



Birmingham J.
Mahon J.
Edwards J.

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Applicant

V

COLIN CULHANE

Respondent

Judgment delivered on the 27th February 2017 by Mr. Justice Edwards

1. In this case the respondent pleaded guilty to eight counts of burglary contrary to s. 12 (1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 before Limerick Circuit Court on 3rd June, 2015. He was sentenced on 1st October, 2015.

2. The respondent received sentences of 5 years imprisonment on counts nos. 1, 2, 3, 4, 5 and 6 respectively, to date from the 1st October of 2014. The sentences on those counts were to run concurrently with each other. The appellant also received sentences of two years imprisonment on counts nos. 7 and 8. Again these were to run concurrently with each other but they were to be consecutive to counts nos. 1, 2, 3, 4, 5 and 6. The two year sentences imposed on counts nos. 7 and 8 were further suspended in their entirety upon the respondent entering into a bond in the sum of €100 to keep the peace and be of good behaviour for a period of 7 years from the date of sentencing.

3. The applicant now seeks a review of the said sentences pursuant to s. 2 of the Criminal Justice Act, 1993 on the grounds that they were unduly lenient.

The Facts of the Case

4. The sentencing Court heard evidence concerning the circumstances of each of the eight burglaries in question from Detective Garda Gerard Healy. Count no. 1 concerned a burglary committed on the 3rd of February, 2014 at Mary Immaculate College, South Circular Road, Limerick. On that date, at approximately 11 p.m., a security guard at Mary Immaculate College was carrying out his rounds of the building. He entered a hallway between the Accounts Office and the Finance Office and upon doing so observed a male inside the Finance Office wearing a short dark jacket and a ski mask. This individual's face was covered except for his eyes. When the intruder realised that he had been spotted by the security man he ran towards one of the windows. The security man had to use a swipe card to get into the Finance Office as it was locked. By the time he got the door open the intruder had climbed out of one of the sash windows onto a flat roof. He then made good his escape. It was realised subsequently that a glass panel had been removed from the sash window through which the man exited the Finance Office. This was the means by which he had gained access to the building in the first place. The intruder had taken €46 in coins in the course of the burglary and he dropped these on the flat roof just outside the building in the course of making his escape.

5. Count no. 2 concerned the burglary of a house called "Villa Maria" at Summerville Avenue in Limerick City. This was a house let to students and two of the tenants were a Ms. Lorna Kiely and a Mr. Paul Kelly. Ms. Kiely was a fourth year student at Mary Immaculate College. On 10th March, 2014 she left her said residence at about midday. She locked the door into her room but she did not lock the front door. She came back to the house at 3.45 p.m. and found that the front door had been locked. On admitting herself to the building she noticed that the drawers in the kitchen were open and she saw that the door of her own room had been opened and her property was scattered all over the place. Although her bag was turned over and the drawers of furniture in the room were pulled out nothing appeared to have been taken. In the case of Mr. Paul Kelly who also resided in that house, he was not so lucky. He received a call to the effect that there had been a burglary and upon returning to the house discovered that his Ipod and a set of Beats headphones had been taken from his room.

6. Count no. 3 concerned the burglary of an office at Mount St. Vincent on O'Connell Avenue in Limerick. This was the office of a Ms. Mary Collins who had left work at 5.30 p.m. on 11th March, 2014. She left a laptop computer on her desk. When she arrived at her work the following morning she noticed the window beside her desk had been broken and the laptop computer, which was worth approximately €695, had been taken during the night. The laptop was a work laptop and contained data relating to Ms. Collins' work

