



THE COURT OF APPEAL

Record No. 248/2015

Birmingham J.
Mahon J.
Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

EAMON MURPHY(No. 2).

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 16th day of January, 2017 by Mr. Justice Mahon

1. The appellant was convicted on 19th February, 2015, of one count of aggravated burglary contrary to s. 13(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001, and one count of unlawfully taking a mechanically propelled vehicle contrary to s. 112(1)(a) of the Road Traffic Act 1961, as amended, following a jury trial at Longford Circuit Criminal Court. In respect of the first count (aggravated burglary), the appellant was sentenced on 23rd October, 2015, to a term of imprisonment of ten years with the final three years suspended on condition that he enter into a bond of €500 to keep the peace and to be of good behaviour for a period of three years post release.

2. In relation to the second count (the unlawful taking of the motor vehicle), the appellant was sentenced to a term of imprisonment of one year, and it was directed that both sentences be served concurrently. This is the appellant's appeal against the former, that is the sentence of ten years with the final three years suspended on conditions. The appellant's earlier appeal against conviction was dismissed by this court in October 2016.

3. On 3rd July, 2011, the appellant unlawfully entered the dwelling house of Mr. Seamus Higgins and Ms. Frances Reilly at Ballymahon in Co. Longford, at approximately 3am in the morning. Mr. Higgins and Ms. Reilly were in bed and were awoken from a noise from downstairs. Mr. Higgins went downstairs to investigate and in his kitchen was confronted by the appellant wielding a knife. He was threatened that he would be killed if he did not return upstairs, and the knife with a blade of approximately 12 inches in length was held against his throat. Meanwhile, Ms. Reilly who had followed Mr. Higgins downstairs ran back upstairs and was able to telephone the gardaí. The appellant and his associates then left the house in Mr. Higgins' Mercedes motor vehicle, valued at €16,000. They took with them two flat screen televisions, a laptop computer, watches, jewellery and a wallet containing €100. The car was later found abandoned and burnt out, with its contents destroyed, near Strokestown in Co. Roscommon. A bloodstain found at the rear door through which the appellant and his associates gained entry into the property connected the appellant with the crime.

4. The severity of the sentence is appealed on the following grounds:-

- (i) the learned sentencing judge erred in law in failing to give sufficient weight to the mitigating factors offered on behalf of the appellant;
- (ii) the learned trial judge erred in law in giving undue weight to the aggravating factors in the case; and
- (iii) the sentence was excessive in all the circumstances.

5. In relation to the mitigating factors, the greatest emphasis is placed by the appellant on his role as the almost full time carer for his partner who suffers from Addison's disease and epilepsy. The couple have four school going children aged between seven and thirteen years old, and the appellant's nine year old son suffers from a serious hearing impediment requiring additional care.

6. The appellant has a number of previous convictions. Most relate to road traffic matters, but importantly one involves the possession of a flick knife. In the course of his sentencing judgment, the learned sentencing judge however indicated that he did not deem the previous convictions to be a particularly relevant factor in his approach to sentence.

7. The sentencing judgment was lengthy, detailed and indicated a very considered approach on the part of the learned sentencing judge. He referred to the very significant effect on Mr. Higgins and Ms. Reilly by their experience and the general seriousness, in terms of gravity, of the aggravated burglary offence.

8. The learned sentencing judge stated:-

"The court has also to take into account the need to send out a clear and unequivocal message that people (who) engage in aggravated burglary can expect a sentence that will not only punish the perpetrated but also act as a deterrent to others."

