



THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

Record No: 122/17

THE PEOPLE AT THE SUIT OF THE
DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

v

CRAIG O'DONNELL

Appellant

Judgment of the Court (*ex tempore*) delivered on the 2nd of July 2018

by Mr. Justice Edwards

Introduction

1. On the 5th of May 2017 the appellant faced sentencing by Limerick Circuit Criminal Court on two bills of indictment, namely LKDP0060/2015 ("60/15") and LKPD0054/2016 ("54/16"), respectively.
2. The appellant had earlier pleaded guilty to counts no's 1, 2 and 3 on bill no 60/15 being offences of aggravated burglary, contrary to s.13 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the Act of 2001"); burglary, contrary to s.12 of the Act of 2001; and having an article which had a blade in a public place, contrary to s. 9(1) and (7) of the Firearms and offensive Weapons Act 1990, respectively.
3. The appellant was sentenced to five years' imprisonment for the aggravated burglary, and to three years imprisonment for the offence of burglary and also for the offence of having an article which had a blade. All of these sentences were to date from 05/12/2015 and were to run concurrently *inter se*.
4. The appellant had earlier also pleaded guilty to counts no's 1,2, and 3 on bill no 54/16, being offences of robbery contrary to s.14 of the Act of 2001; having a firearm with intent to commit an indictable offence, contrary to s.27B of the Firearms Act 1964 as substituted by s.60 of the Criminal Justice Act 2006 as amended by s.39 of the Criminal Justice Act 2007; and escape from lawful custody contrary to common law, respectively.
5. The appellant was sentenced to five years' imprisonment on both counts no's 1 and 2 on bill no 54/16, being the robbery offence and the firearms offence, respectively, with the final one year and six months of the said sentences suspended upon conditions for a period of ten years from the date of sentencing. These sentences were to run concurrently *inter se* but were to be consecutive to the sentences on bill no 60/15, the longest of which was the five-year sentence imposed for the aggravated burglary. Count no 3, on bill no 54/16, being the offence of escaping from lawful custody, was taken into consideration.
6. The appellant now appeals against the severity of his said sentences.

The circumstances of the offences charged on bill no 60/15

7. In the early hours of the morning on 3rd December 2014, Mr. Ronan O'Halloran, a student at the University of Limerick, awoke at 4am to find that the appellant along with another young male had entered the dwelling which was his student accommodation at 2 Cambridge Close in College Court, Castletroy, Limerick. The complainant was alone at the time, as his housemates were away. Both the appellant and his accomplice were armed with knives and had their hoods up. One of the knives was described as a breadknife estimated as being twelve inches long. The other person's knife was slightly shorter and was estimated as being ten inches long. They proceeded to demand from Mr. O'Halloran his mobile phone and laptop which he gave them. They also asked him for money and Mr. O'Halloran gave them €20. The victim was held against his will and at knifepoint for approximately 20 minutes by one of the intruders while the other searched it for valuables. The victim was also subjected to a threat to kill. He was told not to alert anybody to what had happened. If he did he would "get two bullets in the head". To this threat was added the remark: "we know where you live". The appellant and his accomplice also took an Xbox console and some aftershave before they left Mr. O'Halloran's premises. This incident became the subject matter of the aggravated burglary charge.

8. Shortly after the incident just described the appellant entered another nearby dwelling, at 11 Harbour Close, in College Court, Castletroy, Limerick, and which again was resided in by students. In this instance, however, all of the student occupants were at home. One of the occupants was Mr Cian McCarthy. He was woken when his telephone rang and the call was from another occupant of the house who alerted him to the fact that he suspected there was an intruder in the house. Mr McCarthy left his bedroom and went out on to the landing. While standing at the top of the stairs, and looking downstairs, he could see a male intruder, who he estimated was aged approximately 18 or 19 years, and who was dressed all in black with a grey beanie hat, with a hoodie and a dark puffy jacket over it. It was later established that this person was the appellant, and that he had a knife with him at the time. The intruder was looking up the stairs and Mr McCarthy called out to him demanding to know who was there. The intruder responded by ordered him to "Get back up the stairs". With that Mr McCarthy shouted to his housemates to get up, and ran back to his bedroom. He re-emerged from his bedroom after a few moments to find that all of his housemates were now up, and that they had chased the intruder out of the house. This incident was reported to the Gardaí, who proceeded immediately to the College Court estate, and within a short time of arriving there succeeded in apprehending the appellant, whom they suspected of having been involved, on nearby Carysfort Avenue. The appellant found to be in possession of a knife at the time of his arrest. The incident at Mr. McCarthy's house became the subject matter of the burglary charge. The charge of having an article with a blade arose from his possession of such an item at the time of his arrest.

