



THE COURT OF APPEAL

[272/2017]

Birmingham P.  
Edwards J.  
Hedigan J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

JOHN PAUL THORNTON

APPLICANT

RESPONDENT

JUDGMENT of the Court (*ex tempore*) delivered on the 8th day of October 2018 by

Mr. Justice Hedigan

**The Appeal**

1. This is an appeal brought by the Director of Public Prosecutions on the basis that the sentence imposed on the respondent on the 23rd of November 2017 in the Cork Circuit Criminal Court was unduly lenient. The respondent pleaded guilty on the 23rd of October 2017 to all three counts on the indictment; to robbery contrary to s.14, burglary contrary to s.12, and theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The Court imposed a sentence of twelve months imprisonment with the last four months suspended for a period of twelve months.

**Background**

2. On the 17th of June 2017, the respondent carried out a robbery at Ladbroke's bookmakers, Edward Walsh Road, Ballyphehane, Co. Cork. At 19.48, the respondent entered the bookmakers and picked up a number of football coupons which were beside the door. He walked towards the cashier, Jonathan Callan, and went to the price screen close to him. He picked up a betting docket, wrote on it, and then presented the docket and football coupons to Mr Callan. The docket read: "give out the money or I'll fuck petrol in on top of you." The respondent then told Mr Callan that he was going to rob the bookmakers, that he needed the money, and that he would set the premises on fire. He put his hand behind his back as if to get something, and Mr Callan handed over the contents of the till, which amounted to €878. Mr Callan recognised the respondent as someone who had been in the bookmakers on previous occasions and knew him by his nickname "Bubbles". The respondent was identified on CCTV and was subsequently arrested a few days later on the 20th of June. The money stolen was not recovered.

3. The other offences took place on a different date, the 27th of May 2017, in other areas of Cork. A burglary took place on a residential premises, 4 Elderwood Avenue, Boreenmanna Road. The third count of theft took place at O'Driscoll's Superstore, Ballinlough. At 15.05, the respondent entered the supermarket, and proceeded to pick up a sherry trifle and began to eat it while in the store. He then ordered a chicken roll from the deli counter and the left without paying for the items, which were valued at €1.59 and €3.50 respectively. After leaving the store, the respondent went to 4 Elderwood Avenue and entered the house there. Whilst he was there, Mr Eoin McCormack returned home to find the respondent in the kitchen, holding a watch and two bottles of aftershave. The respondent asked Mr McCormack not to call the Gardaí and left the house, leaving the items behind. Mr McCormack took a photograph of the respondent leaving the premises. In this photograph the respondent can be seen wearing the same clothes that he had been wearing in O'Driscoll's Superstore.

4. The respondent was interviewed in relation to the offences on the 20th of June 2017. He made no admissions in relation to the offences at that time. His fingerprints were taken, which matched with the samples taken from the bottles of aftershave in Mr McCormack's home. The respondent pleaded guilty to the offences on the 23rd of October 2017. After hearing the evidence and the plea in mitigation, the Court requested a report from an addiction counsellor. The respondent was on a waiting list to see a counsellor at the time. The matter was adjourned until the 21st of November 2017, with the respondent in custody.

**Sentence**

5. On the 23rd of November 2017, the respondent was sentenced to twelve months imprisonment, with the last four months suspended for a period of twelve months, backdated to the 20th of June 2017. The sentence was imposed on all three counts to run concurrently.

6. In mitigation, it was pleaded that the respondent suffers from addiction issues, which had caused him to get involved in criminality. Letters were provided to the Court to explain that the respondent had been undertaking treatment from 2015-2016 but had relapsed at the time of the offences. It was pleaded that the respondent is a man of good character and capable of contributing to society when he is sober. The respondent made no attempt to disguise himself while committing the offences and was recognised by the cashier in the bookmakers. There was little planning or premeditation to the crimes.

**Personal Circumstances**

7. The respondent was thirty seven years of age when sentenced. He has three young children. He resided with his partner in Togher, Co. Cork, but was not living there at the time of the offending. He has long term addiction issues. The respondent had 140 previous convictions, including three previous convictions for burglary and fourteen convictions for possession of drugs. On the 23rd of May 2007, the respondent was sentenced to four years imprisonment for robbery, and on the same date he received a four year sentence for carrying a firearm with intent. On the 9th of May 2012, he was sentenced to three years in prison with twelve months suspended for burglary. On the same date, he received a three year sentence with twelve months suspended for robbery. On the 3rd of October 2016, he was convicted at Cork District Court and received 200 hours community service and five months imprisonment for entering a building with intent. In relation to this offence, he had been in custody since the 20th of June 2017, the date of his arrest for the

present offences. The respondent had treatment for his addiction while in custody.

