THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

9/2017

10/2017

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

The People at the Suit of the Director of Public Prosecutions

Applicant

V

Michael Casey and David Casey

Respondents

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

Mr. Justice Birmingham

1. On the 15th December 2016 the respondents to this application, Michael Casey and David Casey, appeared in the Circuit Court in Limerick for sentence in relation to three burglary offences and an offence of criminal damage, all of which had been committed on 27th August 2015. The sentences imposed in each case were identical, a sentence of four and a half years with the final year suspended imposed in respect of a particular burglary, concurrent sentences of two years in respect of the two other burglaries and the criminal damage matter was taken into consideration. The period of suspension was to run for six years from the date of sentence. The Director of Public Prosecutions seeks to review the sentences imposed as unduly lenient.

2. The first event, in terms of time with which the Court was concerned occurred at Dromsallagh, Cappamore. The injured party left his home at 8am in the morning, secured the house and when he returned at 2pm, he noticed there was damage to the front door and that somebody had tried to force open the door but had been unsuccessful. When the injured party went around to the rear of the house he discovered that the door there had also been interfered with and damaged but again the efforts to open it had been unsuccessful. This incident gave rise to the criminal damage charge.

3. In terms of the sequence of events, the next matter was a burglary at Kyle, Cappamore, County Limerick, Ms. H.O'K. left her house to go to work at approximately ten to eight that morning and became aware later that day that the front door of the house had been pushed in and the house had been ransacked. In the burglary, approximately €500 in cash was taken, €250 from the room of the householder and €250 from her daughter's room. Also taken was jewellery to an approximate value of €1,000. The Circuit Court heard that some of the jewellery was of sentimental value.

4. The next incident occurred at Portnard, Cappamore, County Limerick. A resident of the area was working outside his home when he heard noises or voices nearby, and then saw a male coming out of the front window of the house of his neighbour, Ms. K.E., and the alarm going off. He noticed a large black Renault car making a turn at the home of his neighbours and coming back down the road in the direction of his own home.

5. The next matter relates to a burglary at Toomaline, Upper Doon, County Limerick. The property was occupied by the late John O'Donoghue and his sister Ms. Christine O'Donoghue. On the day in question Ms. O'Donoghue and her late brother went to shop in Tipperary town, returning home around two o'clock. As they went to enter the driveway of their house, Ms. O'Donoghue noticed a black car on the left hand side in the gateway of an old farmhouse which was across the road from their home. They then noticed that the gate to their property was ajar, although they had closed it when leaving to go shopping. They became suspicious that there was somebody inside the house and it became evident that the front door had been broken. The driver of the car at the old farmhouse began sounding the horn. The late Mr. O'Donoghue went to get a shovel from a shed and took up a position near the door of the house. At this point, his sister noticed that he did not appear to be looking well. At that stage, the late Mr. O'Donoghue collapsed and died. Ms. O'Donoghue actually called on the intruders for assistance but none was forthcoming. Gardaí and an ambulance were summoned, as it happened one of the Gardaí who responded was a paramedic, but despite efforts to revive Mr. O'Donoghue he was pronounced dead at the scene. A post-mortem examination indicated that the late Mr. O'Donoghue had an enlarged heart and there was significant coronary artery disease and scarring of the heart muscle as a result of which he was at an increased risk of sudden collapse and death. The State Pathologist, Professor Marie Cassidy commented that while Mr. O'Donoghue did not have direct contact with the intruders in his home, the stress of the situation would have caused an increase in his heart rate and his blood pressure and the physiological effects of the situation would have precipitated his death as he was at risk of developing a fatal cardiac arrhythmia in those circumstances. While of less significance in the context of what occurred, it is the case that a number of items of property were stolen in the course of this burglary as well as a small amount of sterling and dollars. The Court heard a powerful and moving statement from a spokesperson for the extended family.

