



**THE COURT OF APPEAL**

**Birmingham J.  
Mahon J.  
Edwards J.**

**Record No: 2016/182**

**THE PEOPLE AT THE SUIT OF  
THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

**V**

**ALAN JUDGE**

**Appellant**

**JUDGMENT of the Court (ex tempore) delivered on the 12th of May 2017 by Mr. Justice Edwards.**

**Introduction**

1. The appellant was arraigned and pleaded guilty on the 2nd of February 2016 in respect of two counts. i.e., counts 1 and 3 on the indictment before the court, of burglary, contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act 2001. A further three counts were to be taken into consideration.

2. On the 17th of June 2016 the appellant was sentenced to four years imprisonment on counts 1 and 3, both sentences to run concurrently and to date from the 7th of May 2016. The remaining counts on the indictment pertaining to criminal damage contrary to s.2 of the Criminal Damage Act 1991 were taken into consideration.

3. The appellant now appeals against his sentence on the grounds that it was unduly severe.

**The Relevant Background Facts**

4. On the 28th of June 2015 the appellant committed burglaries at two premises, both of which were unoccupied. The sentencing court heard evidence from Garda Brendan Noone who told the court that at approximately 7 p.m. on the 28th of June 2015 he and a colleague, Garda Mick Kilkenny, attended Murtagh's Hardware in Ashbourne, County Meath following an alarm activation. Garda Noone met with the owner of the shop, Mr. Colin Murtagh, who took them to a warehouse at the rear of the shop and pointed out broken windows. Garda Noone viewed CCTV footage showing the intruder attempting to move the CCTV camera and he recognized the intruder as the appellant. The appellant stole a hammer and there was evidence of windows having been broken and further evidence that the appellant had searched the office area of the building. Drawers had been pulled open and paper had been disturbed and removed from a drawer. No money was taken.

5. Later on the same date, Garda Noone received a call in relation to a suspected burglary at the Ashbourne Community Centre. Garda Noone and Garda Kilkenny attended the premises and found a window was open. They waited approximately 40 minutes for the key holder. While waiting they could hear noises from inside and it appeared to Garda Noone that a person within was attempting to break out of the building. Essentially the appellant had broken into the centre and found himself trapped within the building. During a subsequent search of the ground floor toilets Garda Noone located the appellant hiding in one of the cubicles. He was arrested at the scene and initially provided his name as "Karl Blake" but made immediate admissions to breaking into Murtagh's Hardware earlier in the evening.

6. The court heard of the damage to the community centre. A door had been taken from its rail to allow the appellant access to the upper floor and a further two office doors were completely smashed open. There was severe damage to a safe. The estimation of the damage in monetary terms was just under €2,000. In respect of the community centre the appellant admitted to Gardaí that he broke in looking for money. He found the safe but couldn't open it and then heard Gardaí coming.

**The Appellant's Personal Circumstances**

7. It was accepted at trial that the appellant had been co-operative with the investigation and despite initially giving a false name his correct name was ascertained at an early stage. He did not require a solicitor to attend at the Garda station and made admissions. He was not armed, nor did he have a history of violent offences.

8. Garda Noone told the court that at the time of sentence the appellant had forty previous conviction of which approximately thirty were convictions for burglary and related theft offences. The appellant's first conviction was when he was 14 and he received his first custodial sentence at the age of 16. His offending behaviour then continued in a cyclical manner. At the time of the commission of this offence the appellant was on temporary release from prison. The court heard of the appellant's efforts to engage and deal with his drug addiction, and was provided with correspondence from Merchants Quay Ireland, that had clearly been produced for and presumably relied upon at a sentencing for an earlier offence, confirming that, when in Mountjoy prison on a previous occasion, the appellant had self referred to the MQI Addiction Services there, and that he had gained insight into his addiction problem and it was hoped to engage with him in developing a solid recovery plan upon his release. It appears that the hoped for recovery did not come to pass because, as counsel for the respondent has informed this court, not only did the appellant commit the offences the subject matter of the present appeal, he went on to commit further such offences of which he has since been convicted.