7. Count no. 4 related to the burglary of the home of Ms. Michelle Collins at O'Connell Avenue, Limerick. On 17th May, 2014 she left her house at around 4.30 p.m. She secured all the windows and doors and was away overnight. Prior to her return she received a phone call to say that her daughter had called to the house and had found that the front left sitting room window had been broken and that the house had been broken into. Ms. Collins returned at 12.30 p.m. on the following day and when she got home she saw the bottom left pane of the glass on the bay window was smashed and the house had been ransacked. A large quantity of electrical items had been stolen including a silver Dell laptop computer valued at €300, a black Acer laptop valued at €500 and an Ipod valued at €229. In addition a large quantity of jewellery was taken including an engagement ring valued at €4,000, a diamond tennis bracelet valued at €2,000, diamond earrings valued at €4,000, a diamond pendant necklace valued at €2,500, a quantity of links jewellery with a total value of €3,000 and a Raymond Weil watch valued at €800. In addition a brown leather brief case was taken.

8. Count no. 5 concerned the burglary of an office premises at 29 Henry Street, Limerick. This was the office of Cathal Barry. He returned to his office at about 3 p.m. on 17th June, 2014 having left it at 11.30 a.m. When he returned he noticed that a laptop computer had been stolen. It appears he may have left a rear window open. However the doors of the office premises were secured. The laptop was valued at €1,000.

9. Count no. 6 concerned the burglary of John Nash who lives at 3, Rope Walk, Mulgrave Street, Limerick. On Monday, 23rd June, 2014 he left his house at 1.30 p.m. It was locked up and there was no one else at home. He returned home at 4 p.m. and noticed that the rear patio door had been smashed. The bedrooms had been ransacked and the front sitting room window was opened. A bag containing around €120 in coins, a duty free bag with 20 boxes of tobacco, a bottle of vodka and 3 watches had been stolen.

10. Count no. 7 concerned a burglary at Windmill House which is an apartment block in Limerick City. One of the residents of that apartment block was a Ms. Daniela Grech. On Thursday, 27th August, 2014 at 11.30 a.m. Ms. Grech took certain medication, put in her ear plugs and went into her bedroom to sleep. Her sleep was disturbed when she heard something coming from the direction of the door across the way from her apartment. At approximately 12.35 p.m. her dog started barking and came into her room, jumped on the bed to wake her up and was growling. She then heard a noise at her door as if the handle was going up and down continuously. Then her doorbell kept ringing. She had the presence of mind to tie up the dog's mouth with socks to keep him quiet and to wait to see what would happen because she believed that somebody was trying to break in. She left the bedroom barefoot so as not to make any noise and heard the handle going up and down again. Then she heard the thump of a shoulder against her door and then a kick to the door. She looked through a crack underneath the door and could see a pair of black trainers with a thick sole. She tiptoed back into her sitting room and rang her next door neighbour and told him that somebody was trying to break in. She also called the estate management company and the Gardai. The neighbour came out of his apartment and saw a man outside Ms. Grech's door. This man, upon seeing the neighbour, ran into the fire escape and by that means left the apartment building. Subsequent to this damage was observed to the door of Ms. Grech's apartment which was dented. Similar damage was also observed on the door of an adjacent apartment.

11. Count no. 8 concerned the burglary of a house at 5, Grattan Street, Limerick in which Mr. Dara Bailey resided with his wife and daughter. Mr. Bailey was working on the 29th of September, 2014 when he received a phone call to say that his house, which he was renting, had been broken into. A purse was taken in the course of the burglary containing some €50 in cash as well as a Prestigio computer tablet belonging to his daughter, worth approximately €150. There was also damage to a pane of glass in the front door.

12. The respondent was identified as the intruder in each case in the following circumstances. In the case of the burglary to the office of Cathal Barry at 29, Henry Street, Limerick the scene was technically examined and a partial palm print belonging to the appellant was found on the inside of a PVC window at that premises. The appellant was subsequently arrested in connection with that burglary and made certain admissions. Following the burglary to the premises of Mr. Nash at 3, Rope Walk, Mulgrave Street, Limerick Detective Garda happened to be in Casey's Centra on the Dock Road in Limerick where he observed the appellant enter the shop carrying a duty free plastic bag. The appellant then proceeded to empty the contents of the bag into the coin counting machine which was inside of that shop. He cashed in a large number of coins for notes and then left the shop. When Detective Garda Healy commenced duty shortly thereafter he received a call to attend the burglary at 3, Rope Walk when he learned that a large quantity of coins was amongst the property stolen. In follow up investigations the appellant was arrested and interviewed and he made a number of admissions.