6. In terms of the Garda investigation and the apprehension of the respondents, the position is that Gardaí received reports of a burglary at Portnard, Cappamore, and of the fact that a black Renault Laguna appeared to be involved or connected with the offence. As Gardaí were making their way to the scene of the reported burglary, they saw two men on the road at a point some two kilometres from the O'Donoghue home. Thereafter, Garda Collins made his way from the O'Donoghue home in the direction of Cappaghwhite, it being the direction in which he had seen the two men on foot earlier. Garda Collins came upon the two men, who were panting and out of breath and their clothes were wet, having come through fields. They were arrested and detained. David Casey initially gave a false name, that of Adam Casey. It is the case that both men subsequently made full admissions. The case mounted by the

prosecution against them was dependent on these admissions. From those admissions an amount of information about the *modus operandi* emerges. The driver's role was to identify how to get into the house and the back seat passenger remained in the car with a view to sounding the horn by way of warning if that became necessary. It emerged that the vehicle used in these offences, the black Renault Laguna, had been purchased on the Done Deal website, on the day prior to these offences and was registered in a false name, giving an address in Blanchardstown, Dublin.

7. As far as the personal circumstances of the respondents are concerned, Mr. Michael Casey was 33 years of age at the time of the sentence hearing. He was a married man with two young children. There were previous convictions. With one exception, his previous convictions were recorded in the District Court: public order, theft, handling stolen property, possession of articles, a trespass and a s.15 Misuse of Drugs Act offence. His most significant previous conviction was one for robbery in respect of which he received a sentence of two years imprisonment on 26th July 2012; the offence having been committed on 12th April 2011. At the initial sentence hearing it was disputed that this conviction related to the Mr. Michael Casey who appeared before the Court and it was suggested that it related to a different Michael Casey. However, following further enquiries at the adjourned hearing, it was accepted that this conviction did in fact relate to the accused man, Michael Casey.

8. So far as David Casey is concerned, he was born on 12th October 1994 and lives with his mother in Coolock in Dublin. At the time of the commission of these offences, Mr. David Casey was subject to High Court bail. This was in respect of a burglary committed at Lackamore in Galway on 6th March 2013. He received bail from the High Court on 22nd March 2013. He was subsequently convicted of that offence on 2nd December 2015 and received a six month sentence. He was also on station bail at the time of these offences. He had received station bail from Rochfortbridge Garda Station on 10th July 2015 in relation to a charge of burglary. That matter was dealt with in the District Court in Athlone on 4th September 2015 and he received a two month suspended sentence. The Court was told that neither man had any history of having been in gainful employment. Probation reports described both men as being at high risk of reoffending during the following 12 months.

The judge's approach to sentencing

9. The judge adjourned the sentence hearing, in order to consider the situation until 15th December 2016. One matter that remained outstanding related to the prior robbery conviction of Michael Casey. The court had heard that that offence involved an attack on a male with a broken bottle and the taking of his mobile phone. However, at the initial hearing, counsel for Mr. Michael Casey indicated that his client was contending that the offence was in fact committed by and attributable to a different Michael Casey, also from Limerick. On the resumed date, 15th December 2016, it was confirmed by counsel for Mr. Michael Casey that he was no longer disputing the conviction. In the course of his pre-prepared sentencing remarks, the judge indicated that he saw the aggravating factors present as being:

> (i) the loss of life:
>
> (ii) the circumstances in which it had occurred;
>
> (iii) the planned and premeditated nature of the offence which involved easy targets in rural or unoccupied houses;
>
> (iv) the invasion and violation of one's home;
>
> (v) the loss of property;
>
> (vi) the previous convictions.

10. He saw the mitigating factors as being the early admissions by both accused on the day that they were arrested, which the State acknowledged as pivotal, and that the accused had cooperated at every step of the investigation, entering early pleas of guilty. He referred to the fact that it was clear that both accused were deeply shocked and remorseful and had so reacted when advised of the passing of the late Mr. O'Donoghue, both had written letters, the judge described them as profound letters, admitting their responsibility in the matter and their remorse. He referred, too, to the fact that there was information that both men before him had been using their period in custody productively to try to improve themselves and that both were fully committed to their respective rehabilitation.