9. Be that as it may, at the sentencing hearing in the court below, the Court was again asked to take account of the appellant's progress towards rehabilitation. In addition to the said correspondence from Merchants Quay Ireland which was again relied upon the sentencing judge was also handed in certificates in respect of the completion of detoxification and relapse prevention programmes from several other agencies including the Ana Liffey Drug Project, the Harmony Preventing Drug and Alcohol Misuse Programme, the Coolmine Therapeutic Centre as well as a Prison Governor's report confirming his engagement with a number services within the prison. The appellant's counsel submitted that the motivation behind the offence was his drug addiction, and the court was urged to take into account his desire to rehabilitate as evidenced in the documentation submitted and to afford him some additional leniency on that account.

10. At the time of sentencing he was aged 44. He left school at the age of 12 or 13 and has no history of work.

### **The Sentence Imposed**

11. In sentencing the accused, the sentencing judge made the following remarks:

*"It appears that at the time Mr Judge had a chronic drug addiction. This is not a mitigating or excusing factor but it's quite correctly put before the Court as to why was this man involved in these offences. His drug addiction included heroin addiction and that it -- that when he carried out these offences that he did it at a time when persons would not be in occupation of the property.*

*It would appear that there was some degree of selection or planning having regard to the hours of the evening in which both the properties were broken into and burgled. There's no doubt Mr Judge may have perceived that because properties are unoccupied, in other words because persons are not residing or working on premises, that it makes it easier for the occupants or the owners of the properties and, indeed, they may well be perceived to be easy targets by reason of the fact persons are not in occupation of properties but burglaries have a substantial effect on the owners of properties whether they're in occupation at the particular time or not. The feeling of having a person to enter your property unlawfully as a trespasser without your permission or consent is an extraordinary feeling. They're on your property unknown to you, they're on your property with the intention of stealing from you, burgling your property and a person's property is one of the most important items, and I don't mean an item comparable to consumer goods, it is your business, it is your community, as in this -- is in the count No. 3, it is where people in the community centre -- it is an essential part of the community.*

*In respect of Mr Murtagh, the hardware shop, that is his life, that is his business and breaking in, trespassing, committing an offence such as theft, being burglary, in respect of these properties, it is a serious interference, a violation and invasion to the peaceful enjoyment, possession and use of person's property. Where a person enters the property unlawfully and where the person is a trespasser on the property and commits or intends to commit the -- in an offence which would be theft, making it an offence of burglary, it has extraordinary devastating effects on people where they have been burgled and it's understandably -- the -- you have -- your privacy has been invaded and abused by strangers or persons entering your property without your permission or consent.*

*In respect of count No. 1, the maximum custodial prison sentence is 14 years. Then I must decide where does this count lie in respect of the maximum sentence. I am satisfied it would be in the higher range. In respect of count No. 3, the maximum custodial prison sentence is 14 years. Then I must decide where does this count lie in respect of the maximum sentence. I am satisfied it would be in the higher range. Then I must have regard to his personal circumstances. He's aged 44 years, He left school at 20 -- sorry, he left school at 12 or 13 years, very limited education, a single man, appears to have no work experience or no history of work and that's understandable having regard to his substantial criminal history. He had a chronic history of drug addiction and heroin addiction prior to, and at the date of, these offences.*

*In mitigation are his pleas of guilty. He fully co-operated with the investigation. He made full admissions, there's an expression of remorse. It appears that he is well behaved while in custody and in respect of his chronic drug addiction, and indeed also his alcohol abuse but particularly in respect of his chronic drug addiction, he fully engaged in one-to-one counselling sessions and completed an eight-week drug treatment programme in the medical unit of Mountjoy Prison.*

*In addition, it's confirmed that he successfully completed a drugs detox therapy programme in the healthcare unit of Mountjoy Prison from the 17th December '15 to the 11th February 2016. Also, as well, it's -- there's a certificate confirming that he successfully completed a six-week drug-free programme and this work was completed on the 10th February 2016. Also, there is another certificate that he fully participated and completed a series -- the Harmony Programme, Preventing Drugs and Alcohol Misuse and that's -- that was prior to the 11th February 2016 and there was also a certificate of completion in respect of a community reinforcement approach relapse prevention with the Coolmine Therapeutic Community and that's dated the -- February 11th 2016. And it would appear that having regard to his attitude and his engagement in respect of his chronic drug addiction that he is currently drug clean and this all means that he has taken very positive rehabilitation steps in respect of his chronic drug addiction and also he is currently alcohol-free and, of course, that's understandable having regard to the fact that he is in custody but obviously he has also, I suppose, engaged with -- in respect of his alcohol difficulties or alcohol abuse.*