13. Again, in the case of the burglary of the apartment block at Windmill House, the scene was technically examined and a finger mark from the left palm of the appellant's hand was found on the door of the apartment adjacent to Ms. Grech's apartment, which led to the appellant being arrested in respect of that offence. The appellant made admissions in relation to the other burglaries in the course of being interviewed in connection with the various crimes in respect of which there was forensic evidence.

14. Counts nos. 7 and 8 were committed whilst the appellant was on bail in respect of the other counts on the indictment.

15. In the case of the burglary to the dwelling of Mr. Nash at 3, Rope Walk, the property stolen was recovered. However the majority of the property stolen in the other burglaries was not recovered and in particular the jewellery of Ms. Collins which cumulatively was worth approximately €10,000 was not recovered.

The Appellant's Personal Circumstances

16. The appellant was born on the 13th of June 1981. He is a drug addict chronically addicted to heroin. At the date of sentencing he had 71 previous convictions, of which 37 were for burglary. He had last been before the Circuit Court on the 27th of October 2011 in respect of a number of burglaries when the Circuit Court Judge imposed a 5 year sentence on him in respect of each one and suspended the final 3 years for a period of 6 years. The offences which are the subject matter of the present case were committed within the period of the suspension, thereby giving rise to a s. 99 application.

17. It was agreed by the prosecuting Garda that the appellant had been co-operative and had given a very early indication of his indication to plead guilty. The Garda characterised him as a pitiful character.

The Section 99 matters

18. The sentencing court was told that there were two bills which had come before the Court on 27th October, 2011. Bill No. LK 58/11 involved a series of burglaries. There were 5 counts. The accused received 12 months on Counts 1 to 4 and on Count 5 he received 5 years imprisonment with the final 3 years suspended for 6 years. The 5 years was consecutive to the sentences of 12 months that were imposed for Counts 1 to 4. The second matter involved Bill No. LK 97/11. This also involved offences of burglary and there were a total of 12 counts. The appellant received 5 years imprisonment on each count to run concurrently inter se and with the final 3 years suspended for a period of 6 years. However the sentences on Bill No. LK 97/11 were to run consecutive to the sentence imposed on Count 5 on Bill No. LK 58/11.

The Sentencing

19. Having heard a plea in mitigation the sentencing Judge reserved his judgment from the 29th of July 2015 to the 29th of September 2015. On 29th of September 2015 the sentencing judge invited further legal submissions in relation to s. 99 of the Criminal Justice Act, 2006 (as amended). Following the submissions the sentencing judge further adjourned the matter to the 1st of October 2015 when he gave judgment.

20. Having rehearsed the facts of the case insofar as Counts 1 – 8 were concerned the sentencing judge then stated:

"In respect of this matter, two issues arise. Firstly, the accused was before Limerick Circuit Court on two separate indictments - bill 58 of 2011 and bill 97 of 2011. Both these matters were dealt with by my predecessor, Mr Justice Moran on the 27th of October 2011. Bill 58 contained five counts of burglary; bill 97 contained 12 counts of burglary. In respect of bill 58, on counts No. 1 to 4, the accused received a 12-month sentence. And on count No. 5 he was sentenced to five years' imprisonment, consecutive to the 12 months with three years of that five years suspended on condition that he be of good behaviour and keep the peace for a period of six years.

In respect of bill 97 on the same date, on counts No. 1 to 12 he was given five years' imprisonment, consecutive to the 12 months, with three years suspended for a period of six years. It's not clear from the evidence that he was trying -- he finished his sentences that were handed down, but what is absolutely clear is that the offences now before the Court were committed during a suspended period handed down by this Court in October 2011. The second issue of relevance is that on the current indictment, counts No. 7 and 8 were committed while the accused was on bail and therefore that further complicates matters.