9. When interviewed while in detention subsequent to his arrest the appellant admitted his involvement in both the aggravated burglary of Mr. O'Halloran's residence, and the burglary of Mr. McCarthy's residence.

The circumstances of the offences charged on bill no 54/16

10. On 1st August 2014, Ms. Nicole Slattery, having just arrived home, was seated in the driver's seat of her parked car outside her apartment building at Brookfield Hall, Castletroy, Limerick and was talking on her mobile telephone. Suddenly, the driver's door of her car was opened and her mobile phone was snatched taken from her possession by one of two men who were there and who were wearing balaclavas. Ms. Slattery's car keys were then taken from the ignition by the other of the two men. The man who took the phone said to Ms Slattery:

"Give us everything, give us everything."

11. The men blocked Ms Slattery from getting out of the car, and she was told:

"You're not going anywhere; you're not going anywhere."

12. Ms. Slattery was then threatened, with the following words from one of the unidentified men:

"I have a gun and I'm going to shoot you. I'll kill you."

13. A black hand gun, which later transpired to be an imitation firearm, i.e., pellet gun, was then produced and pointed at Ms. Slattery's face by one of the said men. Ms Slattery later told Gardaí that she thought she was going to die. She went to move, and was told:

"Put your hands back or I'm going to fucking shoot you"

14. Thereafter, Ms. Slattery's handbag was taken from the back seat of the vehicle before both men made off with the said handbag and the mobile phone. Before doing so, one of the men handed her back her car keys and said "Thanks", following which both men ran away in the direction of the main road.

15. The bag contained Ms. Slattery's wallet which in turn contained her credit card, social welfare card, medical card, various other personal effects and €170 in cash.

16. Ms. Slattery was found in a distressed state by a security man who then notified the Gardaí of what had occurred. The Gardaí responded rapidly and instituted a search of the area. The appellant and a companion were found in the vicinity, and they were considered to match the descriptions given by the complainant to the Gardaí. When approached by Gardaí they took off running to a green area of the Cois Ghrúda in Castletroy, Limerick. They were later discovered hiding under a van. They were subsequently arrested, and brought to Henry Street Garda Station where he was detained and interviewed. The appellant was initially non-cooperative but ultimately made full admissions in relation to his involvement in this incident.

17. At one point during the appellant's detention he was being transferred from an interview room to the cells area of Henry Street Garda Station he attempted to escape. He took off out of the door of the garda station and had to be pursued down the street by Gardaí, who managed to apprehend him and return him to the garda station.

18. These offences were all committed while the appellant was on bail for the charges the subject matter of bill no 60/2015.

The appellant's personal circumstances

19. The sentencing judge heard that the appellant was 20-years of age at the date of sentencing, and that he was 17 years of age when he committed the offences on bill no 60/15 and that he was 18 years of age when he committed the offences relating to bill number 54/16. It was also outlined that the appellant's upbringing and lifestyle were dysfunctional and chaotic from a very young age and the appellant had left school without any meaningful education or vocation.

20. The sentencing judge also heard that the appellant was a young man who had struggled with a serious drug issue, both with prescription and non-prescription drugs for many years and that this was the stimulus for his offending behavior. However, it was suggested to the court that the appellant had been drug free since he went into custody some 20 months earlier.

