THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 246/2016

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

MICHAEL GLEESON

Appellant

JUDGMENT of the Court delivered 26th April 2018 by Mr. Justice Edwards.

Introduction

1. The appellant was returned for trial before Portlaoise Circuit Criminal Court on an indictment containing five counts, namely: a single count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997; a single count of burglary contrary to s. 12(1)(b) of the Criminal Justice (Theft & Fraud Offences) Act 2001; two counts of threatening to kill contrary to s.5 of the Non-Fatal Offences Against the Person Act 1997; and a single count of threatening to damage property contrary to s.3 of the Criminal Damage Act 1991.

2. The appellant was arraigned on the 23rd of February 2016 and entered a plea of guilty in relation to the burglary count on a full facts basis and on the basis that the remaining counts would be marked as taken into consideration. A sentence of 10 years' imprisonment was imposed on the burglary count with the final two years suspended on rehabilitative conditions. The remaining counts were marked taken into consideration.

3. The appellant now appeals against this sentence on the grounds that it was excessive and disproportionate in all the circumstances.

The Facts of the Case

4. The circumstances of the offence were outlined to the Court by Garda Gerald Doolan on 14th July 2016 who advised the Court that on the evening of 4th of May 2015, the injured party, Mr. Paul Kelly attended a local pub where the appellant was also present. The appellant had been drinking from early in the day and had consumed a considerable amount of alcohol in the hours preceding this. The appellant appeared to be staring at Mr. Kelly and following a brief exchange of words, Mr. Kelly left and went home. He retired to bed just before 10.00pm. Shortly after 10.00pm, the door of the house burst open and the appellant entered in a very aggressive state, calling out that Mr. Kelly was a "bastard" and saying he was going to kill him. He searched about the house, eventually locating Mr. Kelly in bed where the appellant proceeded to assault him violently. Mr. Kelly was then dragged from the bed and the assault continued by way of continuous punches and kicks. Mr. Kelly bled profusely and in fact slipped a number of times in his own blood as he attempted to stand up.

5. Mr. Kelly's wife attempted to intervene and she was threatened that she would be killed and the house burned if she called the Gardaí. Mrs. Kelly managed however to discretely alert her sister in law, Mrs. Conroy, who came to the scene, observed the appellant's van outside and removed the keys from it. Mrs Conroy then entered the house and almost immediately the appellant left the house. However, very shortly thereafter the appellant returned again looking for his keys, and while present assaulted Mr. Kelly a second time. Following this he left once again and the two women barricaded the door, which they were unable to lock as a result of it having been kicked in, with a couch and furnishings to prevent him re-entering again pending the arrival of the Gardaí and the emergency services.

6. According to medical evidence Mr. Kelly (aged 59 at the time) suffered extensive facial injuries comprising multiple comminuted and depressed fractures particularly involving maxillary sinuses with herniation of the subcutaneous fat, more so on the right side, and fractures of the floors of the orbits without obvious extraocular muscle herniation. A filling was knocked out of one of his teeth. Following a CT scan haemorrhagic fluid was detected in the sphenoid sinus. In layman's language he had suffered two fractured eye sockets, a broken nose, two fractures to his jaw and damage to his teeth. He was referred to the maxillofacial injuries unit at St. James's Hospital, Dublin for further specialist surgical treatment. He required extensive surgery involving several operations to address his facial injuries.

7. Following the incident, the appellant went to ground for a number of days but was eventually located and was arrested. Initially in interview, the appellant indicated that he didn't really remember the events of the night in question but didn't dispute Mr. Kelly's account. As interviews progressed he recounted that Mr. Kelly had been a drinking associate of his (i.e. the appellant's) father. The appellant and his father had had a very unhappy history. According to a psychological report submitted on behalf of the appellant, his father had been physically and emotionally abusive towards him from his early childhood. The father had died in a tractor accident when the appellant was seven years old, but the appellant remains psychologically damaged to this day on account of the abuse that he suffered. His situation was seemingly compounded when he was later subjected to further physical abuse, as well as sexual abuse, while he was in care in St Lawrence's Institution.

8. The appellant stated to the Gardaí that on the evening in question Mr. Kelly had reminded him of his father but that Mr. Kelly was "a nice man." In answer to the question "who did you think you were hitting?", the appellant replied in interview, "my father." In the course of being interviewed he expressed remorse for what he had done, and Garda Doolan accepted in his evidence that this remorse as genuine.