11. It is said that the judge erred in failing either to identify pre-mitigation headline sentences for each of the individual offences or a global headline sentence reflecting the totality of the offending behaviour. The Director says that this was a case where quintessentially a global headline sentence was called for. In support of this submission, she says that residential burglary is a particularly serious offence and that here the respondents had effectively embarked on a burglary spree in a manner that was clearly planned and pre-meditated. It was important that there should be a clear statement as to the sentence that such behaviour merited.

12. We consider it appropriate at this point to make some general observations with respect to this submission. Where multiple offences have been committed in a spree there is nothing in principle wrong with a court taking account of the overall gravity of the offending conduct viewed globally, indeed it is desirable that it should do so. Where a court is sentencing for multiple offences committed in a spree, the fact that they were committed in a spree should be regarded as an aggravating factor. That it was part of a spree renders the gravity of each individual offence more serious and the overall offending conduct must consequently be regarded as more serious than any individual offence considered in isolation. There are a number of ways in which this increased gravity can be reflected. The first is to impose proportionately higher offences for each individual offence and simply make them all concurrent. The second is to assess gravity in respect of each individual offence without reference in the first instance to the fact that they were committed in a spree and then, having done so, to at that point seek to reflect the aggravating circumstance of the spree by having recourse to at least some degree of consecutive sentencing. However, going further and nominating a global headline sentence, while certainly possible, complicates the sentencing process as we will explain. Before doing so, however, we feel it necessary to highlight some pertinent issues.

13. The first of these is that even if a global headline sentence is nominated, there ultimately requires to be an individual sentence for each individual offence, or at the very least a sentence or sentences for one or more offences with the others taken into consideration. It is preferable, however, not to have regard to the latter expedient. This was made clear in the case of *The People (Director of Public Prosecutions) v Higgins* (Unreported, Supreme Court, 22nd of November 1985) where Finlay C.J., in his judgment (with which Walsh J, Henchy J, Griffin J, and McCarthy J concurred) observed:

> "…the accused having been convicted on a number of charges arising out of the same incident but varying in the sense of their seriousness, the learned trial judge imposed upon him a sentence in respect of one count only and took the other counts into consideration. Having regard to the possibility that always exists of a court of appeal setting aside on some

technical or other ground the conviction on a particular count, but leaving undisturbed the convictions reached on other counts on the same indictment, even though they arise out of the same incident, this would appear to be an undesirable and unsatisfactory procedure. Appropriate sentence should, in my view, be imposed on all counts in respect of which an accused person is convicted by the jury."

14. Consistent with this, Professor O'Malley in his well-regarded work, "Sentencing Law and Practice" (3rd Ed), suggests (at para 31.55) that the statutory provision on foot of which other offences may be taken into consideration, namely s.8 of the Criminal Justice Act 1951:

> "was intended solely to allow defendants to ask for uncharged offences to be taken into account in order to forestall the possibility of a later prosecution for those offences. Yet, it is not uncommon for courts to take into account offences of which a defendant has actually been convicted. They impose a sentence for one offence and take the rest into consideration. Strictly speaking, a sentence should be imposed for each offence of conviction, though the overall impact can be mitigated by making custodial sentences concurrent rather than consecutive."

15. Secondly, any individual sentence imposed cannot lawfully be disproportionately severe to the particular offence for which it is being imposed. However, the sentence imposed for the offence of conviction may be increased as a result of other offences properly being taken into consideration, provided the maximum penalty is not exceeded.