### **Grounds of Appeal**

8. The appellant puts forward the following grounds of appeal in that the sentencing judge erred:

(a) in principle in imposing an unduly lenient sentence in all the circumstances, being a sentence of 12 months imprisonment suspending the last 4 months on each count concurrent when the maximum sentence for robbery is life imprisonment, for burglary is 14 years imprisonment and for theft is 10 years imprisonment.

(b) in failing to attach appropriate weight to the aggravating factors in the case.

### **Submissions of the Appellant**

9. The maximum sentence in respect of robbery is life imprisonment, the maximum sentence in respect of burglary is fourteen years imprisonment, and the maximum sentence in respect of theft is ten years imprisonment. The gravity of the robbery and burglary offences were such that, individually, a sentence of twelve months imprisonment would be lenient, but taken together, and with the added offence of theft, a twelve month sentence for all three counts to run concurrently is an error in principle. Reference is made to the case of *DPP v Stronge* [2011] IECCA 79, where it was accepted that a sentence may be unduly lenient when it is proven that the sentence imposed constitutes a substantial or gross departure from sentencing norms.

10. The Court failed to attach appropriate weight to the aggravating factors present in this case. For example, the respondent made a threat to Mr Callan in Ladbrook's bookmakers, saying that he would set fire to the premises. He reached behind his back as if to get something, and this put Mr Callan in fear. The respondent has significant previous convictions, including three for robbery and three for burglary. He has received custodial sentences in the past, including a four year sentence for robbery, imposed on the 23rd of May 2007. On the same day, he received a four year sentence for carrying a firearm with intent.

11. The burglary in this present case took place in the middle of the day, during which Mr McCormack, the householder, came home to find an intruder in his home. This aggravates the matter, see *Hardiman J in DPP v Barnes* [2006] IECCA 165, as referred to recently by this Court in the case of *DP v Michael Casey and David Casey* [2018] IECA 121:

"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.'"

12. Further, the Court placed undue weight on the respondent's attempts at rehabilitation. The respondent has serious addiction issues, and was by his own admission intoxicated when committing the offences. He has made attempts to recover in the past but relapsed. While efforts to seek treatment may be mitigating, the sentencing judge gave too much weight to this by sentencing the respondent to effectively eight months imprisonment, backdated to the 20th of June 2017.

13. The Court did not give adequate weight to the gravity of the offences and gave too much consideration to mitigation. In all of the circumstances, the Court was unduly lenient when imposing a sentence of twelve months imprisonment with the final four months suspended.

### **Submissions of the Respondent**

14. The respondent pleaded guilty to the three counts on the indictment of robbery, theft, and burglary on the 23rd of October 2017 and was subsequently sentenced on the 23rd of November that year. The most serious of these offences is the robbery charge at Ladbrook's bookmakers, Edward Walsh Road, Co. Cork. The respondent suffers from addiction issues. Following cross examination, it was accepted by Detective Sergeant Martin Canny that the respondent has badly relapsed at the time of the offences. There was not any great degree of thought or premeditation put into the offences. In fact, when the respondent handed the bookmaker's cashier, Mr Callan, a written threat, Mr Callan first thought that the respondent was joking, as he recognised him from frequenting the shop. The circumstances of the theft of food items in O'Driscoll's Superstore was similarly poorly considered. The respondent made no attempt to conceal himself and acted so blatantly that it was inevitable that he would be caught for his actions. In relation to the burglary at Elderwood Avenue, the respondent made no attempt to ransack the house and walked out the front door when the householder returned.

15. With regard to the respondent's 140 previous convictions, this does not equate to 140 separate incidents of criminal behaviour; many are multiple summonses for the same incident. More than half of the convictions are for road traffic offences. The most serious previous conviction, dating back to 2007, was in relation to a carrying a firearm, which subsequently transpired to be an imitation firearm.

