



THE COURT OF APPEAL

**Birmingham P.
McCarthy J.
Kennedy J.**

BETWEEN/

Record Number 213/2017

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

GERARD MOREY

APPELLANT

Record Number 212/2017

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DECLAN PRICE

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 26th day of November 2018 by Ms. Justice Kennedy

1. This is an appeal against severity of sentence. The sentences under appeal concern, in the instance of Gerard Morey, a sentence of eight years' imprisonment for the offence of burglary, three years' imprisonment for the offence of assault causing harm and four months' imprisonment for the offence of assault contrary to s. 2 of the Non Fatal Offences Against the Person Act. 1997. The sentences were ordered to run concurrently and with the final three years of the sentence suspended.
2. Declan Price received a sentence of ten years' imprisonment on the burglary count, three years in respect of assault causing harm and three years in respect of the offence of production of an article contrary to s. 11 of the Firearms and Offensive Weapons Act 1990, the sentences to run concurrently and again with the final three years of his sentence suspended. The sentences in both instances of each appellant were imposed after conviction by a jury and were backdated to the 8th December 2016.
3. The facts in relation to these offences are that the first appellant; Declan Price, on the 23rd May 2015, at around 1pm, entered a dwelling house in Tipperary town. The occupants of the house were present. The development in question is a small one, made up of four houses, one of which was occupied by the second appellant; Gerard Morey. On the evening in question one of the occupants was upstairs with her small child when Declan Price entered the house through an open window, and while in the utility room was seen by this woman who alerted her housemates who came to her assistance. The gardaí were contacted. The woman's partner, a Mr Wang, arrived back to the house and attempted to restrain Mr Price. Another friend arrived and tried to assist Mr Wang. Mr Wang was then assaulted by Mr Price who punched and kicked him and also picked up a hammer. At this point the second appellant arrived and climbed in the window to assist his friend, Mr Price. A struggle ensued with Mr Price and Mr Morey kicking and punching Mr. Wang before walking out of the house. The gardaí arrived and whilst Mr Morey was being conveyed to the Garda station he spat at one of the gardaí, which is the subject of the offence of assault contrary to s. 2 of the 1997 Act.
4. Mr Wang, who was assaulted by both men, was taken to hospital for his injuries. He suffered a fracture to his upper jaw, swelling to the head and a bleeding nose. No Victim Impact Reports were before the court. Both men were convicted after a trial. However, on the date of sentence probation reports were available for the judge's consideration and both men accepted responsibility for their actions. It was submitted on Mr Morey's behalf that he had not previously grasped the elements of burglary but had come to understand the nature of the offence and at the time of sentencing accepted his guilt. Mr Price also, in the period between conviction and sentence, accepted his guilt.
5. Mr Price is a man with forty nine previous convictions; three for the offence of burglary, four for possession of knives and one conviction for the offence of production of an article contrary to s.11 of the Firearms and Offensive Weapons Act. Mr Morey is a man with twenty three previous convictions; including two for assault contrary to s. 2 of the Non Fatal Offences Against the Person Act 1997.
6. Letters of apology were furnished to the injured party who found such difficult to accept and a letter was sent by Mr Morey to Garda Bohan which Garda Bohan said he fully accepted and believed such apology to be genuine.
7. In cross examination, Garda Bohan accepted that the offences were not premeditated and that as such were opportunistic. It was

accepted that Mr Price, who was twenty nine years of age at the time of sentence, had a long history of substance abuse, was intoxicated at the time of the offences and was attending Merchants Quay personnel whilst on remand pending sentence.

8. As regards Mr Morey, Garda Bohan accepted that his involvement was of a lesser nature than his co-accused, that he was involved in his community, that he is a member of a football club and had been in employment.

9. As far as Mr Morey's personal circumstances are concerned, it was submitted that he had a difficult upbringing and a letter was furnished to the Circuit Court in this respect. However, he also, it was said, had the support of his grandmother. He trained as a barber and worked in that capacity prior to his incarceration. He also trained as a plasterer and worked in Australia for a while and has a young child. When this relationship came to an end, the appellant turned to alcohol and drugs. He and his new partner of 5 years by the date of sentence had moved residence and so no longer reside beside the injured party. References were furnished to the court attesting to his character and offering employment to him. He also attended Merchants Quay whilst incarcerated and a care plan was in train for him. He attended to his education whilst in custody and finally, Mr Morey offered the sum of €1,000 by way of compensation to the victim.