16. Thirdly, we suggest that quite apart from the issue identified in the penultimate paragraph above, a further reason exists as to why the option of taking an offence or offences into consideration requires to be used sparingly in this type of case, i.e., where an accused is being sentenced for a series or spree of similar offences, namely, that it carries with it the risk that an impression may be given either to the offender, or to a relevant victim, or to both, that the offender is in some respect getting "a free ride" in respect of an offence or offences for which discrete sentences are not imposed. (A "free ride" was how the Manitoba Court of Appeal put it in *R v Wozny* 20 MBCA 115, a case cited in that regard by Prof. O'Malley in the work previously cited, at para 15.39).

17. The principal of proportionality in sentencing is a constitutional requirement and has to be at the forefront of every sentencing judge's mind. In *State (Healy) v Donoghue* [1976] IR 325 (SC) 353, Henchy J opined that cumulatively Article 38. 1, Article 40.3.1 , Article 40.3.2 and Article 40.4.1o of the Constitution necessarily imply, *"at the very least, a guarantee that a citizen shall not be deprived … where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances"*.

18. Proportionality in this context means proportionality in its ordinary meaning (see *Whelan & Lynch v Minister for Justice* [2010] IESC 34, [2012] 1 IR 1 (54); see also *Osmanovic v DPP* [2006] IESC 50, [2006] 3 IR 504 [34] (Geoghegan J) endorsing the comments of Flood J in *People (DPP) v W.C.* [1994] 1 ILRM 321 (HC) 325 concerning proportionality in sentencing), and has a different meaning to the proportionality referred to in the context of the constitutional *"doctrine of proportionality"* as expounded in *Heaney v Ireland* [1994] 3 I.R. 593.

19. The former Court of Criminal Appeal has said in *The People (Director of Public Prosecutions) v McCormack* [2000] 4 IR 356, at 359, that *"[t]he 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."* Accordingly, a sentence has to be proportionate in both of these respects.

20. The totality principle is potentially engaged whenever a court is seeking to reflect the overall gravity of two or more offences for which an accused faces sentencing, either by means of overlapping sentences, or wholly consecutive sentences. It permits a court to adjust the final sentence, and some or all of its individual components, as required to reach an overall figure that is proportionate both to the gravity of the offending, but also to the circumstances of the individual offender.

21. It is most frequently seen to operate where a court approaches sentencing on the basis of first determining in the normal way the appropriate post mitigation sentence for each individual offence, and whether and to what extent those sentences should be consecutive or concurrent *inter se*, without reference to any consideration of what cumulative figure it may result in. The Court is then required to step back and give consideration to the resultant cumulative figure and if necessary adjust it downwards, with appropriate pro-rata adjustments to the individual component sentences, so as to avoid the imposition of a "crushing" sentence on the offender.

22. The main criticism of this approach is that it may result in artificially inadequate sentences having to be imposed for individual offences in order to give effect to the principle.

23. However, it is open to a court to adopt a different approach, but one which again may bring the totality principle into play. Certainly, if this approach is adopted there will require to be an acute focus on proportionality at every stage. It is open to a sentencing court, where it is sentencing for multiple offences, before considering what actual sentences should be imposed in respect of individual offences, and whether and to what extent individual sentences should be concurrent or consecutive inter se, to determine in the first instance a global pre-mitigation sentence reflective of the overall gravity of the offending conduct.

24. Clearly, in making such a determination, any global figure selected by the sentencing court is required to be proportionate to the gravity of the totality of the offending conduct, but no more than that.

25. Then, with the selected global headline sentence as a reference point, the court must proceed to assess gravity in the case of each individual offence and by resort to a combination of concurrent and consecutive sentences to ensure that the cumulative total aligns with the global headline figure selected, by making adjustments up or down as required. (This may not prove to be as easy as it might appear at first glance because, as pointed out earlier, no one sentence should be disproportionately severe to the offence for which it is being imposed.) Appropriate discounts should then be applied to each individual component sentence to reflect mitigation.

26. If the discounting for mitigation has been appropriate and proportionate to the offender's personal circumstances, as it should be, the accumulated post-mitigation individual sentences, structured as previously determined with respect to whether they should be concurrent or consecutive inter se, will yield a final figure that meets the overall proportionality requirement.