*In mitigation -- or, sorry, that's mitigation. The aggravating factors in the case is that these are serious offences, the manner of his involvement in the offences. Burglary is a serious interference, violation and invasion to a person's entitlement and right to the peaceful enjoyment, occupation, possession and use of their property. It was a serious interference, a violation and invasion with Colin Murtagh's and Ashbourne Community Centre to their entitlement and right to the peaceful enjoyment, occupation, possession and use on their property.*

*In respect of Colin Murtagh's property, the -- Murtagh's Hardware, that's count No. 1, the manner of gaining access to the property, unlawfully gaining access to the property, breaking the glass windows to gain access and then to trespass on or in Murtagh's Hardware property -- shop, in respect -- and the disturbance that he caused in the main office in respect of the burglary in respect of Murtagh's Hardware in respect of count No. 3. In respect of the manner of the unlawful access to the Ashbourne Community Centre he gained access up to a fire escape and he got in through a top window, was able to push it in and gain unlawful access and while in the -- or on the property, in the course of committing the burglary, he caused substantial damage to the property in respect of the main offices and doors and other items which was -- indeed was very substantial for any property but in particular for a community centre which depends on voluntary people to keep it going and the support of the community to sustain it, the effect of the offences, firstly on Colin Murtagh of Murtagh's Hardware, and the Ashbourne -- and then the Ashbourne Community Centre and also the loss in respect of damage caused to the respective properties.*

*There are substantial previous convictions, substantial previous convictions for burglaries and a substantial history of criminal reoffending. These are offences -- were committed while he was on bail. There are substantial aggravating factors in the case. Then I must have regard to the seriousness of the offence and to the very substantial aggravating factors in the case and balance them against the mitigating and the personal circumstances and I will have regard to the mitigating and the personal circumstances, and he has made substantial progress in respect, indeed, major substantial progress, in respect of his rehabilitation but there are substantial aggravating factors in this case.*

*In respect of count No. 1, I'm imposing a four years custodial prison sentence. Count No. 3, a four years custodial prison sentence. I am satisfied, in the circumstances, that it's appropriate that both sentences should run concurrently so both sentences for four years and four years for counts 1 and 3 to run concurrently, the sentences to run concurrently from -- sorry, they run concurrently but they have to run consecutive from the sentence that he is currently imposed and is serving by reason of the fact these offences were committed while he was on bail so they will run consecutive to the sentence which is -- has been -- which he is presently serving. It will be a continuation of that sentence for four years in respect of each count. He's entitled to the credit in respect of the four years, in respect of the period that he was taken into custody"*

## **Grounds of Appeal**

12. The appellant appeals on five grounds, namely:

1. The sentence imposed by the trial judge was excessive and oppressive in all the circumstances;
2. The trial judge erred in law and in fact in locating the offences before the court in the higher range of offences of burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 in terms of assessing the applicable penalties to be imposed;
3. The trial judge erred in law and in fact in determining the seriousness of the offences in and of itself to be an aggravating factor;
4. The trial judge erred in law and in fact in attaching excessive weight to the aggravating factors as outlined during the course of the sentencing hearing;
5. The trial judge failed to have regard sufficiently or at all to the extensive efforts made by the applicant in respect of his rehabilitation and further failed to have regard to the objective of rehabilitation insofar as same is a component part of any sentence.

## **Analysis and Decision**

13. At the oral hearing of this appeal Counsel for the appellant helpfully indicated that, in truth, his complaints could be distilled into two points.

14. The first, covering grounds 1,4 and 5 above, was that the sentencing judge attached too much weight to the aggravating circumstances. The second, covering grounds 2 and 3 above, was that the sentencing judge did not follow established sentencing procedure with the result that he placed the offence at too high a point on the spectrum of available penalties.

