THE COURT OF APPEAL

Record No. 43CJA/2017

Mahon J.
Edwards J.
Hedigan J.

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND–

RICHARD EVANS

RESPONDENT

JUDGMENT of the Court delivered on the 8th day of May 2018 by Mr. Justice Mahon

1. The respondent pleaded guilty and was convicted on the 18th January 2017 at Dublin Circuit Criminal Court of one count of burglary contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001. He was sentenced on the 6th February 2017 to three months' imprisonment to date from the 5th September 2016. The respondent was sentenced on the same day to a term of imprisonment of twelve months with the final six months suspended in respect of two charges of criminal damage following his conviction of same following a guilty jury verdict.

2. The appellant seeks a review of the three month sentence in respect of the burglary offence on the grounds that it was unduly lenient pursuant to s. 2 of the Criminal Justice Act 1993.

3. The burglary charge arose from an incident which occurred on the 18th February 2015 at Coke Lane, Dublin 7. On that occasion Mr. Laurent Malmus encountered the respondent in Coke Lane, close to his home, in possession of two bags belonging to him, Mr. Malmus tackled the respondent and successfully recovered the bags. He did not recover other items taken from his home, including a packet of cigarettes and a pouch containing £150 sterling. The respondent was later identified by gardaí on CCTV footage in the area. He was then identified by Mr. Malmus in the course of an identification parade. He made no admissions at the time of his detention. His plea of guilty was entered at a late stage in the proceedings. The respondent has one hundred and twenty seven previous convictions including a number in the Circuit Court. On the 11th March 2013 he was convicted of two burglary offences in respect of which he received two two year consecutive terms of imprisonment, with the final two years suspended. That suspended sentence was subsequently activated and is currently being served. The current expected date of release from custody is the 25th June 2018.

4. The respondent came from a dysfunctional background. He had a history of drug addiction, but was apparently drug free since July 2015. He previously worked as a baker and a fork lift driver before becoming homeless.

5. The appellant's grounds of appeal are that the learned sentencing judge:-

> (i) erred in principle in failing to properly formulate and to structure the sentence in accordance with approved sentencing practice as annunciated by the Court of Criminal Appeal;
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> (ii) erred in principle in failing to adequately reflect the seriousness of the offence by imposing a sentence of three months imprisonment;
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> (iii) erred in principle in imposing a sentence of three months imprisonment in circumstances where the offence in question involved a physical confrontation with the injured party;
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> (iv) erred in principle in failing to attach sufficient weight to the evidence of the respondent's previous convictions including previous convictions for similar indictable offences, and
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> (v) erred in principle in giving undue weight to mitigating factors in the case in circumstances where there was a significant absence of other mitigating factors namely an absence of co-operation with the investigation and a plea of guilty been entered into on a trial date.

6. Section 2 of the Criminal Justice Act provides as follows:-

> *"2(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Appeal to review the sentence.*
>
> *(2) An application under this section shall be made, on notice given to the convicted person within 28 days from the day on which the sentence was imposed.*
>
> *(3) On such an application, the Court may either:-*

(a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(b) refuse the application."

7. The principles to be applied by this court when considering an undue leniency application were usefully summarised by McKechnie J. in *DPP v. Stronge* [2011] IECCA 79, when he said:-

"(i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose; sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of such court is quite different on a s. 2 application, it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between the sentence imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified, and finally,

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

8. Having sentenced the respondent in respect of the criminal damage counts to a term of imprisonment of twelve months, with the final six months suspended on certain conditions the learned trial judge proceeded to impose sentence in respect of the burglary charge. She said:-

"…And in relation to the other matter, that is a matter in which you pleaded guilty. All items that were stolen were retrieved, apart from some sterling and a packet of cigarettes. There is no victim impact statement. The owner identified this man, Mr Evans, but he obviously hasn't offered any victim impact to us and I'll impose a three month sentence for that to run concurrently with the other."

9. In her submissions to this court, the appellant emphasises what she contends is the different approach adopted by the learned sentencing judge imposing the sentences for the criminal damage offences, and her approach to sentencing in respect of the burglary offences. In relation to the former, it is pointed out that the learned sentencing judge followed best practice by identifying where on the scale of gravity the offences lay when she expressed the view that the offences fell *well below the midway* point, whereas in respect of the latter she did not do so.

10. While it was indeed the case that the learned sentencing judge did not assess the gravity of the burglary offence as ought to have been done in line with best practice as expressly stated by this court on many occasions she imposed sentences in respect of the index offence and other offences at the same time and in circumstances where she considered the burglary offence to be the least serious of those offences. It is necessary to consider the sentence in which a review is sought in the wider context of the sentences imposed in respect of both sets of offences. To put it another way, the sentence for the burglary offence should not, in the circumstances, be taken in complete isolation to the sentences imposed in respect of the criminal damage offences and which are not the subject of this application.

11. While the physical altercation in this case was not initiated by the respondent and while the altercation which did take place did not result in any physical injury to Mr. Malmus, the offence was nevertheless a serious one because it involved the respondent forcibly entering the residence of Mr. Malmus and thus constituted a conscious and determined invasion of the sanctity of a person's home. Burglary of private residences has become a scourge in our society and has greatly undermined the extent to which people feel safe and secure in their own homes.

12. Counsel for the respondent has urged this court not to consider the confrontation that did take place between Mr. Malmus and the respondent as an aggravating factor because it was not initiated by him. While that is not an unreasonable submission to make it must be borne in mind that there is a real possibility in any burglary, even where it is genuinely intended by an offender to avoid confrontation with any occupant in the premises entered, such a confrontation may very well occur where an occupant who comes upon the burglary, either because he loses his composure in the face of the effrontery of his house being unlawfully entered or, as occurred in this case, he attempts to recover his personal property as he is perfectly entitled to do. What occurred may not have been intended by the respondent but it must have been within his contemplation that a confrontation with an occupant or other third party might occur.

13. Perhaps the most serious aspect of this offence was the enormous number of previous convictions and more particularly the fact that seventeen of them relate to burglaries. Furthermore the activated sentences currently being served by the respondent also relate to burglary offences. It is clearly therefore the position that the respondent is a recidivist burglar in respect of whom previous and recent efforts at rehabilitation have failed.

14. It is evident from the sentencing remarks of the learned sentencing judge that she treated the burglary offence to have been significantly less serious than the criminal damage counts. This court cannot agree that this is so, and indeed is satisfied that the reverse is the case. The burglary offence was the more serious offence and required to be so reflected in the sentence imposed. No apparent consideration was given to the existence of the many previous burglary convictions. Further, the assumption on the part of the learned sentencing judge, as appears to have been the case, that the absence of a victim impact statement was suggestive of little or no distress caused to Mr. Malmus was erroneous. There had to have been a significant impact. A decision by an injured party

not to provide a victim impact statement may be taken for a variety of reasons, including fear, or a desire to avoid revisiting the experience.

15. Counsel for the respondent has fairy acknowledged that the sentence in this case was lenient but that the reasons for such leniency are not clear from the sentencing judgment. However, he submitted that the sentence of three months imprisonment was not unduly lenient and ought therefore not be interfered with.

16. The court is however satisfied that the sentence of three months imprisonment was unduly lenient to a significant degree for the reasons already referred to. It will therefore proceed to re-sentence the respondent as of today. It does so on the presumption that the respondent has behaved well in prison although such was not expressly confirmed by the prison authorities.

17. The sentence now imposed is one of two years and six months imprisonment to date from the 1st January 2017, with the final nine months of that term suspended for a period of two years post release on entry into a bond in the sum of €100 to keep the peace and be of good behaviour.