27. However, if a sentencing judge is in any doubt as to whether his/her presumptive final figure is in fact proportionate, then, once again, in application of the totality principle, he/she should step back and consider whether that presumptive final figure requires further adjustment in the interests of achieving overall proportionality.

28. The advantage of the global headline sentence approach is that it is arguably the approach to sentencing multiple offenders that

may be most effective in achieving a degree of general deterrence. The nomination of a global headline sentence, which may well be highlighted in any media reporting of the case, will communicate very clearly how the court views the overall gravity of the offending conduct that was committed in the course of the spree. This is what the DPP believes was required in the present case. However, the disadvantage of the approach is that it is complicated to give effect to correctly.

29. It is a matter for individual sentencing judges to adopt the approach with which they are most comfortable, and which seems to them most appropriate in the circumstances of an individual case. We are, however, satisfied that the failure to adopt the global headline sentence approach in the present case cannot, *per se*, be said to have been an error of principle.

30. In so far as the trial judge, not having adopted a global headline sentence approach, failed to identify pre-mitigation headline sentences for each of the individual offences on which he imposed sentences, we have said many times that while the identification of such headline sentences is desirable, the failure to do so does not, per se, represent an error of principle.

31. The trial judge is further criticised for his reference to unoccupied houses. In the view of the Court this criticism of the judge is somewhat unfair. It seems that what the judge was doing was referring to the *modus operandi* which involved knocking or ringing at the door to check whether the property was occupied at that moment in time. However, the four targeted properties were all domestic dwellings and we do not believe that the Circuit Court judge was ever suggesting anything different. As the facts of the O'Donoghue burglary so tragically illustrate, even if the intention of the burglars is to enter a property at a time when it is unoccupied and leave while it remains unoccupied, there is always the potential for the householders to return and thereafter for a confrontation to develop or at the very least for the homeowners to be traumatised at finding that their house was in the act of being invaded. The Court recalls the remarks of Hardiman J. in *The People (DPP) v. Barnes* [2006] IECCA 165:

> "Any occupier in the presence of a burglar (whether the burglar knows that he is there or not), is in a position of very acute difficulty. Firstly, his dwellinghouse has been violated and this is not merely a crime at law but an invasion of his personal rights. Such a thing, especially if repeated, may in itself gravely undermine the wellbeing even of a strong and healthy occupant, and still more that of an older or feeble one. The offence of burglary committed in a dwellinghouse is in every instance an act of aggression, an attack on the personal rights of the citizen as well as a public crime and is a violation of him or her."

32. The Court takes the view that the fact that properties are temporarily unoccupied offers little mitigation but it does accept that if no effort is made to ascertain whether the property is occupied or unoccupied at the moment in time that an entry is made, that the likelihood of confrontation increases and that would be an additional aggravating factor.

33. Dealing with the facts of the individual cases, the Director says that the ransacking of the property in the case of the Kyle/Cappamore burglary was an aggravating factor and it was not appropriate that the same sentence be imposed for this burglary as for the burglary at Portnard, Cappamore. The Court agrees that the fact that a dwelling is ransacked is a significant aggravating factor. In this case there was merely a passing reference to the fact that the home of Ms O'K. was ransacked. The Court would suggest that when the facts of burglaries are being outlined to a court that those doing so should take a moment or two to describe what was involved including outlining the extent to which the property was ransacked, if that was the situation.

34. The Director also points out that in this case a significant amount of property was taken, including property of sentimental value, and that this puts the offence into the higher category of burglaries.

35. Around the time that this case appeared in a list to fix dates, the Court took an initiative in deciding to list together on the same day a number of burglary cases in the belief that this would provide an opportunity to address the issue of sentencing in burglary cases in a wider context than would usually be possible in the context of a single case. For various reasons, the idea of a "burglary day" encountered difficulties. In one case, the respondent to an undue leniency application, a non-national, had been released by the prison authorities and had returned to his home country, apparently unaware or possibly unaware of the undue leniency application. In another case, one member of the Court had to recuse himself at a late stage when he realised that he knew the householder victim and had been in the home that was burgled on a number of occasions.