15. We have carefully considered the complaints made. We acknowledge that the sentencing judge's approach was somewhat unorthodox, and that he did not follow recommended best practice in the way in which he arrived at his sentence and that this was an error of principle. That having been said, however, his failure to follow best practice would not necessarily justify this court in interfering with his sentence if at the end of the day his sentence was correct notwithstanding how it was arrived at. The trial judge was right in his view that every offence of burglary is intrinsically a serious offence. Moreover, the particular circumstances of the individual case may aggravate that intrinsic seriousness, by indicating even greater culpability on the part of the particular offender, and these particular circumstances require to be taken into account, in addition to the harm done, in assessing the gravity of the case

16. There were a number of aggravating circumstances in this case, and while they may not have been taken into account at the recommended point in the process, they were ultimately taken into account and properly so. The aggravating circumstances in question were that these offences were premeditated, and they were committed by an accused who had numerous previous convictions for the same or a similar type of offending. In addition, property was damaged in both burglaries, the damage being quite significant in the case of the burglary of the Community Centre.

17. To arrive at a proportionate sentence the trial judge was required, having assessed the gravity of the case, to take into account the mitigating factors in the case and any relevant personal circumstances relating to the appellant. In fairness to the sentencing judge he lists and acknowledges the pleas of guilty, the appellant's co-operation, his remorse, his chronic drug addiction and his efforts at rehabilitation in the past. Having taken into account aggravating and mitigating factors, albeit in an unorthodox and not entirely logical order, the sentencing judge ultimately determined upon a sentence of four years imprisonment. We note in that regard that no portion of it was suspended.

18. In the last analysis the question for us is whether the imposition of a straight four year sentence was correct in principle in the circumstances of this case. Counsel have helpfully referred us to a number of comparators i.e., *The People (Director of Public Prosecutions) v. Mullen* [2002] 12 JIC 1708; *The People (Director of Public Prosecutions) v. Foley* [2008] IECCA 55 ; *The People (Director of Public Prosecutions) v. Reilly* [2015] IECA 53 and *The People (Director of Public Prosecutions) v. Kelly* [2016] IECA 359. The first three of these were *ex tempore* judgments. In addition we are acutely aware of yet another case, namely *The People (Director of Public Prosecutions) v. Donal Lee* (Court of Appeal, 12th of May 2017), in which we gave judgment only this morning, although not involving the same trial judge, in which we rejected a suggestion that a sentence of five years with two years suspended for a series of burglary offences was too severe. Despite some similarities, in that both involved serial burglaries in which there were multiple (albeit different) aggravating factors, we believe that the circumstances of the present case were certainly not more aggravated than the circumstances of the *Lee* case. Every case is of course different, and comparators are therefore only of limited help.

19. On balance, however, we consider that the four year sentence nominated was excessive in the circumstances of this particular case, particularly in the absence of any suspended element which might have served to incentivise rehabilitation.

20. While the evidence establishes that the appellant has relapsed in terms of his earlier attempts at rehabilitation, the documents submitted to the court below, and again to this Court, make clear that the appellant's commitment to rehabilitation is real and there remains a basis to hope that if afforded a further opportunity to overcome his addiction problems he may yet be successful in turning his life around.

21. We are therefore disposed to quash the sentence imposed by the Court below and to proceed to re-sentence the appellant.

22. In doing so we will nominate five years as the appropriate headline sentence but reduce that by one year to reflect mitigating circumstances. We will then suspend a further year of the resultant four year sentence for a period of three years in order to incentivise rehabilitation. In doing so the effective custodial sentence to be served, assuming the appellant complies with his bond, will be the same as in the *Lee* case, namely three years.

23. The conditions upon which we are prepared to partially suspend the sentence will be that, in addition to the standard requirement to enter into his own bond in the sum of €100 to keep the peace and be of good behaviour, the appellant shall continue to engage with drug rehabilitation services during the remainder of his sentence, and following his release during the period of the suspension of his sentence. In addition he must during the same period engage with, and comply with all recommendations of, the Probation Service.