The Impact on the Victims

9. Three Victim Impact Reports were read into the record from Mr. Kelly, Mrs. Kelly and Mrs. Conroy, respectively, in which they all recounted a terrifying ordeal on the night of the offence, the state of the house afterwards and the horror of the clean-up. Mr Kelly had bled profusely from his injuries and there had been blood everywhere including on the walls, the floor, and on the bedsheets, pillows and duvet in the bedroom in which he was attacked.

10. Mr. Kelly told the court that he suffered flashbacks, and about how when the appellant returned to the house a second time he was certain he was coming back to kill him. As a self-employed man the time spent recovering in hospital left him substantially out of pocket. He has suffered physical scarring and is in constant pain. He spent weeks being unable to see his four grandchildren as he did not want to frighten them with his appearance. He further told the Court how neither he nor Mrs. Kelly feel safe in their home, a circumstance made all the more difficult by the fact that the appellant's girlfriend lives less than 20 metres from their home.

11. Mrs Kelly described feeling helpless and thinking that she had lost her husband. She was convinced the appellant was going to kill her and her husband when he returned a second time. She has regular nightmares, is in constant fear and will not stay in the house on her own. She also lost earnings on account of having to take a number weeks off unpaid from work to look after her husband.

12. Mrs Conroy said she would never forget the image of her brother covered head to toe in his own blood, unable to speak or see. She was certain he was going to die. Mr Kelly was a father figure to her, her own father having died at the age of four. His house was very important to her as it was also the house where she was born and raised, however she now rarely visits. She told the court that like her brother and sister-in-law she remains in constant fear. She worries constantly about threats directed at her by the appellant in the course of the incident, including that he would kill her and burn her house down.

The Appellant's Personal Circumstances, and Matters of Mitigation

13. There was an early plea of guilty and an apology was extended to the victim by counsel on his behalf. Although he had been granted bail following his arrest in May 2015, and had taken it up, he surrendered his bail in October 2015 because he was worried about a past heroin addiction and "that he was going to go off the tracks again".

14. The appellant was single at the time of the offence. He was in a relationship with a young woman since approximately 2012, and was living with her and her son. He has a son of his own from a previous relationship, but is not in contact with him. He was born on the 21st of February 1983 and was 33 years of age at the time of the offence. He had completed no formal education but had worked as such intermittently since he was a teenager with interruptions mainly due to periods of imprisonment and losing jobs due to issues connected with an addiction to heroin. At the time of the offence he was working in the construction industry as a labourer

15. The court was told that the appellant's history of offending commenced in March of 2000 when he was still a juvenile. While he was a juvenile the appellant served periods of detention in St Patrick's Institution. This was not however the appellant's first experience of being confined in an institution. When he was 11 years old his mother and some other members of his family were imprisoned for a period arising out of a physical dispute between his family and a neighbouring family. The appellant was taken into care and was sent to St Lawrence's Institution. He reports that while at St Lawrence's he was subjected to both physical and sexual abuse. The appellant attained his majority on the 21st of February 2001.

16. The sentencing court was told that the appellant had "a number of convictions for assault" as well as convictions for public order offences, criminal damage, breaches of barring orders and offences under the Misuse of Drugs Act 1977 (as amended). The evidence from the court below is somewhat unsatisfactory in that it appears that, apart from a 2010 public order conviction, the sentencing court was neither informed of the circumstances of the previous offences involving assaults or public order incidents, nor how many assault and/or public order convictions there in fact were, nor what penalties were imposed in respect of them. However, a list appended to the appellant's written legal submissions and supplied to this Court provides at least some further details. It indicates that he has seven previous convictions for assault, six of those being for s. 2 assaults and one representing a single s. 3 assault. Two of the s. 2 assaults and the s. 3 assault on his list of previous convictions were committed since he attained his majority. In the case of one of those s.2 assaults committed on 26/06/2002 he received a sentence of six months' imprisonment, and in respect of the other, committed on 23/01/2005, he was fined €200. He received a further sentence of six months' imprisonment for the s.3 assault which was committed on 31/5/2006. He further has ten recorded convictions for public order type offences including obstructing a peace office, breach of the peace and other offences arising under various provisions of the Criminal Justice (Public Order) Act, 1994, nine of which were committed since he had attained his majority, and for which he has received various penalties involving community service, fines and short periods of imprisonment. In other instances, convictions for public order offences were taken into consideration with other matters.