The accused in this matter is now 34 years of age; he has 71 previous convictions. The bulk of these are all for burglary or larceny, stretching from a period of October 1997 to date. He has served a considerable amount of sentences, but despite this fact, still continues to commit several more similar offences, as such. He has 36 previous convictions alone for burglary.

It is manifestly clear also that the last sentence imposed in October 2011 contained both a long sentence and an equally long suspended portion, presumably to act as a deterrence, however the accused continued to reoffend. It is appropriate also to mention the victims. These are a variety of people - office workers, students, homeowners who no doubt feel that their workplaces and homes and apartments have been violated. There are a number of computers, iPads, the last of which can cause untold damage and difficulty for all concerned. There is the sentimental value of the items that were also taken, such as the jury and this, as I understand, has caused severe emotional distress and trauma. Insofar as the aggravating factors are concerned, the accused is before the Court on 8 counts of burglary again. There is his previous convictions for similar offences. There is the aggravating factor also that some of these burglaries were committed during the course of this suspended sentence and furthermore committed while on bail. There is the considerable loss of property, little or none of which has been recovered, and the state have described the accused as a professional burglar, a recidivist.

In mitigation on this particular matter there is the early admissions and co-operation with the gardaí; there is the early plea of guilty and the benefit to all of the victims in this matter. There is the fact that the accused has been in custody since the 1st of October 2014. There is the fact that he has chronic drug addiction issue and the State are satisfied that all the property was sold to try and fuel a very serious drug habit. There is the fact that the accused is making good use of his time while in custody in efforts to try and deal about it, well, in an effort to educate himself. The efforts that were made to recover some of the items, which was somewhat successful. There is his own efforts to try and deal with his drug addictions while he is in custody.

However, the Court must take a very serious view of these offences. The Court are obliged to look at both the offences and the circumstances of the same and the offender and his circumstances. The Court is also obliged to hand down a sentence which is proportionate, having regard to all the circumstances. And the circumstances, having listened carefully to the evidence in this case and the submissions made by the State, and having listened very, very carefully to the plea in mitigation, I don't intend to invoke any period of the suspended sentence that has been handed down in 2011.

However, in respect of count No. 1 on this indictment, he is convicted and sentenced to five years' imprisonment and I'm going to backdate that to the 1st of October 2014. On count No. 2 he is sentenced to five years' imprisonment. Again, I'm going to backdate that to the 1st of October 2014. I am going to impose a similar sentence on counts No. 3, 4, 5 and 6. In respect of count No. 7, I am going to impose a two year sentence consecutive to the five years, suspended for a period of seven years from today's date. And on count No. 8, two years imprisonment consecutive to the five years, suspended for a period of seven years from today's date. In other words, I am fulfilling my obligation for the consecutive sentence, but I am actually suspending the consecutive sentence.

MR McINERNEY: I am grateful. Actually you should impose a sentence then on count No. 6 as well.

JUDGE: And count No. 6, my apologies, is five years. Counts No. 1 to 6 are five years concurrent.

MR McINERNEY: Inter se?

JUDGE: Inter se and to be backdated to the 1st of October 2014.

MR McINERNEY: Then you're imposing a sentence of two years on 7 and 8?

JUDGE: Correct.

MR McINERNEY: Suspended for a period -- consecutive to 1 to 6, but suspended for a period of --

JUDGE: Well, I was trying to work your other formula on the basis that there is a five years --

MR McINERNEY: Seven years. Yes, seven years from today's date.

JUDGE: Yes, seven years from today.

MR McINERNEY: May it please the Court, you are entitled to do that. May it please the Court, and you are making no order, as I understand it, on the two other -- the two bills where the section 99 arises?