36. While the Court's plans for a burglary day did not come to fruition, the Director has taken the opportunity in the course of this case to make some general observations about the approach to sentencing in domestic burglary cases. This Court has found those submissions extremely helpful. In truth, the respondents have not really challenged what the DPP was saying at a general level but instead have focused rather on the fact that there were significant mitigating factors present here and therefore submitting that while the offences were serious, if regard is had to the mitigating factors that were present, the sentences that were imposed in the Circuit Court were appropriate and ought not be interfered with as being unduly lenient.

37. In the course of his sentencing remarks, the judge, having summarised the factual background to the various offences, turned to the particular circumstances of the offenders. He noted that both men had been in custody, on remand, since August 2015. In the case of Michael Casey the judge noted that a probation report which had assessed him as being at high risk of reoffending, provided an insight into his dysfunctional background. The judge noted that there was a governor's report which indicated that Michael Casey was a model prisoner, having completed a number of educational courses and engaged with both the Merchant's Quay project and the Tipperary Rural Travellers Project. The judge referred to the fact that Mr. Michael Casey had written a lengthy letter expressing profound remorse about what he described as "that fateful day", adding that nobody could have foreseen the tragedy that was about to unfold. In the case of David Casey, the judge noted that he was 22 years of age, making specific reference to his youth. Dealing with his previous convictions, he said that he they had all been dealt with at District Court level, he said that there was one previous conviction for burglary, there were in fact two, one dealt with in Loughrea and one in Athlone. A probation report also assessed that accused as being at high risk of reoffending in the next 12 months. The judge noted that his family background was a difficult one, he had lost his father at a young age and had also lost a brother and a cousin in a fatal road traffic accident. There were substantial issues with prescription drugs and other substances. As in the case of his co-accused there were reports confirming that he was using his time in custody in a very positive manner. This Court can confirm that it has received and taken account of information that both respondents to this application continue to use their time in custody constructively.

38. In contending the sentences were unduly lenient, the Director say that residential burglary is a particularly serious offence. Here, four dwellings were targeted, albeit that one was not actually entered. In this case the respondents had embarked on a burglary spree, a spree that was carefully planned and premeditated. The Director says that residential burglary, when committed in remote rural areas, as these ones were, are a matter of intense social concern. Sentences for such offences, the Director contends, must include a deterrent element.

39. The Director says that the judge fell into error in approaching this sentence on the basis that he was sentencing for burglaries of

unoccupied premises. While the houses might have been temporarily unoccupied, there was always the possibility of a householder returning as the facts of the O'Donoghue burglary case so tragically illustrate. The Director says that the ransacking of the premises in the Kyle burglary case should have been treated as an aggravating factor as should the fact that property of not insignificant monetary value but also sentimental value was taken. She further submits that the overall sentence failed to reflect the totality of the offending and that what was involved was a carefully planned spree. She further submits that the sentences in respect of the O'Donoghue incident were themselves unduly lenient. In that regard the Director is careful to make clear that she accepts that there was no intention to kill or injure the late Mr. O'Donoghue, nor was there any suggestion being made that the respondents were responsible for manslaughter and indeed it is accepted that the respondents were genuinely remorseful and shocked when they learnt later of Mr. O'Donoghue's death. However, the Director says that an accused must take his victim as he finds him. She says that residential burglary is always traumatic and someone entering a home must allow for the possibility that contrary to the impression they had formed that the dwelling was in fact occupied, perhaps by an elderly or bed-ridden person who had not been in a position to respond when the bell was rung, or there was also the possibility that a resident would return while the burglary was in progress.