17. In relation to the drugs offences, one of these was an offence of possession of drugs for sale or supply under s. 15 of the 1977 Act, while the remainder related to possession under s. 3 of that Act. His most recent offence at the time of sentencing dated from March 2015 and this offence related to holding a mobile phone while driving for which he was fined €300. By contrast his most recent offence for a crime of violence, which was a public order conviction involving threatening and abusive behaviour, dated from 2010.

18. The appellant was described by the prosecuting Garda as having had a "troubled youth" and as having an "aggressive manner". A psychological report provided to the Court detailed that he was "a psychologically vulnerable man who experienced severe maladjustment in his early childhood and adolescent years". It noted that the appellant had developed addiction problems in his late adolescent years and this had escalated in his adult life. The report detailed that he had suffered sexual abuse at the age of 11 whilst in the care of St Lawrence's Institution and had not completed any formal education. He was assessed as being at high risk of committing further violent offences. He has limited impulse control, and is highly susceptible to feelings of anger, powerlessness and ineptitude. He has significant cognitive deficits and has experienced mental health difficulties, including hallucinations, depression and anxiety throughout his life. When he is under the influence of alcohol he cannot control his negative emotions, which results in disinhibition of his behaviour. His cognitive assessment results are suggestive of an intellectual disability, however his ability to live independently and acquire and maintain employment demonstrates that his adaptive functioning is at an adequate level.

19. The appellant has not had any mental health intervention to date. The assessing psychologists whose brief was merely to prepare a report for sentencing purposes have recommended a full psychiatric assessment with a view to determining the extent of, and formulating a treatment plan for, his mental health difficulties. They further recommend that he should engage in psychotherapy, as well as in a specialised educational programme, and an appropriate life skills course.

20. Testimonials received from Noel Dowling of the Merchants Quay Project and Fr O'Sullivan, chaplain of Cloverhill Prison, were provided to the court below. Both testimonials indicated that while on remand the appellant was making an earnest effort to rehabilitate himself. The court was also told that his urine analysis was negative for drugs at that time.

