THE COURT OF APPEAL

Appeal No. 127/16

Appeal No. 172/16

Birmingham J.
Edwards J.
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Don Duggan

Appellant

JUDGMENT of the Court delivered on the 26th day of April 2018 by

Mr. Justice Hedigan
1. There are two appeals brought before the Court by the above appellant. The Court will deal with them as follows.

The Clonmel Sentences
2. The appellant appeared before Clonmel Circuit Court charged with one count of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and a threat to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997. He had signed a guilty plea in the District Court and affirmed his signed plea before the Circuit Court on 26th April, 2016. The appellant was sentenced on 11th May 2016 at Clonmel Circuit Court by His Honour Judge Teehan. Evidence was heard on 11th May 2016 and the appellant was sentenced to a term of imprisonment of ten years with the final four years suspended on strict conditions. The appellant was at that time serving a sentence due to expire the following October. It was thus directed that the six year sentence would not commence until the expiry of the existing offence.

The Backround to the case
3. On 23rd December 2015, the appellant broke into the injured party's home. She had left in order to go and assist a friend in cleaning her house. Her 10-year old son was the only occupant. He heard the sounds of somebody trying to break in and phoned his mother, telling her "a burglar is trying to break in." His mother was terrified by this call and immediately proceeded back towards her house having alerted the Gardaí. When she arrived at her house she was confronted in the hall by the appellant who was carrying some of her property. She saw her son's mobile phone on the floor and was overcome with panic and fear that her son may have been harmed. She grabbed at the appellant and would not let him go. She demanded to know where her son was. The appellant then threatened her by telling her that he would shoot her. He managed to free himself and escaped in his motorcar which had been parked outside the house. According to the victim, he drove across the lawn and through the gates like a maniac. The Gardaí arrived shortly after and some ten minutes after that the victim discovered that her son had in fact made his escape through a window in his pyjamas and had gone to a neighbour's house. The appellant was identified by the Gardaí from CCTV footage and subsequently arrested. Upon his arrest he admitted to everything. He also admitted to being a heroin addict and it has been accepted that most of his past or criminal convictions were caused by that habit. At the time of sentencing for this offence, the appellant was already in custody serving a sentence which was due to expire in October, 2016. As the applicant was on bail at the time of the commission of this offence, the sentence imposed was to commence at the expiration of the sentence that he was serving i.e. in October, 2016.

The grounds of appeal
4. The grounds of appeal submitted are:

(a) No adequate regard to the plaintiff's signed plea of guilty;

(b) Failing to have any or any adequate regard to the appellant's chronic drug and alcohol addiction;

(c) Failing to have any or any adequate regard to the high level of cooperation and highly inculpatory admissions;

(d) Failing to have any or any adequate regard to his remorse and his direct apology to the victim;

(e) Failing to have any or any adequate regard to the principle of totality;

(f) The sentence was too severe in all the circumstances.

The personal circumstances of the appellant
5. The appellant was born on 7th January 1988. He has a long, well-established pattern of drug abuse and of criminal activity. At the time of sentencing for these offences, he had 115 previous convictions including 28 for burglary, 36 for Road Traffic Act offences, 13 for theft and four for robbery with violence, these last four having been committed abroad. The learned sentencing judge heard of his very unfortunate background including his drug abuse. The Court heard that he now had reached 28 years of age and that he had a son of 11 years. The judge was asked to deal with him on the basis of, in essence, a "last chance".

The sentence
6. The victim read her impact statement to the court herself. The learned sentencing judge was clearly impressed by this statement

