



## THE COURT OF APPEAL

Birmingham J.  
Edwards J.  
Hedigan J.

133/16

Between

The Director of Public Prosecutions

Respondent

V

Noel Kinsella

Appellant

**JUDGMENT of the Court delivered on the 2nd day of March 2017 by**

**Mr. Justice Hedigan**

### **Background**

1. This case concerns an aggravated burglary committed in the early hours of 11th October, 2015, at 25 Cloverwell, Edgeworthstown, Co. Longford. The two appellants were involved together in committing the offence. Ryan withdrew his appeal before this Court. They wore hard helmets, high visibility jackets and had their faces covered. Kinsella held a steel bar. Ryan held a knife. The house was occupied by six people when both men breached the front door by kicking it in after they had failed to break the glass at the rear patio door. This occurred a short time after 1 am in the morning.

2. The six occupants of the house were Adil Raza and his wife Hafsa (Mary) Hussein and Mr. Raza's parents, one of whom (his father) was confined to a wheelchair at the time. He was 74 years old. They also had two children in the house, aged 5 years and 3 years respectively.

### **The circumstances of the offence**

3. Garda Gary Beattie gave evidence which was summarised by the learned sentencing judge in passing sentence on 12th May, 2016. The description given painted a picture of absolute terror in the household. Mr. Raza's elderly father had a knife placed to his throat by the appellant Ryan. This was accompanied by a demand for money. Mr. Raza himself was taken upstairs by Ryan at knifepoint in search of money. Mr. Raza's wife was then brought upstairs at knifepoint by Ryan and told by him that unless money was found their children would be stabbed. Laptops and phones were placed into a black bag by Mr. Raza and his wife in order to appease the men, one of whom also searched in cupboards and under the mattress of the master bedroom in an effort to find money. Mr. Raza succeeded in telephoning his mother in law surreptitiously with a request that she alert the Gardaí to what was unfolding in the house.

4. Garda Beattie responded to a call to the Garda Control Room at Roscommon Garda Station. He arrived on the scene alone. He saw two men exiting the house through the front door. Both were wearing masks. They were also wearing high visibility jackets and builders' hats. He identified himself to them. They took off running and he gave chase towards the back garden of the house. The Garda saw the taller of the two men (Ryan) climb the garden wall into a neighbouring property. As Kinsella attempted to climb the back wall Garda Beattie grabbed him and pulled him down from it, knocking him to the ground and then placing him under arrest. Less than one hour later, Garda Angela Keegan arrested Ryan after she stopped him as he drove a car out of the estate.

### **The nature of the offence**

5. The offence of aggravated burglary constitutes a serious offence against the person. In *The People (DPP) v. Paul Murray* [2012] 2 I.R. 477 at para. 13 the former Court of Criminal Appeal dealing with burglary offences stated as follows:

*"[T]he reason it is treated so severely by the law is because of the fact that the victims have generally been terrified in the process and by reason of the long term impact which such offences have on the peace of mind of the persons affected. In that respect, burglary is in truth regarded as an offence which is more akin to an offence against the person than a pure theft offence simpliciter."*

Dealing with the same topic in *R. v. Brewster* [1998] 1 Cr. App. R. 220, Lord Bingham stated that domestic burglaries:

*"are the more serious if they are of occupied houses at night; if they are the result of professional planning, organisation or execution;... if they are committed by persistent offenders;... if they are shown to have a seriously traumatic effect on the victim; if the offender operates as one of a group;... if force is used or threatened; if there is a pattern of repeat offending. It mitigates the seriousness of an offence if the offender pleads guilty, particularly if the plea is indicated at an early stage and there is hard evidence of genuine regret and remorse."*

### **The procedural background**

6. On 9th February, 2016, when the case was first listed before the Circuit Court, Kinsella pleaded guilty to aggravated burglary, being the sole count on the indictment. He was remanded in continuing custody to the 10th May, 2016, for sentencing. Urinalysis was directed by the Court.

7. On 11th February, 2016, during the same Circuit Court sittings Ryan pleaded guilty to the same offence and was remanded in continuing custody until 10th May, 2016, with directions that a prison governor's report be placed before the Court together with the urinalysis.

8. Sentence was imposed on 12th May, 2016. Having considered the matter and having prepared a written judgment, the learned

sentencing judge determined that both had acted under a common design to perpetrate the offence and were equally culpable for it. He stated:

*"While it could be argued that given that Mr. Kinsella has 98 previous convictions, as opposed to Mr. Ryan's 23, he should receive a heavier sentence than [Mr. Ryan], I am satisfied that given the fact that Mr. Ryan had the knife when this crime was committed, it is clear that each of the accused should be treated equally for their involvement in this crime."*

9. Accordingly, the headline sentence for the offence was determined to be 12 years and, having considered the aggravating and mitigating features in the case, each of the appellants received 9 years imprisonment with the final 2 years suspended on condition that;

- i. they entered a bond of €500 to keep the peace and be of good behaviour for 2 years post release;
- ii. that they remain under Probation Service supervision for 2 years following release;
- iii. that they refrain from alcohol and drug consumption for 2 years following release and that;
- iv. in the intervening period they engage with drug addiction counselling services in prison.