JUDGE: That's 11; 58 and 97.

MR McINERNEY: 58/11 and 97, may it please the Court.

JUDGE: I have decided not to invoke any of the suspended period in the light of the sentences I have imposed."

Grounds of Application

21. The applicant complains that the said sentences were unduly lenient having regard to the nature, circumstances and gravity of the offences and, in particular the sentencing court erred in principle in:

a. Failing to identify an appropriate starting point at a sufficiently high level to reflect the nature of the said offences and the aggravating factors in the case.

b. Failing to reflect in the said sentences the following aggravating factors, namely:

i. The fact that the respondent was on bail when he committed the offences set out at Counts 7 and 8;

ii. The fact that when the respondent committed the offences the subject matter of the said indictment he was subject to suspended sentences imposed on 27th October, 2011 in respect of a multiplicity of offences which were similar in nature to the offences the subject matter of the above named indictment;

iii. Suspending the sentences imposed in respect of the said offences set out at Counts 7 and 8 of the said indictment notwithstanding the fact that the respondent had committed the said offences while on bail for offences of a similar nature and had reoffended when subject to suspended sentences in respect of offences of the like nature.

Submissions on behalf of the Applicant

22. The applicant makes the point that by virtue of the provisions of s. 11 of the Criminal Justice Act, 1984 (as amended by s. 10 of the Bail Act, 1997 and as substituted in part by the Criminal Justice Act, 2007) it was mandatory to make any sentence imposed for an offence committed while the offender was on bail consecutive to any sentence imposed for any offence in respect of which the offender had been released on bail. Secondly, offending while on bail must be treated as a separate aggravating factor unless there are exceptional circumstances justifying a sentencing court in not doing so. The Court was referred to examples of cases in which both this Court and our predecessor the Court of Criminal Appeal have repeatedly stressed the importance of sentencing judges having regard to these requirements. In particular we were referred to *The People (Director of Public Prosecutions) v. Doyle* (unreported, Court of Criminal Appeal, 19th February, 2004); *The People (Director of Public Prosecutions) v. Yusuf* [2008] 4 I.R. 204; *The People (Director of Public Prosecutions) v. Doran* [2008] IECCA 78; and *The People (Director of Public Prosecutions) v. Healy* [2016] IECA 3.

23. It was submitted that having regard to the volume of offences which he was required to address the learned sentencing judge ought to have approached the case by determining the appropriate starting point or headline sentence for the offences taken individually.

24. It was further submitted that the offences which the learned sentencing judge had to address had been committed during the currency of two lengthy suspended sentences. Further, the offences at Counts 7 and 8 had been committed when the respondent was on bail in respect of the burglaries at Counts 7 and 8.

25. It was submitted that in relation to all of the offences the learned sentencing judge did not identify a proper starting point to meet the seriousness of the offences and the accumulation of same. It was further submitted that it was only in exceptional circumstances that sentences for offences committed while on bail should be suspended in their entirety. The applicant contends that the sentences for the offences at Counts 7 and 8 do not reflect the fact that these offences were committed when the respondent was on bail for similar offences. It was submitted in the circumstances that the sentencing judge erred in principle in suspending the sentences for these offences in their entirety. It was further submitted that having regard to the very significant disregard by the respondent for the terms of the suspended sentences imposed upon him for offences of a similar nature it was not appropriate for the sentencing judge to impose a further series of suspended sentences. The applicant therefore contends that the sentences imposed by the sentencing judge constituted a significant departure from the norm and were unduly lenient.

Submissions on behalf of the respondent

26. Counsel for the respondent has submitted that in structuring the sentences which he imposed upon the respondent the sentencing judge did not make any error of principle but rather imposed a sentence based upon the evidence, the findings made by him and proper sentencing principles. It was submitted on behalf of the respondent that while the sentence imposed might be considered lenient it was not unduly so.