16. Letters provided to the Court outlined that the respondent had engaged with treatment in 2015-2016 and was doing reasonably well. However, after suffering a relapse he engaged in criminal behaviour. The Court accepted that there were addiction problems. When the matter came before the Court on the 21st of November 2017, a report was available from the prison in relation to drug addiction treatment. After examining the report, the Court adjourned the matter for sentencing on the 23rd of November that month. Reference is made to the case of *DPP v Stronge* [2011] IECCA 79, where it was stated that in order to establish undue leniency, it must be determined that the sentence imposed substantially departed from what would be an appropriate sentence in the circumstances. After considering the evidence first hand, the sentencing judge must have a degree of discretion in which to operate. The fundamental tenet of sentencing in this jurisdiction is that a proportionate sentence is that which is not only the correct sentence for the offence, but also for the particular offender. It is accepted that the sentence imposed on the respondent was lenient, but not unduly so. Regard must be had to the personal circumstance of the offender and the nature of the offence. The nature of the offending in this case showed that there was little or no planning involved. The respondent also made no effort to disguise himself and was not armed with any weapons. He would have been aware that he would be recognisable to the cashier in Ladbrook's bookmakers. It was inevitable that the respondent would have been arrested for the offences. While the incident at 4 Elderwood Avenue was no doubt distressing to Mr McCormack, the respondent made no attempt of violence or threat of violence. It was not a burglary spree, and lacked any substantial premeditation.

17. The respondent is a person who has struggled with addiction. He has a number of previous convictions. On occasions he has done well and in others he has not. The offending in this case is a result of an unfortunate relapse. The Court was entitled to consider the respondent's addiction issues when determining sentence. It is clear that the judge gave this matter careful consideration, as he requested for a report to be made available to him from an addiction counsellor in relation to the respondent.

18. When considering all of the factors outlined above, it is clear that the sentencing judge did not err in law and/or principle with regard to the sentence imposed. While the sentence fell on the lenient side, it did not substantially depart from the norm and should not be interfered with.

### **Decision**

19. The respondent has a very poor record of 140 previous convictions. It is conceded that a large number of these arise from Road Traffic Act offences and many from the same incident. Nonetheless, these convictions include ones for robbery, carrying a firearm, albeit an imitation firearm, and burglary. He received a four year sentence for the robbery and firearms offences in 2007. In 2012 he received a sentence of three years for burglary and robbery with the last 12 months suspended. On the 3rd October 2016, he received a sentence of 200 hours community service and five months in prison. The Court is informed that he is currently in Midlands Prison on foot of further drug offences and has a release date of the 16th March 2019.

20. It is clear that the learned sentencing judge considered the respondent as a man more to be pitied than condemned. Nonetheless, some of the offences involved herein are serious ones, normally attracting substantially more severe penalties. However, the judge took some care to enquire into the respondent's situation. He was informed that he was a man that had the capacity to do well when sober and clear of drugs. He was informed that he had been doing well for a number of years but earlier, in 2017, had relapsed quite badly. He had as a result gone back to prison since the 20th June 2017. He was continuing to do well in custody. The judge directed a report from the addiction counsellor. This report was before the judge at sentencing. It was a positive one that considered that the respondent could do well.

21. The learned sentencing judge adjourned sentencing for two days. At that stage he decided that the respondent did seem to have improved greatly in his appearance. In the light of all he had been told and the reports of his efforts at self-improvement, the judge imposed a sentence of 12 months imprisonment with the last four suspended for 12 months. He was required to enter a bond to be of good behaviour and to remain in contact with probation services for the purposes of rehabilitation.

22. The sentence was undoubtedly a very lenient one. Nonetheless, the learned sentencing judge clearly was of the view that the respondent was worth a chance to see if he could get his life back on track. He carefully considered the improved demeanour of the respondent in court. It would have been helpful to this court if the judgment had been more structured and discursive to enable us to assess the reasoning behind the sentence. However, the learned sentencing judge was obviously very careful to enquire into the respondent's circumstances. To that end he ordered a report on him from an addiction counsellor. This, together with the somewhat pitiful nature of the offences herein, obviously moved the judge in the direction he took. It is a most unusual case of somewhat bizarre circumstances. In the light of all this, whilst we consider the sentence to have been a very lenient one, we consider it one within the range available to the learned sentencing judge and we will not interfere with it. The application is refused.