



**THE COURT OF APPEAL**

**Birmingham J.  
Irvine J.  
Edwards J.**

**Appeal Number: 305/2012**

**BETWEEN**

**The People (at the suit of the Director of Public Prosecutions)**

**Prosecutor/Respondent**

**-v-**

**Rory Gahan**

**Accused/Applicant**

**Judgment of the Court (ex tempore) delivered on the 17th day of December 2014 by Ms Justice Mary Irvine**

1. This is an appeal against the severity of a sentence of eight years imprisonment, with the final three years suspended for five years subject to conditions that was imposed on the appellant at Kilkenny Circuit Criminal Court on 11th October 2012

2. On 3rd October 2012 the applicant pleaded guilty to one count of aggravated burglary contrary to s. 13 of the Criminal Justice (Theft and Fraud) Offences Act 2001 in respect of an offence which took place on 9th January 2011 at Graiguenamanagh in Co. Kilkenny.

3. On that occasion the applicant was jointly indicted with Mr. Liam Foley who was later sentenced by Judge Alice Doyle on 15th January 2011 to a period of nine years imprisonment with the final two years suspended for a period of five years.

**Circumstances of the offence**

4. The circumstances of the offence as those which were outlined by Gda. O'Donovan in the course of the sentencing hearing and they are as follows. At approximately 1 a.m. on 9th January 2011 the applicant and Mr. Foley called to their victim, Mr. Hayden's home. They got him to open the door on the pretext that they were members of an garda síochána and then shoved past him. Mr. Foley proceeded to smash a television set with a hatchet and also took €160 from Mr. Hayden's wallet and stole a range of medication.

5. Mr. Foley then went out of the house, brought back in a holdall from which he took some white spirit, set fire to certain receipts and rubbish in the fireplace. That fire spread into the room and it was the applicant who put out the fire with a jumper that was close at hand. Then a demand was made of Mr. Hayden to know where his drugs cabinet was located. He was also asked about the whereabouts of his mobile phone and when he did not respond sufficiently two or more televisions were smashed.

6. It is clear from Gda. O'Donovan's evidence that he at least seemed to accept that it was more likely that it was Mr. Foley who had smashed these televisions. Mr. Foley then tied Mr. Hayden up. He spilled some white spirit and later petrol on Mr. Hayden's hands apparently to reduce any prospect of finding evidence. Again, it was Gda. O'Donovan's understanding that it was Mr. Foley who had in fact been engaged in pouring the petrol and the white spirit on Mr. Hayden's hands. There was no evidence that Mr. Hayden ever thought he was going to be set on fire.

7. However, before this very significant burglary concluded Mr. Foley s proceeded to slash Mr. Hayden's face with a penknife and it is very clear from the transcript of the sentencing hearing that this caused a very significant injury requiring twelve sutures to be inserted in Mr. Hayden's face.

8. In the course of the exchange between the parties it appears likely that the appellant asked Mr. Hayden how long it was likely to be before somebody would actually call to his house and that following this exchange Mr. Hayden gave him the phone number of a friend. To the applicants credit it has to be said that he phoned this man, who was a taxi driver, some five or seven hours after they left Mr. Hayden's premises.

9. After this particular assault Mr. Hayden got free relatively quickly and he was able to attend to his face. However, he had not the courage to leave the house until the following morning at which stage he went to a neighbour's house. In the course of the sentencing hearing Gda. O'Donovan certainly made it clear that Mr. Foley in his view had been the main aggressor and that seemed to be accepted ultimately by the sentencing judge.

10. Insofar as Mr. Hayden was concerned a matter of importance to the trial judge in assessing the gravity of the offence, Mr. Hayden was sixty five at the time of the burglary, he was living alone. He was apparently very frightened by the events and it took him about six weeks to recover to the point that he felt secure enough to go back to live in his house but even then he had remained very vulnerable. He had additional bars inserted in his home and he had also installed some CCTV television surveillance equipment - all, I suppose, tending to show that this burglary had a very significant effect on him.

11. As to the circumstances of the accused, which of course are important to culpability, the court heard that Mr. Gahan had a number of medical and learning difficulties. He was born in 1984. He was twenty eight at the time of the offence. In 2000 he had been diagnosed as having some problems in terms of ADHD. He was also diagnosed as being dyslexic and having Tourette Syndrome. He was from a good family background and he had thirteen previous convictions, although all of these were for, I suppose, in a

qualitative sense of a much lesser significance than the offence in question. It was very clear from the evidence given to the sentencing judge that he had been addicted to drugs for many years, in particular heroin, and that he had made excellent efforts to rehabilitate himself and GdA. O'Donovan confirmed to the trial judge that the applicant, Mr. Gahan, had been on a methadone program successfully since November 2011. So it was against that background that the trial judge imposed sentence.

