitting in front of a monitor for security cameras just watching what is happening outside. My wife and I have suffered a great deal, not just emotionally, but financially. The business that so much work had gone into was no longer an option as we were afraid of something happening again. Even now as I write this, I can still hear voices shouting: ‘Where is your money? We want your money’. There was jewellery taken that belonged to my late mother-in-law that had great sentimental value to my wife. That can never be replaced. Our family home where we have been raising our kids and living happily, all those happy memories we have will forever be tainted by what happened that night. I can only hope that as time goes on that painful day in November becomes a very distant memory.” 13. In relation to the background and personal circumstances of the appellants, so far as Dean Byrne is concerned he was 21 years old at the time of the offence, born on 20th October, 1992. He is a single man with no children. He himself is one of a family of 10 children, his parents are separated and it appears his father had a drug addiction problem. He had a chaotic childhood and suffers from addiction difficulties. He started drinking when aged 8 or 9 and taking cannabis and then cocaine before he was a teenager. He had difficulties in primary school, suffered from ADHD and ADD. He was placed in St. Joseph’s, Clonmel aged 10. He is effectively illiterate and can barely read or write. He has been using cannabis, cocaine, benzodiazepines and other drugs as well as abusing alcohol. At the time of the sentence hearing he had not been drug free since age 8 and had spent half of his life in different institutions. There were 120 previous convictions recorded. They may be summarised as involving 80 general traffic matters, 2 dangerous driving, 1 drunk driving, 1 for possession of stolen property, 1 for violent disorder, 8 for criminal damage, 13 for unauthorised takings of a mechanically propelled vehicle, 1 for theft and 1 for burglary. When mobile phones that were recovered from people arrested in the Volkswagen Passat and Kia jeep were analysed, it was noted that 16 calls were recorded between the phone of John Joyce, driver of the Volkswagen Passat, and the phone of Dean Byrne, an occupant of the Kia Sorrento, between 8.20 and 11.50 on 20th November. Mr. Byrne entered a plea of guilty on 17th July, 2015, as did Patrick Gately, when the matter was listed for trial. Some days before the matter was listed for trial additional evidence was served which dealt with a comparison of glass fragments found on clothing of the accused and glass from the Corcoran home as well as an analysis of footwear impressions. Four accused, including Thomas Flynn and

Patrick Joyce, had entered pleas of guilty on 19th November, 2014 and John Joyce entered a formal plea of guilty on a date in May, 2015, having given an indication through his counsel in Court on 24th February that he would be taking that course. 14. In the case of Patrick Gately, he was born on 23rd December, 1987 and was 26 years old at the time of the offence. He was the youngest of 6 children. The Circuit Court heard that his parents had experienced difficulties in relation to alcohol abuse and that there was violence in the home and that he was effectively raised by an older brother. He was introduced to cannabis at an early age and thereafter Mr. Gately had a history of substance abuse. He began drinking and using drugs at the age of 14 years. The Court heard that he was surpassed by 98 to 99 % of people his age when it came to cognitive assessments. At the time of the sentence hearing he was in a relationship with a woman who was some years older than he was. She was a devout Catholic and disapproved of his substance abuse and was very supportive of the fact that he was returning to his Christian faith. He had written a letter of apology and had expressed a willingness to apologise personally to the victims through a restorative justice scheme. So far as previous convictions are concerned in his case he had 85 recorded. In summary, these included 10 for unauthorised taking of vehicles, 34 general road traffic matters, 1 handling stolen property offence, 11 offences contrary to s. 3 of the Misuse of Drugs Act, 2 public order offences, 4 drink driving offences, 2 s. 4 theft offences, 5 offences contrary to s. 15 of the Misuse of Drugs Act, 1 for obstructing Gardaí, 4 for dangerous driving, 1 for endangerment and 1 for s. 2 assault. 15. In the case of Thomas Flynn, he was 19 years of age at the time of the incident, he was a single man, the youngest of 6 children, and was supported by his family. He had completed his Junior Cert and had received an average result despite having experienced earlier learning difficulties. A psychological report and cognitive functioning testing which was undertaken assessed him as "borderline". He left school after the Junior Cert and thereafter experienced significant addiction issues. He first began taking cocaine aged 14. The psychological report that was before the Circuit Court stated that he abused both cocaine and alcohol at the time of the offence. The Court also heard that he had accumulated a significant drug debt. Mr. Flynn expressed remorse through his counsel and also by writing letters to the victims. He had completed a number of educational courses while in prison, including metalwork courses and had also obtained a certificate in industrial cleaning. At the time of the sentence hearing, Mr. Flynn was serving a 3 ½ year sentence for a firearms offence that had been imposed on 29th January, 2015 backdated to 9th April, 2014. There was evidence that Thomas Flynn had purchased two sets of walkie-talkies on the evening prior to the crime. While purchasing the walkie-talkies he was in the company of three other co-accused, namely Patrick and John Joyce and Michael McDonagh. 