The Sentencing Judge's Remarks

21. In imposing sentence, the sentencing judge made the following remarks:

> *"In determining sentence in a case such as this, the Court has to send out a clear and unequivocal message that people like the accused who engage in this form of criminality can expect a harsh sentence. This is not so much to punish the accused as to deter others who might be tempted to engage in such activity. The Court has to take account of all aggravating factors and mitigating factors. In addition to this, the Court has to take account of the forensic psychological report on the accused, and the victim impact statements. The Court must also look at the culpability of the accused and the gravity of the offence.*
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> *The aggravating factors are, one: The level of violence used in the perpetration of this crime is an extremely aggravating factor; the accused subjected his victim, Mr Kelly, to a sustained and prolonged beating. Two: The fact that the accused returned on a second occasion and perpetrated further acts of assault on Mr Kelly has to be considered a further aggravating factor. Three: The fact that the attack took place in the bedroom of the victim is a further aggravating factor. Citizens are entitled to feel safe in their homes. As a direct result of the accused's offending, Mr Kelly and his wife no longer feel safe in their family home, this is an appalling situation. A further aggravating factor is the threat from the accused to Mrs Kelly that she would be killed and that the house would be burnt if she reported the matter to the gardaí. And I must also take into account as an aggravating factor the repetition of these threats to Mrs Conroy. A further aggravating factor is the negative effect of the crime on the victims. Mr and Mrs Kelly no longer enjoy the confidence they had prior to the offence. I think it is fair to say that their lives have been shattered as a direct result of the accused's offending. The accused's previous offending is a further aggravating factor; he has numerous previous convictions for offences which involve the use of violence, he has five convictions for assault together with convictions for criminal damage, intoxication in a public place, possession of drugs and breach of a barring order. The failure of the accused to surrender to the gardaí immediately after the perpetration of the crime is a further aggravating factor. The evidence discloses that the accused was at large for approximately five days post the incident and that he was only arrested after the gardaí got a search warrant. In fairness, the accused indicated that it was his intention to surrender himself to the gardaí. The forensic psychological report prepared for this hearing puts the accused at high risk of reoffending, and again, this is an aggravating factor that I must take into account.*
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> *The mitigating factors to be considered are, one; the early plea of guilt which saved the State the considerable cost, time, resources and expenses that a jury trial would have entailed. Two; the early plea of guilt also saved the victims the stress and trauma of having to give evidence and be subjected to cross-examination. A further mitigating factor is that once the accused was arrested, he cooperated fully with the gardaí and made fulsome admissions in interviews, which assisted in the successful prosecutions of this matter. A further aggravating factor is the expression of remorse shown and given by the accused for his wrongdoing. I'm satisfied that this remorse I sincere and genuine. I also note that the accused had a difficult upbringing and that he was the victim of sexual abuse as a child. It is clear that this abuse has negatively impacted on his personality and that as a consequence, he has difficulties controlling his anger and temper. I am conscious of the fact that any custodial sentence imposed on the accused will negatively impact on his relationship with his partner and family. His separation from his partner and family which is an inevitable consequence of his incarceration is in and of itself a significant punishment. It is clear that most of the accused's offending behaviour stems from his abuse of alcohol and illicit substances. He is clearly a very dangerous individual when he is intoxicated and under the influence of illicit substances. I have great concerns in relation to his ability to remain out of trouble after his release from prison. In particular, I am satisfied that if the accused is to cease to be a danger to society, then he must engage fully with all the counselling and rehabilitative services that are available in prison. It is clear that unless he remains drug and alcohol free, he is unlikely to be able to remain out of trouble. To his credit, since going into prison last October, he has become drug free, as is evidenced by the results of the urinalysis which have been furnished to this Court. The forensic psychological report indicates that if the accused was to remain drug and alcohol free, this would substantially reduce his risk of reoffending, provided he was also able to achieve a stable emotional state. The forensic psychological report details that the accused is a psychologically vulnerable man who experienced severe maladjustment in his early childhood and adolescent years. The report acknowledges that the accused has addiction problems which commenced in his late adolescent years and escalated in his adult life. The report notes that the accused was the victim of sexual abuse at 11 years of age whilst in the care of St Lawrence's Unit. It also notes that he has not completed any formal education. The report also indicates that the accused recognises his mental health symptoms and the need for treatment. The report further states that the accused has significant limitations across all cognitive domains which can impact on his insight into his offending. Given these limitations, it is not unusual for the accused to become frustrated as a result of not understanding what has been said to him. His cognitive functioning was assessed as being within the extremely low range of intellectual functioning, whereby his abilities were exceeded by 97.7 percent of adults his age. His cognitive assessment is suggestive of an intellectual disability. However, his ability to live independently and acquire and maintain employment demonstrates that his adaptive functioning is at an adequate level. Significantly, the psychological report goes on to state that the accused appears to have significant mental health difficulties which have been present throughout his life. It says he has experienced auditory and visual hallucinations since his late adolescence and has not received any medical intervention to date. This is significant because in his interviews with the gardaí, the accused maintained that he thought he was assaulting his father when he perpetrating the assault on Mr Kelly. Even allowing for the fact that the accused thought it was his father he was assaulting, nothing his father did to him could have justified the beating he administered to Mr Kelly. I have to confess to not being convinced by the accused's explanation that he thought he was perpetrating the assault on his father. I make this observation arising from the fact that in her statement, Mrs Kelly states that while perpetrating the assault, the accused kept shouting the victim's surname, which would clearly indicate that he knew the person who he was assaulting was somebody other than his father. There is nothing in the documentation or reports before this Court which indicates that Mr Kelly that the accused didn't have the ability to realise what he was doing was wrong. I think it is also noteworthy that no explanation has been given for the very serious threats he made to Mrs Kelly.*
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> *The revocation of his bail at his own request in October last constitutes an acknowledgement by the accused of the gravity of the offence and the fact that it will warrant a substantial custodial sentence. The undertaking and completion of courses by the accused while in prison shows willingness on his part to rehabilitate himself. The Governor's report from Cloverhill indicates that the accused is a well-behaved prisoner; this has to be viewed as a hopeful sign for the future. I have noted the testimonials furnished by Noel Dowling of the Merchants Quay project, and Fr O'Sullivan, the Chaplain to Cloverhill Prison. Both of these testimonials indicate that the accused is making an earnest effort to rehabilitate himself and he is to be commended for this.*
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> *Terms of sentence: The maximum sentence that can be imposed for a burglary is up to 14 years' imprisonment. I am absolutely satisfied that this offence is at the upper end of gravity and is, arguably, at the apex of offending for this*