9. He also said:-

"The aggravating factors are that the accused has shown absolutely no remorse for his offending and has tendered no apology to the victims. In my view, the absence of remorse and an apology are significant aggravating factors which have to be taken into account when structuring a sentence. Another aggravating factor is the use of a knife and the touching of the neck skin of Mr. Higgins with the blade. This is a serious aggravating factor; it demonstrates callousness and cruelty. It was clearly a source of huge stress and trauma not only to Mr. Higgins but also to Ms. Reilly. A further aggravating factor is the failure to make restitution to the value of the burnt out car and the items that were stolen. It shows an absence of empathy on the part of the accused and a failure to recognise the loss in monetary terms that the

victims have endured as a consequence of the accused's criminality. Another significant aggravating factor is the fact that the dwelling house which was burgled constituted the family home of Ms. Reilly and Mr. Higgins. People should be allowed to enjoy the quiet and peaceful occupation of their family home. It is clear from the victim impact statement that the security which the victims previously enjoyed in their family home has now been completely destroyed... another aggravating factor is the effect the burglary had on the victims and the fact that they have been adversely psychologically affected. Furthermore, an aggravating factor is that the burglary took place while the victims were asleep and in the middle of the night and was accompanied by threats."

10. In relation to the appellant's previous convictions, the learned sentencing judge stated:-

"Accordingly, while the accused's previous record is an aggravating factor, it is not, given the nature of the record, significantly important to have an adverse effect on the sentence the court will impose."

11. The learned sentencing judge went on to sentence the appellant, commenting as follows:-

"As previously outlined, the prior record of the accused is not of such significance as to impact and firstly on the sentence that the court is going to impose. This offence lies in the middle range for sentencing purposes and accordingly it should attract a of ten to fifteen years. Having taken all the aforesaid matters into account and bearing in mind the gravity of the offence, the culpability of the offender and also the fact that the accused does not enjoy the substantial credit which a guilty plea would have attracted, I am satisfied that the appropriate sentence is twelve years imprisonment. In the light of mitigating factors outlined above, I am imposing a ten year sentence with the final three years suspended..."

12. The description of these events as being extremely serious is an understatement. Forcibly entering a dwelling house and terrorising its occupants, as occurred in this case, constitutes very grave offending. Doing so while armed with a knife and using the knife to threaten the life of a completely innocent person places the offences at an even more serious level. Such offending will normally attract a lengthy custodial sentence.

13. The fact that the appellant pleaded not guilty and fully contested the case at trial, as was his right, has the effect that such credit as might be expected to accrue from a guilty plea is not available to him.

14. Nonetheless there are mitigating factors that require recognition in arriving at an appropriate sentence. Central is the appellant's role as a carer to his partner who suffers from Addison's disease and epilepsy. Also of particular relevance is the fact that the couple have four school going children one of whom, a nine year old boy has a hearing difficulty and requires extra care. These matters have the consequence that the appellant's immediate family will suffer considerable hardship from his absence, and more so perhaps, from the prolonged absence he faces with, in effect, a seven year sentence.

15. While it is always possible, (and regularly occurs), that courts reduce or even avoid the imposition of a custodial sentence because of increased hardship to an offenders family particularly where a family member has a serious medical condition or where very young children are involved, it remains generally the rule that serious offending requires the imposition of a custodial sentence, particularly repeat offending, and even more particularly offences involving violence or the threat of violence (such as the use of a knife or other weapon), notwithstanding such hardship being caused to innocent family members.

16. It is clear from the learned sentencing judge's remarks that he took full account of this additional hardship that would be visited on the family if the appellant was sent to prison. He accepted that the appellant had a major role as carer to his partner and children. He specifically asked that his concern be conveyed to the relevant agencies in order to ensure that the family would receive the necessary supports in the absence of the appellant.

17. It is acknowledged, and properly so, by counsel for the appellant this is not, and was never, a case for an entirely suspended sentence. The issue is firstly whether the ten year headline sentence is appropriate, and secondly, is a discount of three years by way of a suspended element sufficient and proportionate in the circumstances of the appellant in order to alleviate as much as reasonably possible the consequential family hardship?

18. In the courts view the headline ten year term, while possibly on the high side to a degree, was a sentence within the discretion of the learned sentencing judge and did not constitute an error of principle.

19. The only significant mitigating factor concerned the practical problems for the appellant's family caused by his enforced absence from home. An allowance of three years, in the absence of any other mitigating factor, was reasonable. Indeed, any greater discount would possibly have rendered the sentence lenient, and, arguably, unduly lenient.

20. In these circumstances the Court must dismiss the appeal.