



THE COURT OF APPEAL

[59CJA/2018]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

LUKE FORAN

RESPONDENT

JUDGMENT of the Court delivered on the 13th day of December 2018 by

Birmingham P.

Background

1. On 7th February 2018, an aggregate sentence of three years and three months imprisonment with the final nine months suspended was imposed on the respondent, Luke Foran, who had entered pleas of guilty in respect of counts that had appeared on three Bills of Indictment. The Director of Public Prosecutions seeks to review the sentences that were imposed on grounds of undue leniency pursuant to the provisions of s. 2 of the Criminal Justice Act 1993.

2. The three Bills before the Circuit Court were (i) Bill 532/17, (ii) Bill 771/17 and (iii) Bill 1766/17.

3. On Bill 532/17 were counts of burglary, unauthorised taking of a vehicle (Reg. No. 99D 9905), criminal damage to three vehicles (Reg. Nos. 06D 76518, HRZ 1230 and 02MN 383) and theft of a watch. Also appearing on the indictment were counts relating to criminal damage to a garage, the theft of tools, and the theft of a ring. The background to this Bill of Indictment was that in the early hours of 12th March 2017, the respondent entered a family-owned garage in Fairview in Dublin and proceeded to ransack the premises including discharging a dry powder fire extinguisher so that powder covered everything in the garage, and stole a number of items. He then stole a BMW car from the garage, which he crashed into a pole just outside the premises, leaving the pole with tarmac around its base, it having been ripped up out of the ground by the impact, lying across the road and causing an obstruction on the roadway. Mr. Foran returned to the garage and stole a Hyundai car (Reg. No. 99D 9905) which he used to make his getaway. In the course of the incident, he drove into other cars and also into the electronic shutters of the garage causing damage in total to an amount of €20,300.

4. Bill 771/17 concerned one count of arson and arose from the fact that on 12th March 2017, in the Dublin Port area, he set fire to the same Hyundai vehicle which had been removed by him earlier from the garage in Fairview.

5. Bill 1166/17 related to a domestic burglary that occurred on 21st May 2017. On this occasion, the home of an eighty-year old lady was entered while she was out at Sunday Mass. The house was ransacked, including mattresses being pulled off beds, drawers emptied and pictures taken from the walls. Her purse containing €150 and her bank cards were stolen. In the incident, damage was caused to the back window and back door which required replacement locks at a cost of €240. The credit card and debit card taken in the course of the burglary were used later that day by the respondent and another person at an ATM in Killester and a total of €1,480 was withdrawn from her account.

6. This burglary incident occurred at a time when the respondent was on bail in respect of the events that had occurred on 12th March 2017, and so, the sentence imposed on it was required to be consecutive to the sentences on the earlier Bills.

7. In terms of the respondent's background and personal circumstances, he was born on 13th November 1997. He was the father of a newly-born child. The Circuit Court heard that he had thirty-three previous convictions, all from the District Court. These included two burglaries, four unauthorised takings of vehicles, two s. 113 offences (interfering with the mechanism of a vehicle), five criminal damage offences and nine s. 4 theft offences. There were also a number of road traffic offences.

8. The Court heard from a witness from the Solas Project, which works with young offenders following their release from custody, and were told that with their assistance that the respondent was attending a drug rehabilitation programme run by RASP in Coolock, Dublin. The witness indicated that he believed drugs to be at the root of the offending behaviour and that if it was not for drugs, that Mr. Foran would never have seen the inside of a courtroom.

Sentencing

9. The Judge's approach to sentencing in the Circuit Court was to identify where on the scale of gravity the various offences were to be placed. So far as the arson offence, which was the first that he dealt with was concerned, the Judge felt it was at the lower end of the scale, perhaps the lower end of the mid-range of the scale and was of the view that it was not the most serious of offence of arson. Given that what was involved was the destruction of a motor vehicle rather than property, giving rise to a risk to life, the Director agrees with the assessment of the Trial Judge that the offence lies at the lower end of the scale of gravity.

10. So far as the garage offences were concerned, the Judge placed these in the mid-range of offences of criminal damage and mid-range for offences of burglary and theft, perhaps at the lower end of the mid-range for these. The Director says that this was "an extremely charitable assessment" and, indeed, that the Judge erred in considering the offences to be at the medium range of gravity. Moreover, she says that the sentences imposed of two years following an identification of three years as the appropriate headline sentence amounted to an error in principle even if the offence was to be regarded as mid-range. So far as the burglary of the domestic dwelling was concerned, the Judge felt that this was a mid-range offence of its type. The Judge felt that the headline sentence for the arson, for the burglary and the criminal damage offences and for the domestic dwelling offence were all three years. He considered that the previous convictions were not aggravating. In that context, it is to be noted that apart from being told about the number of convictions in respect of each offence and that they were dealt with in the District Court, the Judge was provided with little information. A number of the recorded convictions, including those for burglary, s. 112 of the Road Traffic Act and criminal damage, were potentially quite significant and it would have been helpful if the Judge was provided with fuller information. So far as mitigating factors are concerned, the Judge identified the respondent's plea of guilty, his youth and drew some comfort from the evidence of the witness from the Solas Project.