21. The sentencing judge heard that the appellant had four previous convictions. On the 10th September 2015 he was convicted of robbery by Limerick City District Court and received a sentence of 6 months. In addition, two charges of possession of a knife and other articles were taken into consideration on this occasion. Then, on the 13th October 2015, the appellant was further convicted of being unlawfully carried in a mechanically propelled vehicle contrary to s. 112 of the Road Traffic Act, 1961, and received the benefit of the Probation of Offenders Act.

22. Further details with respect to the appellant's personal circumstances are contained in a Probation Report dated 22/03/2017 which was before the sentencing judge, and which this Court has read and considered. The report assessed the appellant as being at high risk of re-offending in the next twelve months without intervention to address his drug and substance abuse issues, his criminal associations, his lack of training/employment and living in a high crime area. It also records the appellant as having little empathy for the victims of his crimes, and as being inclined to minimize and attribute his behaviour to being "stoned out of his head" at the time.

The impact on the victims

23. Mr O'Halloran declined to make a victim impact statement. However, the sentencing court heard that he had found the incident in which he had been involved very frightening, so much so that he immediately got a taxi straight to his family home in Ennis, from where his parents contacted Gardaí to report the matter. The property taken from Mr O'Halloran's house at 2 Cambridge Close was subsequently recovered.

24. Mr Cian McCarthy also declined to make a victim impact statement.

25. Ms Nicole Slattery did make a victim impact statement and this was read into the record at the sentencing hearing. Ms Slattery stated:

"Victim statement of Nicole Slattery. Since the night in question, I, Nicole Slattery, have been affected by this attack greatly. Shortly after the attack, I was hospitalised due to post-traumatic stress. I suffer from very serious cardiac

problems and this attack was extremely stressful to both me and my family. My father was in hospital at the time recovering from a severe stroke, and at a time as stressful as this, the attack was the last thing I needed. Still to this day, I am constantly startled and frightened by the slightest of things. I am constantly paranoid that there's someone in my house or standing outside my car in the dark, waiting to rob me. I constantly double check all the locks in my apartment and can only sleep once I have my bedroom door locked, even though I live alone. I wake up sometimes in the middle of the night from nightmares about the attack, or that someone in my apartment is robbing me. At times, I am so frightened and worried, I have to leave my apartment and stay in my family home to feel safe. Due to my cardiac condition, I am on disability and at the time was unable to work, as my heart is only functioning at 20%. As you can imagine, the €188 is very hard to survive on while running a household. The sum of money that was taken from my purse put me under great financial strain. I still to this day have not been compensated for this financial loss."

The sentencing judge's remarks

26. In sentencing the appellant to the sentences outlined in the introduction to this judgment, the sentencing judge commenced by noting the ranges of available penalties, the circumstances of each of the offences, the impact on the victims in so far as it was known, and the personal circumstances and criminal antecedents of the appellant. Having done so he continued:

"Insofar as the aggravating factors are concerned, Bill 60/2015, this was a very frightening experience for the student involved, being held at a knife point, effectively imprisoned in his property at the time. The fact that the accused was armed at the time, and although no physical injury was caused, violence was threatened and it's quite clear that it was a very traumatising ordeal for the victim in the matter. In fact, that there were two people armed compounds matters, in the Court's view.

Again, in respect of Bill 54/2016, again, this was an extremely frightening experience for the victim. The victim impact statement shows clearly the sequelae and the fact that the victim is still suffering; again, violence was not used but threatened. There were two people involved, an imitation gun capable of firing pellets was produced, and the Court has seen photographs of same. Again, there's the issue of a mandatory minimum sentence of five years arising under the provisions of section 27 of the Firearms Act charge. And a further aggravating feature is that this offence was committed while on bail and the charges are of a similar nature -- similar and serious nature, and there's the fact that the accused has a previous conviction for robbery, which is not helpful.

Insofar as the mitigating circumstances are concerned, there's the early admissions by the accused; these were made during interview and at a very early stage. There's the early plea of guilty indicated by the accused at all stages, and the steps taken to consolidate both matters to have them dealt with together. This obviously has led to a substantial saving of court time, and also a saving of any risk of re-victimisation of the victims involved. There's the acceptance by the accused of his culpability fully in this matter; there is the youth of the accused and his immaturity at the time. It appears that the accused and the gardaí accept that the accused had very serious drug issues, both with prescriptive and non prescriptive drugs at the time, and that he was stealing and robbing, to use a phrase, for money to feed his habit, and that, in fact, he states that he was stoned on both occasions.