16. So far as John Joyce is concerned, he was born on 11th February, 1994 and was 19 years of age at the time of the offence. The Court heard that he was in the extremely low range of intellectual functioning, that he was surpassed in terms of IQ and other cognitive indicators by 99% of his age group. In addition the Court learnt that he suffered from a severe hearing deficit and, associated with this, that he had a speech impediment. He left school after his first year. The Court was informed that his father had experienced psychiatric difficulties and was often an in-patient. He was also an alcoholic. The appellant John Joyce had little if any relationship with his father. His mother suffers from heart disease and has experienced ill health for much of her life. John Joyce married a girl from the settled community at the age of 17 and his family disapproved of that relationship. The appeal hearing was told that in fact both families disapproved. He was the father of a young son and daughter. In his case, he had abused drugs and was using cocaine and other hard drugs. However, in prison he was seeing a drug counsellor and he too had written a letter expressing remorse for

his actions. In relation to previous convictions, there were 55 previous convictions recorded of which 46 were described as general road traffic matters, two were for dangerous driving, one for failing to stop a vehicle and others were under the Misuse of Drugs Act. All of his convictions were summary and none had resulted in a prison sentence. 17. In the case of Patrick Joyce, he was born on 3rd June, 1992. He was 21 years of age at the time of the offence, was married with a young child who was 14 months old at the time of the sentence hearing, and his extended family were supportive. A psychological report indicated that he was a young man with significant learning difficulties. In terms of cognitive abilities he was placed in the extremely low range. He left school after second year without any qualifications. He had been diagnosed with Obsessive Compulsive Disorder. He boxed competitively when younger and appeared at one stage to have had a promising career before suffering a significant injury. He also expressed remorse and wrote a letter of apology. In his case 16 convictions in all were recorded of which two were for road traffic matters, one under s. 15 of the Theft and Fraud Offences Act, two for possession of stolen property, two for public order offences, one s. 4 theft, two for trespass, one for criminal damage and one for dangerous driving. The sentencing court was told that in the almost two years since the offence was committed that he had taken steps to rehabilitate himself, in particular in engaging constructively with Coolmine rehabilitation centre. The judge's sentencing remarks 18. The judge began his sentencing remarks by referring to rights guaranteed under the Irish Constitution, including the right to property, and the more fundamental right to bodily integrity and the rights of the child. He referred to the situation of the victims of burglary in general and then with particular reference to the offence that he was dealing with. He referred in particular to evidence that had been given by the investigating member, Detective Sergeant White who had referred to listening to the 999 calls in which the terrified screams of the children could be heard as they saw violence being visited upon their parents. He commented that while the direct victims of the crime were the 5 members of the Corcoran family, that there were other victims including the elderly lady whose car was stolen, and those who witnessed the car chase through Ballybrittas and then those caught up in the rush hour traffic between Naas and Dublin. He commented on the many aggravating factors, describing as the most significant of all the effect that the crime had had on members of the Corcoran family. The trial judge then commented that this was a highly planned crime, that more than 7 people were involved and that other significant aggravating factors in no particular order included the nature of the weapons used, a sawn-off shotgun and handgun, and that the machete might well have been even more frightening than the guns. He commented on the fact that the crime was committed in a quiet, country, rural cul de sac, that it involved gratuitous violence and threats and that the sheer number of those participating must have been designed to intimidate. He commented that the attempts by Mr. Gately and Mr. Byrne to evade capture on two occasions posed an enormous threat to life and limb for many people and he felt, taking all factors into account, that it was abundantly clear to