which demonstrated just how traumatic this event had been for her and for her son. He noted that the appellant was probably looking for an unoccupied house. He noted his extraordinarily high number of previous convictions and notably that so many of them had been for burglary. The judge fixed the headline sentence at 12 years. He considered the mitigating factors starting with the signed plea of guilty which the judge considered to be a very significant factor. He indicated that it would be clearly reflected in the sentence that he intended to pass. The learned sentencing judge further took into account the poor start in life that the appellant had. He noted his addiction to heroin. He noted a letter written by him to the Court which he considered to be impressive. He accepted that in a sober and clean condition the appellant would not commit these offences. He considered that the appellant had sought to address his problems while he was in prison. He noted that he was on a methadone course in prison and that he was currently located in a drug free wing of the prison. He noted his desire and willingness to fully address his problems by means of a residential programme. Whilst noting the seriousness of the offences, the learned sentencing judge found that the mitigating factors and particularly the rehabilitation regime allowed him to suspend a substantial portion of the sentence that he intended to impose. He then imposed a sentence of ten years. He suspended the last four years of that sentence having regard to the question of totality in sentencing, taking into account that he was at that time already serving a sentence. The suspension was on very strict terms.

The appellant's submissions
7. The appellant argues that the learned sentencing judge failed to give sufficient regard to the applicant's plea of guilty in the Circuit Court. It is argued that he pleaded guilty at the first available opportunity and signed a guilty plea in the District Court which he affirmed before the Circuit Court on 26th April 2016. It is argued that not sufficient credit was given for this. In this regard the appellant has referred the Court to judgments in *DPP v. M.* [1994] 3 IR 306, to *The People (A.G.) v. O'Driscoll* [1972] 351 and to s. 29 of the Criminal Justice Act 1999 which requires a court to take into consideration the stage at which a person indicated an intention to plead guilty and the circumstances in which such an indication was given. The appellant submits that the primary reason that the trial judge imposed such a lengthy sentence was the seriousness of the charges and the previous convictions of the appellant. The learned trial judge did not take into account the matters advanced in mitigation and also failed to take into account the personal circumstances of the applicant, thus making the sentence disproportionate.

The respondent's submissions
8. The respondent argued that the learned sentencing judge executed his task in an impeccable manner. The respondent notes that the judge identified a headline sentence of 12 years which was perfectly appropriate bearing in mind the circumstances of the offence. The gravity of the offence was to be measured by reference to harm and culpability. The harm caused was very apparent from the striking victim impact statement which was read to the court by the victim herself. €15,000 worth of jewellery was stolen, none of which was recovered. The sole occupant of the house at the time was a 10 year-old boy. He was obliged to escape through a window in his pyjamas to seek refuge with a neighbour. The appellant was confronted in her house by the victim. He threatened to kill her. The threat to kill was taken seriously. Moreover, the extensive list of previous convictions constituted a serious aggravating factor. The respondents argued that having identified the headline sentence, the learned sentencing judge proceeded to consider all the mitigating factors and gave appropriate discount for the same. The respondents submit in conclusion that the effective sentence imposed by the trial judge was proportionate bearing in mind the nature and gravity of the offences to which the appellant had pleaded guilty. The significant suspended portion was more than adequate to provide the appellant with an incentive to engage in rehabilitation and to refrain from further offending.

The Nenagh Sentences
9. On 17th June 2016 the appellant was sentenced again by Judge Teehan in respect of a number of counts of burglary committed between 18th August and 24th August, 2015. He had been arraigned on 2nd February 2016.

10. Details of the offences were heard on 17th June, 2016 and the applicant was sentenced by the learned sentencing judge to a term of imprisonment of three years which was made consecutive to the sentence of six years that had been imposed on 11th May, 2016 in the above case. Although the applicant was not on bail at the time of the commission of this offence, the sentence imposed was made consecutive to that which had been imposed in May, 2016. Neither of these was to commence until the expiration of the sentence being served which was due in October, 2016. The appellant seeks leave to appeal the severity of the sentence.

The background to the case
11. These charges arise out of offences that occurred on 18th August 2015, the 22nd August 2015, and 24th August 2015. In relation to the first the applicant entered an unoccupied house belonging to one Mrs Kehoe and stole property therein in the region of €1,500. In relation to the second, the applicant entered two separate buildings that were unoccupied. The alarm went off and he left without stealing anything. Finally, on 24th August 2015 the appellant opened an unlocked vehicle and stole cash in the sum of €6. Upon being questioned by the Gardaí the appellant admitted his part in all of these burglaries and cooperated fully with the investigation. The appellant admitted to being a drug addict and a heroin addict and it was accepted that most of his past criminal convictions was caused by this habit. It was noted that he was already in custody serving a sentence which was to expire in October 2016.