10. Kinsella's sentence was made consecutive to 5 years imprisonment (final 18 months suspended) which was imposed by Dublin Circuit Court on 12th February, 2016, (expiry date 28th November, 2019) because the instant offence was committed on 11th October, 2015, while he was on bail for that offence which was committed on 24th June, 2014.

11. Kinsella submits that the sentence was too heavy and that the sentencing judge should not have treated his previous convictions as an aggravating factor. He also claims that the judge did not give enough credit for mitigating circumstances and that the proportionality and totality was not considered by the sentencing judge. He also submitted that the reference to his wielding a steel bar during the incident was incorrect.

### **The sentences considered**

12. In the Court's view the headline sentence which was identified was appropriate having regard to the nature of the offence and the particular circumstances in which it occurred which were very serious and terrifying for this unfortunate family. The Court is also of the view that the sentencing judge was correct to regard both appellants as having participated in a common design and that he was entitled to regard them as equally culpable for what occurred. The learned sentencing judge was obliged to have regard to the principle that co-offenders should receive the same or very similar sentences unless there was some appreciable difference in their level of culpability or personal circumstances.

13. The sentence handed down to Kinsella will not commence until 28th November, 2019, owing to the fact that the offence was committed whilst he was on bail for a robbery committed in June, 2014 for which he received a 5 year sentence with 18 months suspended on 12th February, 2016. At that time, he was already in custody having had a 2 year sentence (suspended for 5 years) reactivated on 15th October, 2015. Therefore Kinsella's previous record has ensured that he has been in custody serving a sentence since 15th October, 2015, and that he will serve considerably more time in custody than Ryan will. The totality of consecutive sentences now imposed amounts to 12 and ½ years allowing for the suspended parts thereof. As regards the sentence imposed by the learned sentencing judge upon Kinsella in the instant case, even allowing for the fact that the sentence imposed will not commence until 28th November, 2019, the reduction of 3 years from a headline sentence of 12 to an actual sentence of 9 years, followed by the suspension of 2 further years, in the view of this Court took adequate account of the totality of the consecutive sentences.

14. Kinsella's prior convictions as an aggravating factor: The approach of the courts in relation to this practice has been discussed by the learned author in O'Malley, *Sentencing law and practice*, 3rd Ed., (Dublin, 2016) at para. 8.06. He states therein as follows:

*"Insofar as it [is] possible to identify any pattern emerging from Irish appeal court jurisprudence, it is probably fair to say that a previous conviction is most likely [to] be treated as an aggravating factor where it [is] of a serious nature and similar in character to the current offence."*

15. In *The People (DPP) v. Mahoney* [2016] IECA 27, at para. 45 the Court of Appeal stated as follows:

*"While this Court has held in the past that previous convictions for the same type or very similar types of offence can sometimes be treated [as] an aggravating factor, the preferred view is that previous convictions (other than those for the same or very similar types of offences) do not aggravate an offence. Rather, the better view is that they should be taken into account on the other side of the scales leading, depending on the number and seriousness of them, to progressive, and in some cases total, loss of the mitigation that is normally afforded for good character."*

Thus previous convictions will not be treated as aggravating unless they are similar in nature to the offence of conviction and, unless reasonably serious as well. It is quite clear that these criteria are fully met in this case. Thus the learned sentencing judge was perfectly correct to take the truly dreadful record of previous convictions of Kinsella into account and structure his sentence appropriately. He was obliged to regard it as an aggravating factor that the offence was committed whilst each of the appellants were on bail in connection with other offences. The very limited elements of mitigation present in this case in respect of both appellants were properly considered by the judge.

16. The argument raised on Kinsella's behalf by his counsel concerning the use of the steel bar we consider to be unrealistic. The evidence was that Mr. Raza senior, an elderly man, saw Kinsella attempting to smash in the door of his home with this bar. It is not realistic nor is it helpful to attempt to deconstruct the whole of this terrifying incident so as to isolate its constituent parts. Kinsella appeared at the house armed with a steel bar and used it in a terrifying manner. Moreover, whether he did or did not push Mr. Raza senior into a chair is at best peripheral. As to the proportionality and totality of the sentences he imposed, the sentencing judge did consider both these matters as can be seen at lines 2 to 5 of page 10 of the transcript of the 12th May, 2106.

17. The Court has considered very carefully the question of whether it should increase the sentence to be served by the appellant. In the circumstances of this grave offence, no question arises of decreasing it. We have considered lifting the suspensory element so as to provide that the appellant serves the full nine years. With some hesitation we have decided not to do this.

18. In the light of the above the Court considers that the learned sentencing judge, taking into account all the background facts, the

nature of the offence, the previous convictions of the appellant, the plea of guilty and the fact that the plea followed the apprehension red-handed of the appellant was entirely correct in the manner and extent to which he sentenced the appellant. This Court will not interfere with the sentence imposed.