him where the case came on the scale of gravity. It was not at the lower range or the middle range but fell into the higher range and indeed towards the very top of that range. Particularly, he felt that so serious was the situation that it was a case where he had to consider taking the very rare step of imposing a maximum sentence which was life imprisonment but had decided not to do so. 19. He indicated that in seeking to arrive at sentences that were proportionate he was required to have regard to a number of considerations, one of those was punishment. Where there was genuine contrition, remorse and a turning away from such behaviour then that was a matter to be reflected in the sentence to be passed. A third factor that he took account of was the concept of deterrence. He described the offence that he was dealing with as a

crime which had shocked an entire nation and said that it was necessary that other persons who might be contemplating similar crimes in the future should know that there would be a very heavy price to pay for such crimes. 20. This is a case where the sentencing judge approached his task with particular care and deliberation, putting the matter back for consideration and then delivering a reasoned decision. The Court is in no doubt the judge was correct in concluding that the case fell into the high range of aggravated burglary and indeed the Court was surprised that submissions to the contrary should have been advanced. The Court is of the view that the sentencing judge was correct that the seven accused fell to be dealt with in three groups. Michael McDonagh and Donal O'Hara who had the greatest claim for leniency, and then at the other end of the spectrum Dean Byrne and Patrick Gately who merited the most severe sentences with Patrick Flynn and the two Joyces making up the middle group. So far as the middle group is concerned the judge was very aware that any sentence he imposed on Thomas Flynn had to be consecutive to the firearms sentence he was serving and in passing sentence the judge specifically stated that he was taking account of the principle of totality. In the Court's view he did so in an entirely appropriate manner and the Court sees no basis for interfering with the sentence imposed on Mr. Flynn and accordingly his appeal will be dismissed. So far as Patrick Joyce and John Joyce are concerned, the judge saw fit to differentiate between them, imposing 15 years with four suspended in the case of John Joyce and 14 years with four suspended in the case of Patrick Joyce. Counsel for John Joyce has submitted that apart from the fact that the sentence was too severe, and out of line with sentences imposed in comparable cases that there was no justification for treating his client more severely than his brother. However, there were aspects of the evidence that indicated that John Joyce's role was a particularly significant one. He was the driver and supplier of the Volkswagen Passat and it was his phone that was in intense contact with the phone of Dean Byrne in the Saab. Moreover, John Joyce has the more extensive prior record. It is also the case that Patrick Joyce entered a plea at the earliest possible stage and did so in a situation where there was no forensic evidence to link him to the offence. In these circumstances the Court cannot conclude that the judge erred in deciding to differentiate between the two brothers. Neither can the Court conclude that the sentences were unduly severe. On the contrary, in the Court's view the sentences were appropriate having regard to the gravity of the offence in issue. 21. So far as Dean Byrne and Patrick Gately are concerned there were a number of factors present which required that they should receive the most severe sentences. First of all, they were the occupants of the stolen family jeep when it was involved in outrageous driving, first at Ballybrittas and then in the latter incident on the M7 in rush hour traffic. Secondly, they had the most extensive prior records and their pleas were entered only on the date of trial, albeit that the prosecution had served additional evidence at a late stage. The combination of these factors meant that their situation was required to be differentiated from that of their co-accused and differentiated to an appreciable extent. 22. The Court however has concerns about the extent of the divergence. If one focuses on the net sentence and leaves to one side the suspended sentence element, their net sentence of 16 years is more than 3 times the sentence of those who received the lightest sentence and their sentence is 6 years longer than Patrick Joyce, 5 years longer than the sentence of John Joyce and 7 years longer than Thomas Flynn, though the fact that his sentence was modified having regard to the concept of totality means that there is not a clear comparison. Significant as the reasons for differentiating are, the Court has concluded that the divergence is excessive and requires intervention. The Court will reduce both sentences to ones of 18 years imprisonment with 4 suspended. In deciding to take this course of action the Court has had regard to the additional material that has been

submitted on the appeal hearing. The Court will hear the parties as to the terms on which the sentences should be part suspended.