There is the remorse expressed by the accused and in that regard, I have seen a lengthy letter penned by the accused, expressing his deep, deep remorse and the fact that he is endeavouring to change his way -- methods. The fact that he is now a parent of a young child and is very anxious to have the opportunity to build up a relationship as a parent with his child. There is the fact that he's making excellent efforts to rehabilitate himself while in custody and has completed a number of courses.

The Court has seen the probation report in this particular matter, which the Court is of the view is guarded. However, the Court is also aware of the chaotic lifestyle that the accused was leading at this particular time, and that he's now more mature in his approach. There is the fact that there was no physical injury caused to any of the victims and that the accused is determined to get out of the spiral of criminality that he has been involved in, and as I said, the genuine efforts to rehabilitate himself.

In the Court's view, both of these matters are very serious cases. Both involve the use of weapons and the threat of violence. In respect of Bill 60/2015, I am of the appropriate view that the matter is in the range of five to seven years in respect of the aggravated burglary, and accordingly on that bill, I'm going to impose a sentence of five years' imprisonment, and I'm going to backdate it, I'll have to be informed of the backdate as such. I'm going to impose a sentence of three years' imprisonment on count 2 and make it concurrent, and in count 3, I'm going to impose a sentence of three years' imprisonment and make that concurrent.

In respect of Bill 54/2016, in respect of the robbery charge, again I feel the appropriate tariff in that particular matter is in the range of five to seven years. Now, violence was threatened, an imitation gun was produced, the offence was committed while on bail. I accept the youth and immaturity are factors, and in all the circumstances, in that particular charge, on count No. 1, I'm going to impose a sentence of five years' imprisonment, to commence at the lawful termination of the sentence imposed on Bill 60/2015. I'll suspend the last 18 months of that on condition that the accused be of good behaviour for a period of 10 years from today. In respect of count No. 2, five years' imprisonment, again that's consecutive to the Bill 60/2015, but concurrent inter se, and the escape charge I'll take into consideration. And as I say, the sentences are to be backdated [to 05/12/2015]."

The Grounds of Appeal

27. The appellant appeals on the following grounds:

1. The sentencing Judge erred in principle in pronouncing a sentence on the appellant which, in all the circumstances of the case, was too severe and harsh.
2. The said sentence imposed was excessive and harsh given the following:
 - a) That the appellant made admissions in relation to the said offences while in custody which progressed the prosecution's case and was acknowledged by the prosecution when presenting the evidence.

- b) The appellant pleaded guilty to these charges at an early stage and took steps to consolidate matters which was of assistance to both the prosecution and to the injured parties.
- c) The appellant was remorseful and apologetic for committing the said offence.
- d) The appellant's personal circumstances have changed since he committed the said offences. As such the appellant has a genuine desire to reform.
- e) The appellant has long struggled with a serious drug problem but has recently made great efforts to address same since going into custody in this matter. As such there is a great prospect for rehabilitation.
- f) The fact of the appellant's youth at the time he committed the offence.

3. The sentencing court in measuring the total sentence failed to take into consideration in the circumstances of the case the principles of totality and proportionality.

28. By consent the appellant was allowed to add the following further ground:

- 4. The trial judge failed to properly consider whether the totality of consecutive sentences was excessive in that the aggregate sentence imposed a manifestly unjust punishment upon the Appellant having regard to his age personal circumstances and the background of the offences.