particular offence. Accordingly, I'm satisfied that this offence attracts a headline tariff of 12 years in prison. Taking account of the plea of guilt and the mitigating factors outlined above, I'm going to reduce the sentence to 10 years. Accordingly, I am imposing a sentence of 10 year's imprisonment with the final two years suspended in an effort to foster and promote the rehabilitation of the accused for a period of two years, on the following conditions. One: That the accused enter into a bond of €500 to keep the peace and be of good behaviour for a period of two years' post-release. Two: That the accused admit himself to supervision by the probation service for a period of two years' post-release and follow all directions given to him by the probation service, particularly in relation to dealing with his drug and alcohol addictions. And three: That the accused refrain from consuming alcohol and illicit substances for a period of two years' post-release, and make himself for urinalysis whenever requested to do so by the probation service. The sentence imposed is backdated to the date that the accused went into custody which is [the 8th of October 2015]."

Grounds of Appeal

22. The appellant maintains that the sentence viewed in its totality and structure is excessive with regard to this particular offender. Specifically, it is complained that the headline sentence of twelve years was too severe and further that there was insufficient weight attached to the significant mitigating factors put forward on the appellant's behalf, including:

(a) The early plea of guilty;

(b) The appellant's remorse;

(c) The absence of premeditation;

(d) The appellant's work history and prospects;

(e) The appellant's mental health difficulties and his co-operation with the preparation of reports;

(f) The surrendering by the appellant of his own bail.

(g) The appellant's good behaviour while on remand;

(h) The appellant's efforts to rehabilitate himself.

Submissions on behalf of the Appellant

23. Counsel for the appellant, while accepting that it was a very serious case, contended that the headline sentence of 12 years was out of kilter with this Court's judgment in the case *The People (Director of Public Prosecutions) v Popovici* [2017] IECA 35. He submitted that the circumstances in Mr Popovici's case were as serious, if not more serious, than in the present case and yet this Court saw fit to commence with a headline sentence of nine years and to expressly find that the headline sentence of twelve years nominated by the sentencing court at first instance was erroneous.

24. Counsel sought to emphasise that the maximum available sentence in the present case was fourteen years. He further referred us to the decision of the Court of Appeal (Criminal Division), in the neighbouring jurisdiction of England and Wales, in the case of *Regina v Saw* [2009] 2 Cr App R (S) 54. In that case the Court of Appeal (Criminal Division) had said:

"19. Whilst every case is different, the experience of courts is that some aggravating features are commonly encountered in burglary. They include:

• Force used on, or threatened against, the victim, and especially if physical injury is caused; such cases will often be charged as robbery or as offences against the person. […]

• Trauma to the victim beyond the normal inevitable consequence of intrusion and theft;

• Pre-meditation and professional planning/organisation in the execution; this may be indicated by burglars working in a group or when housebreaking implements are carried;

• Vandalism of the premises;

• Deliberate targeting of any vulnerable victim (including cases of 'deception' or 'distraction' of the elderly);

• Deliberate targeting of any victim, for example out of spite or upon racial grounds;

• The particular vulnerability of the victim, whether targeted as such or not;

• The presence of the occupier at home, whether the burglary is by day or by night;

• Theft of or damage to property of high economic or sentimental value;

• Offence committed on bail or shortly after the imposition of a non-custodial sentence.

• Two or more burglaries of homes rather than for a single offence;

• The offender's previous record, as explained in this judgment."

The Court of Appeal (Criminal Division) had gone on to say that, in terms of appropriate pre-mitigation or headline sentences:

31. Any domestic burglary which, however "standard" it may appear to be, reflects any of the aggravating features we have identified should, subject to strong personal mitigation, normally attract a custodial sentence. Cases of limited raised culpability and/or impact should ordinarily involve a custodial sentence, probably in the general rage of 9-18 months. A

longer sentence may be indicated by a record of relevant offending or by a significant impact on the victim, or both. A shorter sentence may be indicated by established (not merely asserted) subsidiary role or demonstrated exploitation by other offenders. In such cases a community order may be appropriate if it provides the best prospect of preventing future offending by the defendant.

32. In cases of seriously raised culpability and/or serious impact, the starting point should be a custodial sentence, probably in the general range of 2 years and upwards. For a single offence the range would ordinarily be 18 months – 4 years. Sentences beyond the range may be appropriate where the culpability and/or impact is at an extreme level. Longer sentences may be indicated, for example, by a record of relevant offending or where the hallmarks of professional crime are evident, and shorter ones by established minor role or demonstrated exploitation, but all aggravating and mitigating features must be evaluated. Community orders for this class of case would only begin to arise for consideration in the most extreme and exceptional circumstances."