### **Submissions**

12. On the hearing of the appeal today Mr. Delaney S.C. has made a number of points to the court. He firstly submitted that the eight years starting point in terms of the gravity of this offence as found by the trial judge was too high. He said that the trial judge in considering the gravity of the offence did not pay sufficient regard to the fact that his client played the lesser role in this particular burglary and he relies upon the fact that it was Mr. Foley who inflicted the laceration, tied Mr. Hayden's hands, poured the petrol and white spirits over him and overall behaved more aggressively in terms of the use of a hatchet to smash up at least one television set. He also submitted that the other matter that the trial judge failed to take into account when assessing the gravity of the offence was his client's culpability and that the trial judge did pay sufficient regard to his mental health problems. He handed into court his morning the report of Dr. O'Loughlin who prepared a psychiatric report which said that his client was somebody who was he felt was likely to become a fall guy or easily led and that was the opinion of Dr. O'Loughlin on 29th February 2000.

13. Mr. Delaney's next point is that he says that the sentence should have been reduced unconditionally to take account of the very significant mitigating factors in the case which included the plea of guilty, the admissions made, the co-operation and the remorse and he says that this should not have been dealt with by way of suspending a three year portion of the sentence because that placed his client at risk of losing the benefit of mitigating factors should he end up in breach of the conditions attached to the suspension of the sentence. He then says that having reduced the sentence unconditionally to reflect mitigation the trial judge then should have further suspended a portion of that sentence to reflect the fact that his client had been involved in rehabilitation and to encourage him to rehabilitate further.

14. Mr. O'Shea, counsel for the DPP, submitted that the trial judge was not to be criticised for her approach to the imposition of sentence. He says that she properly assessed the gravity of the offence and the culpability of Mr. Gahan. She did not make any error in principle in the manner in which she constructed the sentence. He submitted that it was not necessary for the trial judge to take what he described as a formulaic approach to sentencing and he relied upon the decision of Mr. Justice O'Donnell J. in *DDP v. Byrne* and he says that there is no law to support the proposition that a trial judge does not have the discretion to deal with rehabilitation and mitigation together and to deal with those matters in terms of imposing a suspended sentence, there is nothing requiring the judge to unconditional reduce a term of imprisonment by reason of these factors.

### **Decision**

15. So, the decision of the court is as follows. The court has reviewed the evidence that was available to the trial judge at the sentencing hearing and it has paid particular regard to each of the factors which were outlined by the learned Circuit judge in imposing sentence. Having done so the first matter about which we are satisfied is that in assessing the gravity of the offence and placing this offence high on the range of penalties for this type of offence that the trial judge did not fall into error.

16. She clearly took into account the very serious nature of this offence. She identified the fact that the offence had taken place in Mr. Hayden's own home, that it was a planned pre-mediated attack, that Mr. Hayden was terrorised for an hour in the dead of night, that the two men had gained entry under false pretences and that in the course of a joint enterprise Mr. Hayden had been tied up, petrol spilt over him. She referred to the wanton violence and the fact that money and keys had been stolen for the house and then, to end it all, as part of this joint enterprise a very severe slashing of Mr. Hayden's face had taken place. All of these factors were taking into account by the trial judge who several times in the course of imposing sentence referred to the fact that she accepted that it was clear that Mr. Gahan had played the lesser of the two roles and that she had taken that fact into account when dealing with the gravity of the offence.

17. She also took into account the personal circumstances of Mr. Gahan himself. Insofar as Mr. Delaney has stated that insufficient weight had been attached to Dr. O'Loughlin's report, the court is not satisfied that that medical report itself is of any great significance. Firstly, as to its content it is not very significant in terms of reducing culpability and secondly it is so far out of date in terms of the date of these offences. This is a report dated 2000 that the court feels that the fact that it may not have been considered by the trial judge had not lead to any injustice.

18. As to Mr. Delaney's second point the court is quite satisfied that a sentencing judge has a great deal of discretion as to the manner in which he or she will reflect the mitigating facts when they go about constructing the sentence and in this case there were very significant mitigating factors. However, of very significant importance in the context of this appeal is the fact that the applicant had a background of very serious drug addiction and in respect of which he was undergoing rehabilitation at the time he was sentenced. We believe that these circumstances would tend to suggest that he will remain at risk for many years in respect of his drug addiction and that there is a significant chance that at some stage in the future he may fall foul of the conditions attached to that portion of a sentence that was suspended.

19. In these circumstances *i.e.* those which relate to his drug addiction, this court is satisfied that the trial judge did err in principle in suspending a three year portion of the sentence to take into account all of the mitigating factors in the case. In doing so she has, in effect, exposed Mr. Gahan to the risk of potentially losing the benefit of all of the other mitigating factors in the case which should have led to him serving a lesser sentence of imprisonment. Because of that fact the court feels that there was an error of principle and that the court will, in those circumstances, and having regard to the specific facts of this case, set aside the sentence of the trial judge on that basis and on that basis alone.