40. Moving from the particular to the general, she says that crimes such as these have many victims, the individuals whose property has been entered of course, but others living in the area or in similar circumstances may be frightened and may have their quality of life reduced. She suggests that factors that would put a burglary in mid-range, and more often than not at the upper end of mid-range, would include:

(i) a significant degree of planning or pre-meditation;

(ii) two or more participants acting together;

(iii) targeting residential properties, particularly in rural areas;

(iv) targeting a residential property because the occupant was known to be vulnerable on account of age, disability or some other factor;

(v) taking or damaging property which had a high monetary value or high sentimental value.

41. She identifies factors as would tend to place a burglary in the highest range of gravity as including:

(i) ransacking a dwelling;

(ii) entering during the night a dwelling which was known to be occupied, especially if the occupier was alone;

(iii) violence used or threatened against any person, whether the occupier or anyone else in the course of the burglary; and

(iv) significant injury, whether physical or psychological, or serious trauma caused to a victim of the burglary.

42. When the review hearing concluded, the Court indicated that it had come to the view that the sentences were unduly lenient and then put the matter back to allow a further opportunity for the parties to provide further submissions on what would be an appropriate sentence. The Court had no hesitation in coming to the view that the sentences were unduly lenient and indeed unduly lenient to an appreciable degree. Among the factors that caused the Court to come to that view were that this was a burglary spree. Whatever arguments that might be advanced that the sentence would have been appropriate if there was only one burglary in issue, where what had occurred was a spree with four dwellings targeted, the sentences were simply not adequate. Not only was this a burglary spree but it was, as indeed the sentencing judge recognised, a carefully planned one. This is evidenced by the fact that each of the three involved had assigned roles and by the fact that a vehicle had been acquired shortly before for use in the burglaries and then registered in a false name.

43. Two of the burglaries were, even if viewed in isolation, serious in their own right; one particularly so. While neither respondent intended to harm Mr. O'Donoghue or foresaw his death, such a tragedy is foreseeable. Having one's home burgled is a deeply traumatic event. If one comes into contact with or into close proximity with an intruder, this is very likely to be frightening or stressful. That some individuals will react badly to extreme stress is not at all surprising. It is in fact all too predictable. Those risks are heightened if those targeted are elderly or for other reasons vulnerable. In the O'Donoghue case the harm done was very great and the culpability was high. The burglary at Kyle, Cappamore, was also a serious one. Property of monetary and sentimental value was taken. The Court agrees with the submissions of the Director that the ransacking of the dwelling should be seen as an aggravating factor. Though in that context the Court would observe that the trial judge would have been assisted had he been provided with some greater details as to what had occurred, as it was the reference to ransacking was really in the nature of a passing reference.

44. The other matter to which the Court attaches significance is the fact that both accused had highly relevant previous convictions. In the case of David Casey, two previous convictions for burglary, with the added dimension that the offences for which the Court was dealing were committed while on bail for the two earlier burglaries. In the case of Michael Casey there was the very relevant previous conviction for robbery. That it was a significant and relevant previous conviction was illustrated by the actions of Michael Casey in claiming that it was not his conviction and seeking to pass it on to a different Michael Casey. Again, the Court would observe that a little further information in relation to the previous convictions would have assisted the trial judge. In particular, information about the possession of certain articles conviction and the trespass convictions might have been of assistance.

45. In concluding that the sentences were unduly lenient, the Court did not lose sight of the fact that there were significant mitigating factors present. In that context the Court attaches particular significance to the valuable admissions that were made and to what seems to have been genuine remorse. It was of course the case that early pleas were entered. In the case of David Casey, his youth also had to be considered.

46. The Director, as quoted earlier in the judgment, in the course of submission listed some factors which would tend to place offences in the mid-range or in the highest range. In addition to those listed by the Director, the Court would add the presence of clearly relevant previous convictions. This Court's experience of dealing with burglary cases, whether appeals against severity or undue leniency reviews, is that it is not unusual for those coming before the Court to have relevant previous convictions. Such convictions should be regarded as aggravating. In appropriate cases, the prosecution should be able to provide information to the sentencing judge. If a burglary is recorded, was it a burglary of a domestic dwelling? If there are a number of dwellings recorded, was there a consistent *modus operandi*?