The sentence
12. The learned sentencing judge noted that by far the most serious matter coming before the Court was the burglary in Mrs Kehoe's house. He noted that she was an elderly lady, a widow living alone and living an independent life. He noted how serious the impact was on her. Burglary, he noted, was a crime against society itself. He went on to note the extraordinarily high number of previous convictions including ones committed abroad. He noted that these were due to his drug addiction but also that this was of little assistance to Mrs Kehoe or other victims of burglary. He considered all of these to be seriously aggravating factors. The judge considered that the offence involving Mrs Kehoe's home which was dealt with under count 2 seemed to locate itself at the top of the middle range of gravity. He noted that he had to take that as his starting point and then look to the mitigating circumstances. He went on to state that he considered the guilty plea to be particularly important, so also were the very important admissions that the appellant had made. The judge stated that he should get particular credit for that. He also noted that it was of some assistance that he acknowledged his wrong and apologised for it. The judge considered that his admissions and his cooperation and his plea of guilty at a very early stage stood him in good stead as far as mitigating circumstances go. Going on to consider his drug addiction, the learned sentencing judge noted that the appellant had been making efforts at rehabilitation whilst in prison and gave him credit for doing that. He went on to consider that the appellant had reached an age where he would not wish to continue the path which had led only to his spending long terms behind bars. However he felt that he was dealing with very serious crimes and in particular the crime against Mrs Kehoe but that having regard to the principle of totality he would sentence him to six years on count 2. He noted that the sentence would be greater were it not for the principle of totality. In relation to counts 3, 4 and 5 he imposed sentences of three years and in relation to count 6 a sentence of 12 months. All of these were to run concurrently. The sentences, however, would commence at the expiry of the sentence currently being served by the appellant. In the light of the mitigating circumstances he had identified and subject to very strict conditions, the learned sentencing judge suspended three years of the six year sentence. Counsel on behalf of the appellant raised the question of the consecutive sentence with the judge. The judge stated that he had

considered that very matter but that he felt it would be insulting to Mrs Kehoe and the other victims involved if a sentence imposed overlapped with a sentence imposed a few weeks previously by himself for the Clonmel sentences.

The grounds of appeal
13. It was an error in principle to make the sentence imposed consecutive to the sentence imposed on 11th May 2016 in circumstances where

(a) the offences were not committed while the appellant was on bail;

(b) no adequate regard was had to the principle of totality;

(c) no adequate regard was had to the early plea of guilty;

(d) no adequate regard was had to the appellant's chronic drug and alcohol addiction;

(e) no adequate regard was had to the high level of cooperation where there was a low prospect of a successful prosecution against the appellant in the absence of the same;

(f) no adequate regard to the appellant's remorse and apology to the victim;

(g) the sentence was too severe;

The submissions of the applicant
14. It is submitted that the imposition of cumulative consecutive sentences in this case was wrong in law. Section 11(1) of the Criminal Justice Act 1984 was referred to in relation to its provision for the mandatory imposition of consecutive sentences in respect of offences committed by persons on bail awaiting trial for other offences. It was submitted that the cumulative effect of the consecutive sentence of nine years was excessively harsh in all the circumstances of the case. Based on the principle of totality, the imposition of a sentence of three years consecutive to a six year sentence is disproportionate to the crime and is an error in principle. It is submitted that the learned sentencing judge failed to give sufficient regard to the applicant's plea of guilty in the Circuit Court. He had pleaded at the first available opportunity and cooperated fully with the Gardaí and made full admissions. It is finally submitted that the primary reason that the learned sentencing judge imposed the lengthy sentence was the seriousness of the charges and the previous convictions of the applicant and it is further submitted that proper account was not taken of the matters advanced in mitigation and also there was a failure to take into account the personal circumstances of the applicant thus making the sentence disproportionate.