Discussion and Decision

29. In the course of the oral hearing before us, counsel for the appellant sought to emphasise a number of points. These were in the first instance the contentions that the individual sentences, but particularly those relating to the offences on bill no 60/15, were excessively severe; and that the aggregate sentences imposed by the trial judge were disproportionate, and that this had arisen because the trial judge had failed to properly apply the totality principle. He further contended that in respect of the offences on bill no 60/15, in particular, the sentencing judge had paid insufficient attention to the appellant's youth at the time that these offences were committed, the appellant being just seventeen years of age at the time. Further, it was contended that insufficient regard was had to the fact that there were no victim impact reports in respect of the offences on bill no 60/15, and it was suggested that the trial judge attached excessive weight to the impact statement from the victim in respect of the offences on bill no 54/16. It was suggested that insufficient regard was had to the fact that all goods were recovered, and to the prosecution's concession in the case of bill no 60/15 that the pleas of guilty had been of great assistance. Finally, although counsel concedes that he did not raise the points previously, it was suggested that the alleged knife used by the appellant in the offences on bill 60/15 was in fact a potato peeler that his client had picked up while on the first premises to be burgled. He also sought to make the point, although again he did not raise it in the court below, that the appellant's accomplice had been dealt with in the District Court.

30. We are not prepared to entertain the points concerning the nature of the alleged knife, and how the accomplice was dealt with in circumstances where these points could have been, but were not, raised earlier, and there is no motion to amend the existing grounds of appeal to include them, and no motion to adduce further evidence in respect of them.

31. In so far as the severity of the individual sentences is concerned, we are satisfied having regard to the guidance which this Court has provided in *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121 that they were well within the range of the sentencing judge's margin of discretion. In the case of the offences on bill no 60/15 the range of available penalties was up to life imprisonment in the case of the aggravated burglary, and fourteen years' imprisonment in the case of the ordinary burglary. There were multiple aggravating factors. These were burglaries of occupied dwelling houses in the dead of night. There were two persons involved and certainly in the case of the aggravated burglary both were armed with knives. There were confrontations with the occupiers in both cases. The weapons involved were brandished at the occupant in the case of the aggravated burglary and this was accompanied by serious threats. The victim of the aggravated burglary was greatly traumatised. The appellant had a previous conviction for a relevant offence. The offences were committed in the course of a spree of burglaries in the same housing estate. Given the multiplicity of aggravating circumstances the sentencing judge would have been justified in nominating a headline sentence in the higher ranges in each instance. He did not in fact nominate his starting point, but stated merely that he considered that it was open to him to impose a sentence in the range from five to seven years for the aggravated burglary. The fact that he ultimately opted to impose sentences of five years on the aggravated burglary, and three years on the other offences on that bill, after discounting (generously it must be inferred) for mitigation, does not indicate to us any error of principle.

32. Similarly, in respect of the offences on bill no 54/16 there were again multiple aggravating factors and the victim was seriously traumatised. An imitation firearm was produced and pointed into the face of the unfortunate victim, and she thought she was going to die. Again there were two persons involved. Again the appellant had a relevant previous conviction. This offence was committed while on bail, which by statute is to be regarded as an aggravating circumstance. The offence was committed at night and in the curtilage or precincts of the apartment building in which the victim lived. A presumptive mandatory minimum sentence of five years was applicable in the case of the firearms offence, although the sentencing judge could depart from that in exceptional circumstances. It seems to us that the five-year sentence imposed for these offence was also well within the range of the sentencing judge's discretion, in circumstances where there were so many aggravating factors and given the maximum available penalties in each instance. The trial judge would have been justified at starting much higher than that, and it is to be inferred that he did and ended up at five years after discounting for the mitigating factors in the case.

33. In so far as the totality principle is concerned, the sentencing judge reduced the aggregate sentences by an effective eighteen months and we consider that this was sufficient to render the overall sentences proportionate in the circumstances of this case.

34. It is quite clear from the remarks of the sentencing judge that he had appropriate regard to the plea of guilty, to the appellant's co-operation and to his youth. He also took into account the appellant's expression of remorse in a lengthy letter written to the court, and claims that he was addressing his drugs problem while in prison, although no documentary evidence was produced in support of the latter claim. In so far as it is complained that the appellant's overall circumstances entitled him to a greater discount for mitigation than was in fact afforded to him, we are not persuaded that that is so.

35. In conclusion we can find no error of principle and