47. A confrontation with an occupant of a dwelling will be an aggravating factor. The more aggressive the confrontation, the greater the aggravation. Evidence that an intruder equipped himself with a weapon while in the dwelling will be a serious aggravating factor. This will be particularly so if the item availed of has the obvious potential to be a lethal weapon, such as a carving knife or a meat cleaver.

48. If a number of the factors to which reference is made are present, this will place the offence in the middle range at least, and usually above the mid-point in that range. The presence of a considerable number of these factors or, if individual factors are present in a particularly grave form, will raise the offences to the highest category. Cases in this category will attract sentences, pre-application of mitigation, above the midpoint of the available scale, i.e. above seven years imprisonment and often significantly above the midpoint. In considering the significance of a particular aggravating factor identified as present, it is necessary to view the significance of that matter in the context of the particular case. To take but one example, it has long been recognised that an offence is aggravated if property of significant monetary value or major sentimental value is taken. However, that is not to be seen in purely nominal or monetary terms. Taking what in absolute terms might be thought to be a fairly modest sum of cash becomes a matter of very great significance indeed, if the amount is taken from someone living alone who is entirely dependent on a State pension.

49. Against the background of those comments the Court would suggest that mid-range offences would merit pre-mitigation sentences in the range of four to nine years and cases in the highest range nine to 14 years. The Court recognises that the circumstances surrounding individual offences can vary greatly, and that is so even before one comes to consider the circumstances of the individual offender. While a consistency of approach to sentencing is highly desirable, it is not to be expected that there will be a uniformity in terms of the actual sentences that are imposed. There are just too many variables in terms of the circumstances of individual offences, but even more so in terms of the circumstances of individual offenders, for that to happen. Again, the Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed.

50. So far as the totality of the offending conduct involved in this case is concerned, for reasons already referred to, the Court places that offending in the high range. The principle reasons being that it was a burglary spree, that it was planned and premeditated, was carried out by a group and that aggravating factors were present in respect of some of the individual burglaries, in particular the burglary of the O'Donoghue home but also the Kyle/Cappamore burglary. Also, one cannot lose sight of the fact that both accused had relevant previous convictions.

51. The Court has had to consider whether the judge was correct in deciding to impose the same sentence in respect of each accused. In the Court's view this was a course of action that was open to him. While David Casey was considerably younger and in other circumstances might have received a somewhat lesser sentence, he had directly relevant previous convictions, convictions for burglary, and the offences that the Court was dealing with were committed while he was on bail which of course has to be regarded as an aggravating factor.

52. In the Court's view, the events that occurred on the 27th August 2015 required an aggregate pre-mitigation sentence of not less than ten years. There were significant mitigating factors present which would have justified the reduction of the headline or starting sentence from ten years to an actual sentence of seven years. However, there is an additional factor to be considered. This Court is resentencing well into the sentences. This reflects the fact that the sentences that were imposed in the Circuit Court were, quite properly, backdated to the date when each accused went into custody in relation to this offending. Indeed, it is the case that one respondent had a release date which was subsequent to the undue leniency review application but would have seen him released from custody before judgment is given. The Court will deal with this aspect by further ameliorating the sentence by eight months in each case. The total or aggregate sentence in each case therefore will be of six years and four months to date from the occasion when the respondent first went into custody in relation to these matters. Accordingly the Court will deal with the matter by imposing that sentence of six years and four months in each case in respect of the O'Donoghue burglary, by imposing sentences of three years in each case in respect of the Kyle/Cappamore burglary, two years in respect of the Portnard, Cappamore burglary in each case and twelve months in each case in respect of the criminal damage matter. All sentences will run concurrently.