The submissions of the respondent
15. The appellant pleaded guilty to five offences consisting of three counts of burglary, one count of unlawful taking of a motor vehicle and one count of theft. A *nolle prosequi* was entered in respect of another burglary charge. It was agreed that the most serious of the offences was the burglary committed at the home of Mrs Kehoe, a lady of advanced years. Property valued at €1,500 was taken and none of it was recovered. The victim having left to attend mass returned home and noticed the door of the house was open. In her victim impact statement she described how she was recovering from cancer and on heavy medication. She described the stress and terror that she felt. As a result of the experience she was unable to return to the house for a few days after. Some of the property taken from her had a strong sentimental value. The learned sentencing judge ranked the offence as being at the top of the middle range. In the circumstances this was entirely justified. The learned sentencing judge was quite correct to take account of the appellant's previous record which at this stage now stood at approximately 118 previous convictions. Many of these included burglary and other serious property related offences. The learned sentencing judge may not have specified a headline sentence but considering the principle of totality arrived at a sentence of six years. Bearing in mind the mitigating circumstances, he suspended the last three years of the six year sentence that he had imposed. That represented a 50 per cent reduction. The sentence it is submitted was entirely appropriate. The judge's decision to make the sentence consecutive was entirely in accordance with law and within his discretion. The judge, in answer to counsel for the appellant, indicated that he had considered the matter but did not consider in the light of the nature of the offences especially that committed against the lady, that it would be appropriate or correct to order all or any of the sentences to run concurrently. The respondents note that it would have been open to the judge to impose consecutive sentences on each of the four matters to which the appellant had pleaded as they were entirely separate criminal transactions. It was submitted that the overall sentence imposed for both the Clonmel offences and the Nenagh offences were just and proportionate in the circumstances.

The decision of the Court
16. The Clonmel sentence: Did the learned sentencing judge deal appropriately with the mitigating factors of the appellant's signed plea of guilty, his chronic drug and alcohol addiction, his high level of cooperation, his remorse and direct apology to his victim and the principle of totality. In the written submissions the appellant argues that he did not. Yet starting at line 29 of p. 18 of the transcript of 11th May 2016 through to line 3 of p. 20, the learned sentencing judge did however refer to the signed plea and noted that he considered it a very significant factor. He stated unequivocally that it would certainly be reflected in the sentence passed. He considered the significance of the plea together with the early admissions and the acknowledgment of guilt as very helpful to the victim's family. Thus having found a headline sentence of 12 years, he reduced it to ten. He then addressed the appellant's heroin addiction. He stated that he accepted as genuine the appellant's statement that he would never commit crimes like this were it not for his addiction. The judge observed that he had received an impressive letter from the appellant addressed to the Court which expressed these sentiments. He noted the appellant's efforts to address his problems while in prison and that he was now located in a drug-free wing of the prison and that he was prepared to address his problems by means of a residential programme. The judge concluded that all these factors, in particular the rehabilitation programme he had commenced, enabled him to suspend a portion of the sentence. Thus he suspended the last four years. Ms Stewart, on behalf of the appellant, emphasised to the Court that she identified an error of principle in a failure to take account of the totality of the sentences. Whilst this is a plea that was probably more directed towards the Nenagh sentences, it is clear from line 11 of p. 17 that the learned sentencing judge explicitly stated that he would bear in mind the totality principle and this was in relation to the 15 month sentence imposed in March, 2016.

17. Was the ultimate sentence imposed so outside the range of possible sentences available that it amounted to an error of principle so that this Court might intervene? We do not think so. Bearing in mind the traumatic invasion of the victim's home, the fact that she was actually fighting physically with the appellant in the hall of her own home; that she feared for the life of her 10-year old son; that she was threatened she would be shot and was given good reason by the appellant to believe that threat; and bearing in mind the truly dreadful record of previous convictions it is only too clear that the sentence was an appropriate one and within the range

available to the learned sentencing judge. Burglary is an egregious assault on the personal integrity of the victim. It is a violation of the sanctity of the home which is the very place in which all hope to find safety and comfort. It is clear from the all too frequent cases that come before our courts that the traumatic consequences for victims of burglary are profound and may last a lifetime. It is difficult for any such victim to feel safe and secure again even in their own home. Thus those who commit such grave crimes may expect to be treated severely by the courts. The sentence of the court in this case was entirely appropriate and no error of principle is identified. In respect of the Clonmel sentence the appeal is dismissed.