The Court's analysis and decision making

27. The jurisprudence concerning the exercise of the jurisdiction to review a sentence on the grounds of undue leniency based upon s. 2 of the Criminal Justice Act, 1993 is well settled and has been rehearsed in a great many cases. The seminal decision is that in *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279. This was a judgment of the former Court of Criminal Appeal in the first case referred to it under s. 2 of the Act of 1993, and in it, O'Flaherty J. giving judgment for the Court sets out a number of principles and considerations relevant to the conduct of such reviews. He said:

"In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.

*Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case ... he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Flood J. has termed the 'constitutional principle of proportionality' (see *The People (DPP) v. W.C.* [1994] 1 ILRM 321), his decision should not be disturbed.*

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr Grogan S.C., the test to be applied under the section is not the converse of the enquiry the court makes where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

28. Since then the relevant statutory provision has also been considered by the Supreme Court in *The People (Director of Public*

Prosecutions) v. McCormack [2000] 4 I.R. 356. In that case Barron J. stated:

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

30. We find ourselves in agreement with counsel for the applicant that the sentences imposed on counts 7 and 8 in this case ostensibly diverge from the norm to a significant extent. The express policy of the legislature is to the effect that offences committed while on bail should attract consecutive sentences. While acknowledging that a suspended sentence is still a sentence we consider it reasonable to interpret the policy of the legislature as envisaging that, save in very exceptional circumstances, a mandatory consecutive sentence to be imposed in circumstances where the offence was committed while on bail should involve at least some element of actual custody.

31. Moreover while the sentencing judge in this case did acknowledge that the offences were aggravated by virtue of the fact that they were committed while on bail and also during the terms of the suspension of other sentences, the sentence actually imposed does not ostensibly reflect the fact that they were aggravated in both of those respects.

32. Counsel for the applicant does not, very properly in our view, seek to make the case that a wholly suspended sentence can never be imposed, even in the presence of such aggravating circumstances. However he contends that for it to be justified would require the presence of other very exceptional circumstances and there were none such present in this case. Counsel for the respondent has sought to persuade us that the combination of the respondent's recent resolve to address his heroin addiction and the fact that in the case of many of the offences they could not have been prosecuted save for his admissions created the necessary exceptional circumstances. We cannot agree. While the circumstances mentioned were such as to entitle the respondent to a significant degree of mitigation they were neither so far-reaching nor did they sufficiently have the quality of exceptionality about them to have justified the imposition of wholly suspended sentences.

33. We are satisfied in the circumstances that the trial judge did err in principle, that there was a clear departure from the norm and that the sentences on counts 7 and 8 were unduly lenient.

34. In the circumstances we will quash the sentences imposed by the Court below on counts 7 and 8 and proceed to resentence the respondent. In accordance with established jurisprudence we have invited the parties to put before us on a contingent basis any new materials that they would wish to have taken into account.

35. Counsel for the respondent has furnished us with a number of certificates of achievement by his client in respect of programmes or courses he has participated in while in prison. These include the Shannon Trust Reading Plan, several drugs awareness courses run by the Merchants Quay Project and a number of First Aid courses run by The Red Cross. We note from these that the respondent's stated resolve to address his addiction issues continues and he is to be commended in that regard.

36. We will not interfere with the sentences on Counts 1 – 6 in circumstances where the requested review is now being confined to Counts 7 and 8 respectively. In so far as Counts 7 and 8 are concerned, we will however re-impose as a headline sentence in each case the 3 year term determined upon by the judge at first instance. However instead of suspending the entirety of it we will suspend only the last two years of it. The respondent must therefore serve a year in custody on both Counts 7 and 8 consecutive to the sentences imposed on Counts 1 – 6 respectively. We believe that this sentence is proportionate and appropriate and one that reflects the totality principle while at the same time reflecting the policy of the legislature as set out in s. 11 of the Criminal Justice Act, 1984. The terms of the bond will be the same as heretofore: €100 own bond and the duration of the suspension 7 years.