11. The Judge then proceeded to impose the sentences which the Director now seeks to review. In relation to the arson offence, a sentence of two years imprisonment was imposed. A sentence of two years imprisonment was also imposed on each of the various counts arising from the garage incident, and all these sentences were concurrent. Then a sentence of fifteen months imprisonment was imposed in respect of the domestic burglary, which was made consecutive to the earlier sentences. The sentencing judge indicated that the burglary would justify a sentence of three years imprisonment, but having regard to mitigating circumstances and attempting to be as proportionate as possible, this was being reduced to fifteen months. Then, to take account of the prospects of rehabilitation, he suspended the final nine months of the sentence.

12. In seeking the review, the Director says that the sentence imposed in respect of the arson offence was on the lower end of what might be considered appropriate. She says that the sentences imposed in respect of the garage offences were unduly lenient and clearly involved an error in principle. She says that both the headline sentences identified and the ultimate sentences imposed were unduly lenient and unduly lenient to a significant degree.

13. So far as the burglary offences are concerned, she says that the placing of both burglaries, the garage and the domestic burglary, in the medium range might be defensible, but that the sentence ultimately selected by the Trial Judge amounted to a significant error.

14. On behalf of the respondent, it is said that the Director has failed to cross the threshold which should see this Court intervening. It is accepted that the sentences imposed were lenient, indeed, very lenient, but it is said not so lenient as to amount an error in principle. Counsel goes so far as to say it might be at the limit of the range of lenient sentences available, but he says not outside the range.

Discussion

15. The legal principles to be applied in considering undue leniency review applications were not in dispute between the parties. Indeed, those principles have not been in dispute since the first such case, that of DPP v. Byrne. It is, therefore, not in dispute that the onus is firmly on the Director to establish that the sentence was not merely lenient, but unduly lenient, and this involves establishing a substantial departure from the norm if there is to be an intervention.

16. In the Court's view, these were serious offences committed by somebody with a significant prior criminal record. In the course of a victim impact report, the garage owner had commented that it was not a normal burglary, rather it was over and above. The intruder had spent an hour and a half on the premises just wrecking the place. The garage owner expressed himself astounded by the damage that was caused. These remarks were apt indeed. While it is true the arson offence, taken in isolation, might not be regarded as the most serious of offences, the damage to the car taken from the garage has to be seen against the background of all the damage caused at the garage earlier.

17. Again, there were a number of aggravating features to the domestic burglary. The victim was an elderly lady and the impact on her was very severe. Returning from Mass to find her home ransacked must have been a shocking experience. The fact that her bank cards were taken and that money was taken from her account adds an additional dimension of seriousness.

18. Having carefully considered the matter, we are satisfied that the overall sentence imposed was outside the norm, and that it was unduly lenient. In the circumstances we must quash the sentences which comprise that overall sentence and proceed to a re-sentencing of the respondent.

19. In the Court's view, the principal offences relating to the garage incident, these being the burglary and criminal damage offences, would merit a pre-mitigation headline sentence of five years. Given that the arson offence was closely connected in time and involved a vehicle taken during the garage burglary, a concurrent sentence was not inappropriate and so the Court will provide in that regard for a sentence of two years which will be concurrent to the sentences imposed on the garage offences. So far as the domestic burglary is concerned, the headline pre-mitigation sentence cannot be less than four years.

20. The sentences identified require adjustment to take account of the mitigating factors present, in particular, the early plea of guilty, the respondent's youth and his engagement with rehabilitation services. The Court proposes to address these issues by reducing the headline sentences for the garage offences and the domestic burglary in each case by one-third, resulting in sentences of three years and four months in respect of the garage offence and sentences of two years and eight months in respect of the domestic burglary offence. In order to incentivise rehabilitation and having regard to the evidence that was before the Court in

relation to his engagement with the Solas Project and RASP, the final twelve months of the aggregate sentence should be suspended on conditions similar to those that applied in the Circuit Court.

21. The aggregate sentence, therefore, that the Court would regard as appropriate is one of six years imprisonment with the final twelve months suspended. However, the Court is conscious that it must sentence the respondent as of today's date. The Court has regard to the fact that his sentence is being substantially increased at this stage, and that this will be difficult for him. There are also indications that he is using his time in custody in a productive manner.

22. In those circumstances, the Court will limit our intervention so as to provide for an aggregate sentence of five years imprisonment with the final year suspended which will be achieved by imposing sentences of three years imprisonment on Bill 532/17, a concurrent sentence of two years imprisonment on Bill 771/17, the arson count, and a sentence of two years imprisonment on Bill 1166/17 which will be consecutive with the final twelve months of the aggregate sentence to be suspended.