18. The Nenagh Sentence: Much the same grounds of appeal are raised in relation to these sentences. Some differences arose, notably; that the offences were not committed while the appellant was on bail and thus that consecutive sentences should not have been imposed; the totality principle which, although raised in relation to the Clonmel sentences, has more resonance in the light of these later sentences. The appellant argues that these sentences should have been concurrent with the Clonmel ones.

19. The learned sentencing judge did not specifically identify a headline number of years but did find that on the scale of gravity the offence came at the top of the middle range. Whilst the other four sentences were although serious, not as grave, the most serious certainly was. The invasion of Mrs Kehoe's house, the theft of €1,500 worth of property including items of sentimental value and the scattering around of her medication was traumatising for her. Living alone, the sanctity of her home was violated in a manner which is common to all burglaries. As noted above, burglary is an egregious assault on the integrity of the home, the emotional consequences of which may last a lifetime. Mrs Kehoe had to leave her home and stay with friends. She was only able to return after some days. The learned sentencing judge starting at line 31, p. 10 of the transcript of 17th June 2016 eloquently expressed the injury inflicted upon the innocent victim here. Thus this offence was certainly within the range the learned sentencing judge identified. The other four involved two unoccupied houses where no property was taken, the taking of a motorcar in order to commit the burglaries and the theft of €6 from an unlocked car.

20. The learned sentencing judge starting at line 27, p. 11 considered the plea as particularly important. He also noted the helpful admissions, the apology and remorse. The judge considered all these stood the appellant in good stead as mitigation. He then continued to consider the appellant's drug problem and praised his efforts at rehabilitation. The judge went on to consider the "last chance" element involved here i.e. that the appellant may have reached a turning point in his life. The judge considered that all these mitigating factors amounted to quite a lot. Taking all these into account, he stated that nevertheless these were very serious offences. He stated that his sentence of six years for the burglary in Mrs Kehoe's house would be greater were it not that he must take account of the principle of totality. In relation to the other four counts he imposed sentences of three years on counts 3, 4 and 5 and 12 months on counts 6. He directed these sentences would be concurrent inter se but consecutive to the Clonmel sentence. In view of the mitigating factors he had identified, the learned sentencing judge suspended three years of the six-year sentence. It appears clear that while allowing for the grave nature of the offences particularly on count 2, the sentence imposed with 50 per cent suspended was an appropriate one. The six years took account of the totality principle while the 50 per cent suspension gave fair recognition to the mitigation identified.

21. The appellant argues that the learned sentencing judge erred in making the sentence herein consecutive to the Clonmel sentence. It is argued that he was not on bail at the time of committing these offences. This question was raised by counsel for the appellant with the judge. He said that he had considered that very question but reasoned that it would be insulting to Mrs Kehoe and the other victims if the sentence he imposed simply overlapped with the sentences he had imposed just a few weeks before in Clonmel. This Court notes that while it was not in this case mandatory for the sentence imposed to be consecutive, the learned sentencing judge had the discretion to impose a consecutive sentence. These offences did not arise from the same incident nor were they a part of the same criminal transaction. They were entirely separate and unconnected with the offences dealt with in Clonmel. As stated by the Court of Criminal Appeal in The People (DPP) v. McC. [2003] 3 IR 609 at p. 617:

> "It is of course true and always has been true that where there have been a number of offences relating to different victims and especially if they are unconnected, there is discretion in the sentencing judge as to whether he or she makes the respective sentences concurrent or consecutive."

Thus no error of principle can be found here. The sentence imposed was within the range available to the judge, full account was taken of the mitigating factors and it was within the learned sentencing judge's discretion to make the sentences consecutive. This appeal against the Nenagh sentences is also dismissed.