



## THE COURT OF APPEAL

**Birmingham J.  
Sheehan J.  
Mahon J.**

**207/15**

**The Director of Public Prosecutions**

**Respondent**

**V**

**Duku Popovici**

**Appellant**

### **JUDGMENT of the Court (ex tempore) delivered by on the 23rd day of January 2017 by Mr. Justice Sheehan**

1. This is an appeal against sentence.

2. Following a three day trial at the Circuit Criminal Court in Clonmel the appellant was convicted of aggravated burglary and sentenced to twelve years imprisonment with the final two years of that sentence suspended for a period of five years and on condition that he would not enter Co. Tipperary for a period of five years following his release from prison. The appellant was sentenced on the 23rd July, 2015.

3. The facts are that in the early hours of the morning of the 26th September, 2013, the appellant and another man broke into the injured party's home at the foot of the Slievenamon Mountain in the vicinity of Carrick-on-Suir. The householders were alerted by the noise and the owner Mr. Quigly went to the kitchen area of his home where he was attacked by two men. He tried to arrest one of them, but the man whom he was endeavouring to arrest managed to get outside where he continued to violently resist. Mr. Quigly was further attacked. The appellant had a spanner and the co-accused an iron bar. During the course of the struggle the injured party held the appellant on the ground and when he did so his co-accused in trying to release him kicked Mr. Quigly in the stomach and hit him several times with the iron bar on the back and arm. At the time Mr. Quigly was barefoot and only wearing boxer shorts. The appellant took advantage of the beating which Mr. Quigly received and he escaped. However, Mr. Quigley followed him and detained him. The co-accused made good his escape, but in his effort to do so, broke his leg when falling over a wall.

4. The effect on both victims was set out in their respective victim impact statements. In the course of his statement Mr. Quigley said: "my body was all bruised from the beating that I got when the two men beat me up" and he went on to state:-

"I am terrified at night waking up with every little bit of noise. I don't want to leave my wife Sarah alone in the house. I have to leave the lights on at night. I am finding it very hard to sleep. Our new family home doesn't feel the same after this attack. I can see the man's face every night when I go to bed."

With regard to life changes he stated:-

"I had to install an alarm system in the house which has to be kept on all the time even when we are at home. I had to install sensor lights all around the house. We can't leave without anybody in it. If we are going away I have to ask a family member to mind our home for us. It isn't safe anymore. Sarah's parent's stayed with us a few weeks after the incident. If I hear a noise at night it keeps me awake."

5. Mr. Quigley's wife Sarah Quigley stated in the course of her victim impact report:-

"Since the event I am finding it very difficult to sleep. I don't leave the house vacant. I am afraid to go out at night time to get fuel for the fire or anything like that. I am very stressed over what happened to my husband James and that is a constant source of worry for me. I am nervous about leaving him alone in the house as well and this affects our social life. For peace of mind we have had to install a top of the range alarm and outside lights which we have on the whole time. Our social life is now non existent because one or both of us has to stay at home. The way I view our home has changed. I used to feel safe in it, but not anymore. Even when we are at home at night time we set our alarm. Our house is no longer our safe haven. They have ruined that for us. My parents stayed with us for a number of weeks after the incident, but still we will never forget that night. If I hear a noise at night time it keeps me awake all night."

6. The personal circumstances of the appellant are that he is from Romania, he is 45 years old and has been living in Ireland since 2003. His former wife and daughter now 21 years old live in Italy. He completed second level education in Romania and followed this by studying for three years in college. As a result of his studies he obtained work as a customs officer in Romania and held that position for a number of years. Following that he began going to Germany for work and worked between Germany and Romania. Subsequently he arrived in Ireland in 2003.

7. He has twelve previous convictions, four for theft, the most serious offence being a conviction for s. 4 theft where he was sentenced to seven months at the Circuit Criminal Court in Dublin which said sentence was suspended for a period of ten months on condition that he enter a bond to keep the peace and be of good behaviour for a period of eighteen months.

8. The appellant filed six grounds of appeal:

1. The learned trial judge erred in law and in fact in finding that the effect of the offence on others living in isolated areas was an aggravating factor.

2. The trial judge erred in finding that the previous convictions of the appellant were an aggravating factor or in giving undue weight to same, in particular given that eleven of the twelve previous convictions had been dealt with summarily so that the only previous conviction on indictment was an offence of theft contrary to s. 4 of the Theft Fraud and Offences Act.

3. The learned trial judge erred in law and in fact in finding that the evidence given by the appellant at the sentence hearing was an aggravating factor. An unusual feature of the sentence hearing had been the fact that the appellant chose to give evidence and in the course of that evidence complained about the injured party's uncle pointing a shotgun at him following his arrest by Mr. Quigley.

4. The learned trial judge erred in law and in fact in that he failed to place adequate significance on the mitigating factors in the case and in particular the way in which the appellant has made constructive use of his period in custody prior to sentence.

5. The learned sentencing judge erred in law in failing adequately or at all to set out the basis upon which he viewed twelve years imprisonment as the appropriate headline sentence in the case.

6. The learned trial judge erred in failing to give adequate consideration to the appellant's personal circumstances and in particular the additional hardship of a lengthy custodial sentence in circumstances where the appellant was a foreign national.

9. Counsel for the respondent on the other hand contends that the sentence was proportionate and submits that the sentence was appropriate for the crime committed by the accused and further rejects any submission that the learned trial judge overlooked the mitigating factors in the case.

10. In considering the submissions made by both parties we have come to the conclusion that the learned trial judge erred in locating the headline sentence at twelve years imprisonment. We also conclude that while there were good reasons for distinguishing between the two co-accused in this case, the trial judge erred when he imposed a sentence in respect of this appellant which was twice that of the sentence imposed on his co-accused. The disparity in sentence was excessive and not warranted by the facts of the case.

11. The divergence in sentence already significant was further widened when this Court reduced the sentence of the appellant's co-accused from six years imprisonment to four and half year's imprisonment.

12. In view of these findings it is unnecessary to consider the other grounds of appeal. In proceeding to a fresh sentencing hearing, we note the Governor's report to the effect that the appellant received one P19 in September 2015 but that he is now well behaved and currently working as a staff mess cleaner.

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.

14. Bearing these matters in mind we hold that the appropriate headline sentence is nine years imprisonment. In our view the sentencing judge was correct in suspending the final two years of that sentence. We too will suspend on the usual terms the final two years of the nine year sentence that we now impose in substitution for the original sentence.