



THE COURT OF APPEAL

[219/17]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DOMINIC DOWNES

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 3rd day of December 2018 by Birmingham P.

1. This is an appeal against severity of sentence.

2. The sentence under appeal is one that was imposed in the Circuit Criminal Court in Galway on 18th July 2017. It is a sentence of six years imprisonment to date from 2nd March 2017 that was imposed in respect of an offence of aggravated burglary. The sentence was imposed following a plea of guilty.

3. The background to the case is to be found in the fact that on 24th September 2016, Gardaí were summoned to a residential address at Hazel Park, Newcastle, Galway. At 01.55am, two men were seen leaving the rear of a dwelling. The appellant, Mr. Downes, was one of them. He dropped a bag containing a large amount of stolen property. He had with him a large hunting knife and Garda investigations established that he had entered the dwelling through the back window. A hatchet was found on the ground beneath that window. The items that were used in the burglary, that is to say the hatchet and the hunting knife, had been stolen earlier from a local store with a view to being used in the burglary. Property to an amount of €1,760 was stolen and some, but by no means all of that property was recovered. The sentencing hearing heard that one of the occupants of the house had not made a victim impact statement, but she had moved out of the house in the aftermath of the incident. The other occupant of the house, the other injured party, was off work for some two weeks as he suffered from Post-Traumatic Stress Disorder. He moved out and went to live with family members in the region as he was afraid at that stage to live alone. Later, when he felt able to live alone again, he moved out of the house where the burglary had occurred as he did not want to find himself living there.

4. In terms of the background and personal circumstances of the appellant, he was born in November 1995. The Court heard that he had begun to get into trouble in 2013 and there was reference to "an extensive catalogue since". Recorded convictions include those for s. 112 of the Road Traffic Act, the offence of trespassing in a building, possession of a knife and an offence contrary to s. 2 of the Misuse of Drugs Act. The Court heard that he had, on two occasions, been the victim of stabbing/bottling incidents, and that as a result of this, he had lost the sight in his left eye. The Court heard that he had learning difficulties and was told that he had a chronic drug problem and also a problem with alcohol. The offence that the Court was dealing with was committed at a time when the appellant was subject to probation supervision.

5. The Judge's approach to sentencing was to identify a starting or pre-mitigation figure of nine years imprisonment. The Judge said that in his view, the appellant was far more culpable than a co-accused who was sentenced to a term of four years imprisonment, but which sentence was suspended for a period of six years. The extent of the disparity in relation to the sentences imposed on the two co-offenders has been raised as an issue on this appeal. It is also said that the Judge did not have sufficient regard to the mitigating factors that were present and that he ought to have adjourned sentence when asked to consider doing this.

6. So far as the disparity point is concerned, the Court has not been provided with the transcript of the sentence hearing involved the co-accused, but the Court is aware that the other individual who came before the Court was a minor and this would seem to have been a very significant consideration from the Court's perspective.

7. Before the Circuit Court on 18th July 2017, in addition to this aggravated burglary were District Court appeals, a s. 15 Misuse of Drugs Act case relating to 49 Ecstasy tablets to an approximate value of €500 and an offence involving possession of a knife. These offences were committed on 25th February 2017, so they were committed while the appellant was on bail in respect of the aggravated burglary. The Judge dealt with this District Court appeal aspect by imposing concurrent sentences of five months and three months imprisonment, but suspending those sentences for a period of three years. The effect of this was that the appellant's period in custody was not extended by reason of the additional offence.

8. In the Court's view, the offence with which the Circuit Court was dealing was a very serious offence indeed. Aggravated burglary is

an inherently serious offence. Of note here is the element of pre-meditation, as instanced by the theft of the hunting knife and the hatchet, the considerable quantity of property stolen, not all of which was recovered, and the effect that this aggravated burglary had on both occupants of the dwelling. The fact that the offence was committed while under the influence of drink and drugs does not, in the Court's view, provide any real element of mitigation.

9. In the Court's view, the Circuit Court Judge was entitled to nominate the pre-mitigation or headline sentence that he did and the sentence that he decided to ultimately impose was one that fell within the available range. In those circumstances, in the Court's view, no error has been identified and we must therefore dismiss the appeal.