25. Counsel makes the point that though the present case would undoubtedly qualify in England and Wales as one involving "seriously raised culpability and/or serious impact", the indicative sentencing ranges indicated in *Regina v Saw* are very considerably below the headline sentence of twelve years selected in the present case. While acknowledging that the Saw case can only be of perhaps limited persuasive influence, given the structural differences between the sentencing regime that obtains in England and Wales on the one hand, and that which obtains in our own jurisdiction on the other hand, counsel submitted that even allowing for such differences it nevertheless indicated that twelve years as a starting point was by any yardstick simply too severe for this type of case.

26. It was further submitted that in the present case, where there was plea of guilty, co-operation, remorse, significant personal adversities including cognitive and mental health difficulties, as well as addiction and substance abuse issues, an effective discount of 20% was simply too little.

The Court's Decision

27. It is convenient to deal firstly with the contention that the headline sentence of twelve years was too severe. The judgment in the *Popovici* case relied upon by counsel for the appellant, was an *ex tempore* judgment of this Court (Birmingham, Sheehan and Mahon JJ.) delivered by Sheehan J on the 23rd of January 2017. It was the only comparator put forward by counsel for the appellant. The circumstances of the crime in the *Popovici* case are outlined in brief in the record of this Court's *ex-tempore* judgment on the appeal against severity of sentence, but are perhaps more fully outlined in this Court's earlier judgment rejecting Mr Popovici's appeal against his conviction: *The People (Director of Public Prosecutions) v Popovici* [2017] IECA 35.

28. The facts of that case were that on the 26th September, 2013, at approximately 4:40 a.m., during the hours of darkness, two men broke into the home of James and Sarah Quigley in a remote location at Tullohea, South Lodge, Carrick-on-Suir, County Tipperary. The householders were alerted by a noise from the kitchen. Mrs. Quigley woke her husband up, and he proceeded into the kitchen area of the house. Mr. Quigley gave evidence that two men, subsequently identified as the appellant and another man who had both travelled overnight from Dublin by bus, were standing in the kitchen. Upon shouting at the men to establish the reason for their presence, Mr. Quigley's evidence was to the effect that one of the men, the appellant, who was armed with some sort of adjustable spanner, had said "get back or I'll stick this in you".

29. At this juncture, a scuffle started in the kitchen and moved outside the house. Mr. Quigley gave evidence that the other man had an iron bar in his hand at this point. Mr. Quigley said that he held the appellant to the ground and that as he did so, the second man kicked him in the stomach and hit him several times with the iron bar on the back and arms. Mr. Quigley was only wearing his boxer shorts at the time. According to Mr. Quigley's evidence at trial, as the men had overpowered him, they had first attempted to regain entry to the house and only then did they attempt to run away, but both of them fell over an unfinished wall at the front of the house.

30. Mr. Quigley followed them and, following another scuffle, managed to drag one of the men, the appellant, back. Mr. Quigley states that upon putting to him words to the effect of "what brought you to my house", the appellant had answered "you shouldn't be here, you work all the time, you work nights." The appellant was detained by Mr. Quigley and his uncle, Mr. Brannigan, until gardaí arrived. Garda Cuddy arrived on the scene at approximately 5:05 a.m. Mr. Popovici was cautioned and arrested at 5:12 a.m. The other man escaped but was arrested later that evening.

31. A wrench and lock were found on an outside windowsill, and a black rucksack containing a pair of gloves was found outside on the ground beside Mr. Popovici. The external conservatory/kitchen door was also damaged in that the brass handles were broken off, the lock had been interfered with, and the covers on the door as well as the panels around the door had also been taken off. The garda investigation indicated that the appellant had travelled from Dublin to Clonmel by bus, that the bag that was with him was his, and that it only contained a pair of gloves.

32. Both Mr and Mrs Quigley were profoundly traumatised by the incident and their self-confidences, and sense of security in their own home notwithstanding the installation of a top of the range alarm system and sensor lights after the fact, was seriously damaged.

33. The sentencing judge had fixed on a headline sentence of twelve years but this Court concluded that he had erred in doing so, stating:

> "13. This was a serious burglary offence which violated the constitutional protection of his home which Mr. Quigley was entitled to and both he and his wife suffered serious adverse consequences as a result of this burglary. It was also an offence in which the appellant used serious violence on Mr. Quigley when he tried to make good his escape. We do however, note that the appellant travelled to the scene of the burglary by bus, which is somewhat unusual, and also that he may have been of the view that the house would be empty when he got there.
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> 14. Bearing these matters in mind we hold that the appropriate headline sentence is nine years' imprisonment."

34. We feel that it is important to make several points about the *Popovici* case. While not gainsaying that the Court of Appeal did express the view in the circumstances of that case that a headline sentence of twelve years was too severe, we do not accept the premise on which that case is offered to us as a legitimate comparator, namely, that the circumstances are similar. They are not all similar.

35. While not seeking to gainsay, or in any way to minimise, the seriousness of the circumstances in the *Popovici* case, the circumstances of the present case were even more serious. There three victims here rather than two. The physical injuries to Mr

Kelly, in particular, were much more serious than those inflicted on the main victim in the *Popovici* case. Moreover, the culpability of the perpetrator here is also much greater than was the culpability of the perpetrators in the *Popovici* case.

36. Mr Popovici and his associate had gone out to commit a domestic burglary with a view to achieving a theft and in the belief and expectation that the target dwelling house would be temporarily unoccupied. Assault was not in contemplation by them. They did not enter the premises with the intention of committing an assault. Of course, as is always the risk in burglaries of premises committed in the expectation that the premises will be unoccupied, the premises turned out not to be unoccupied. In the *Popovici* case Mr Quigley surprised the intruders in the kitchen and sought to effect a citizen's arrest of them. This elicited threats from one of the intruders who brandished a spanner at him. Despite this he bravely tackled the intruders with a view to driving them out of the house in order to protect his wife and property. He succeeded in doing so in large measure, including effecting a citizen's arrest of Mr Popovici, but sustained significant injuries when both raiders sought to physically resist his attempts to apprehend them. Most of the actual physical altercation took place outside of the house.

37. In contrast in the present case, the burglary was carried out with the intention of committing an assault. The family home, where one should expect to be safe, was violated for that express purpose. The door was violently kicked down in order to gain access. Mr Kelly was savagely assaulted and sustained horrific injuries. The house was entered for that express purpose. Moreover, there was a second entry and a second assault. While a suggestion was "floated" in the present case that the appellant may have been hallucinating, or in some way delusional, at the time of the offence, and may in consequence have believed that Mr Kelly was his late father, a matter that if accepted would have served to reduce his culpability somewhat, that suggestion was expressly rejected by the trial judge. The trial judge's said rejection is not a ground of appeal. Moreover, the evidential basis for such a claim was weak in any event being based upon the appelant's personal assertion. The psychological report did not address this claim in any terms and there was no forensic psychiatric evidence. In those circumstances, and as the trial judge was in any event best placed to form a view of the limited evidence proffered in support of the claim, we consider that it would be inappropriate to interfere with his ruling.

38. In addition, an important further point of distinction is that while the headline sentence determined upon in respect of the burglary charge in the appellant's case was undoubtedly a significant and indeed severe one, it was intended to reflect not just the gravity of the offending conduct in the matters that comprised the burglary, but also the offending conduct comprising the related offences which were taken into consideration. These, it will be recalled, were the offences of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997; two instances of threatening to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997; and one instance of threatening to damage property by committing arson, contrary to s. 3 of the Criminal Damage Act 1991. In another case in which we delivered judgment earlier this morning, namely *The People (Director of Public Prosecutions) v Michael Casey & David Casey* [As yet, there is no neutral citation and for the moment the case must be cited as "unreported, Court of Appeal, 26th April 2018"], we said that where a sentence is being imposed for an offence, with other offences being taken into consideration, *"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."* There were no other offences taken into consideration in the *Popovici* case and so the judgment in that case is clearly distinguishable on that basis alone, quite apart from the other matters mentioned. There is no question here but that the offences taken into consideration were properly taken into consideration. Although the appellant had been charged with these offences, he was neither tried nor convicted of them. He was arraigned and pleaded only on the burglary count, but did on the basis that, with the consent of the Director of Public Prosecutions, the other matters would be taken into consideration and the evidence at the sentencing hearing would be given on a full facts basis. The sentencing court clearly had power to do this under s. 8 of the Criminal Justice Act 1951.

39. A final point that requires to be made in respect of the *Popovici* case is that there was a second basis on which this Court decided to interfere with the decision by the court below. There was a manifest disparity between the sentence imposed on Mr Popovici on the one hand, and that imposed on his accomplice, on the other hand. While there were differences in their circumstances these differences were not so great as to account for the disparity. In the circumstances, the appeal was going to be allowed on that basis in any event. While this was a separate issue to the appropriateness of the headline sentence, the Court was possibly more readily prepared to also interfere with the headline sentence, about which the Court's members harboured some reservations, than it might have been if the headline figure had been the sole basis for concern.

40. With respect to the decision in *R v Saw* which counsel for the appellant has commended to us for its persuasive influence, we do not consider that it is of much assistance at all when it comes to the issue of what was the correct headline sentence. We have stated previously in *The People (Director of Public Prosecutions) v Wall* [2016] IECA 319 that:

> *"29. It requires to be stated immediately that sentencing cases from England and Wales are necessarily of limited persuasive value in circumstances where judges in that jurisdiction are required to adhere to stringent sentencing guidelines set by a Sentencing Council. We have no such structures in Ireland. Moreover, in the specific case of burglary, there is in that jurisdiction, since 1999, a statutory "three strikes and you're out" policy which requires a mandatory minimum sentence of at least three years to imposed for a burglary if an offender has two previous convictions for burglary. Yet another point of relevant significance is that sentences in England and Wales are generally higher than they are in Ireland, but in circumstances where prisoners typically receive 50% remission for good behaviour as opposed to 25% remission here. It seems to us that in circumstances where burglary has been on the statute books in Ireland since before the foundation of the State, it is surely not necessary to look abroad for sentencing guidance. The Irish courts have been sentencing burglars throughout all those years and in consequence relevant comparators based on decisions of the Irish courts should be readily available.*
>
> *30. In any case we have considered the list of suggested aggravating circumstances advanced in R. v. McInerney which finesses the earlier list promulgated in R. v. Saw. Most of the items on that list save for the "three strikes and you're out policy", are matters which an Irish court would have regard to in any event. In general terms there is nothing novel in the list advanced. However, the weight to be attached to each aggravating factor is a matter for the sentencing judge to determine in the circumstances of the particular case according to his or her understanding of current Irish sentencing policy. The views on a court in another jurisdiction operating on advice from a statutory sentencing advisory panel, (now the Sentencing Council since 2010) as to the weight to be attached to different factors may not necessarily be reflective of current Irish sentencing policy and practice and should therefore be approached with significant caution."*

41. In our judgment in the case of *The People (Director of Public Prosecutions) v Michael Casey & David Casey*, delivered earlier this morning, this Court identified a range of aggravating factors that may arise in Burglary cases, and in truth our list overlaps to a great extent with those listed in *R v Saw*. We suggested that the spectrum of penalties available for ordinary burglaries prosecuted on indictment, running as it does from non-custodial options to imprisonment for up to fourteen years, may usefully be divided into three parts, namely a low range, a medium range and a high range. We went on to say:

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 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.

42. We have no hesitation in saying that in the present case the appropriate headline sentence was properly to be located in the highest range, i.e., in the range meriting sentences of between nine and fourteen years. There were multiple serious aggravating factors in this case, including the violation of a dwelling (twice), the involvement of multiple victims, the causing of serious physical injury to one victim, the causing of immense psychological trauma to all three victims, confrontation with the occupier in circumstances where the entry was effected with the intention of committing assault, the utterance of threats to kill, and to burn another dwelling, the perpetration of a second assault upon returning to the property, the causing of extensive physical damage including kicking down the front door and damage to furnishings and decoration from blood staining. We consider that in the circumstances of this case the sentencing judge's starting point of ten years cannot legitimately be criticised. We therefore dismiss the first ground of appeal.

43. As regards the second ground of appeal, namely that there was insufficient discount for mitigation, we consider that while it was certainly not generous, it was not outside the range of the sentencing judge's discretion. It is clear from his sentencing judgment that he approached the analysis of the evidence carefully and rigorously. He correctly identified all relevant mitigating factors. While, as is usual, the sentencing judge does not indicate the weighting he was prepared to attribute to any one factor, and it would perhaps have been open to him to afford greater discount overall than he did, the failure to do so was not an error in itself in circumstances where the overall discount afforded was within the range of the judge's legitimate margin of appreciation, which we believe it was. We therefore also dismiss the second ground of appeal.

Conclusion

44. The appeal against severity of sentence should be dismissed.