10. As regards Mr Price's personal circumstances at the time of sentence, it was submitted that he had a long standing history of substance abuse and that he was under the influence at the time of the offences. He also engaged with Merchants Quay whilst in prison and attended counselling. Documentation was furnished regarding his progress whilst in prison and also from his partner. The appellant's family circumstances were outlined to the Circuit Court and a sum of €1,000 was also offered on his behalf. Probation and welfare service reports were furnished regarding both men.

Grounds of appeal

11. So far as the Grounds of Appeal are concerned, a number of criticisms are advanced of the sentencing process. As regards Mr Price, the grounds include that the sentence is excessive and the judge failed to have regard to the principle of proportionality. In the instance of both appellants, the grounds include that the judge erred in determining that the gravity of the offences was within the highest range and that the judge failed to attach sufficient weight to the mitigating factors and efforts of rehabilitation. As regards Mr Morey, the grounds of appeal include that the judge erred in assessing gravity by reference to his size and that he erred in considering the facts of the assault on the Guard in his assessment of the gravity of the assault on Mr Wang and the incident in question.

12. Often said by this Court is that before the Court will intervene, an error in principle must be identified. So far as the offences that the Circuit Court was dealing with and which are now the subject of this appeal, by any standards these were serious offences. In particular, the burglary of a dwelling house is a most serious offence. It is a violation of the personal and psychological integrity of a victim and a violation of an individual's home which is a place where a person is entitled to feel safe and secure. That sense of a home being a sanctuary is lost once a person is a victim of a burglary. Therefore, such crimes are considered to be very grave indeed by the courts. A weapon was produced in the course of this incident, albeit one found at the scene. One of the residents of the house was injured and required to be taken by ambulance to hospital. The offences were committed, in the instance of Mr Price, by a person with previous convictions for the offence of burglary and the production of a weapon. The issue for this court is fundamentally in the first instance, as to whether the judge fell into error in assessing that the gravity of the offences placed the offences in the upper range of permissible sentences.

13. We consider, firstly, Mr Price. In the view of this court, the judge correctly identified the aggravating factors, to include the fact of Mr Prices' previous convictions, specifically those which we have referred to above in accordance with the jurisprudence of this court. The gravity of the offence was correctly assessed by the judge as within the upper range. Whilst he did not specifically identify a headline figure, he found that on the scale of gravity, the gravity of the offence was such that it was within the higher range of permissible sentences for this category of offence and he considered the appropriate sentence to be one of ten years' imprisonment. In light of the circumstances of the burglary, the invasion of the victim's home, the use of a weapon and the injury caused, the penalty was within the range the judge identified. The same can be said for sentences imposed for the assault offence and for the offence of the production of an article under s. 11 of the Firearms and Offences Weapons Act 1990. The assault on Mr Wang was a serious one requiring he be taken to hospital by ambulance for treatment. In considering, what this court views to be the limited mitigation urged on his behalf, the judge gave Mr Price credit for his expression of remorse, albeit at the stage after conviction and, in suspending the final three years of the sentence, also factored the efforts made by the appellant to rehabilitate himself and to address his substance abuse. Indeed, in the instance of both appellants, the judge acknowledged that each had developed insight into their conduct and he accepted the apologies offered by both were genuine. It cannot be said that the learned judge gave insufficient weight to the matters offered in mitigation and we are satisfied that no error in principle can be identified.

14. In the instance of Mr Morey, much of the same analysis equally applies to him. It is submitted on his behalf that the judge fell into error in considering that his culpability was of a high order given his build and further failed to take into account that his culpability was of a lesser calibre than that of his co-accused.

15. In the first instance, we are satisfied that the judge was entitled to take into account Mr Morey's physical size in assessing his moral culpability, bearing in mind that he entered the house whilst Mr Price, his friend, was there, not with the intention of assisting the residents but with the intention of assisting his friend. He then does precisely that, and assaulted Mr Wang by punching and kicking him. The judge was careful to distinguish between Mr Price and Mr Morey and in consequence assessed the appropriate sentence in Mr Morey's case, as being one of eight years' imprisonment. We are satisfied this is within the range of permissible sentences and find no error in principle. Again we find no error in the assessment of the sentence of three years on the assault count, there being no basis to distinguish between the two men in the assessment of gravity on this offence bearing in mind both men punched and kicked Mr Wang and that Mr Morey has convictions for assault, albeit assault contrary to s. 2 of the Act. We find no error in the sentence imposed either for the s. 2 assault count and are satisfied that the court was entitled to take into account that Mr Morey's response to the gardaí was not to his credit

16. The judge considered all matters in mitigation in respect of this man and we can find no error in this respect.

17. Overall, this court is in no doubt that the sentences decided upon by the sentencing judge were ones which were available to him and ones which fell very firmly within the available range of sentences.

18. In those circumstances, this Court will dismiss the appeal in both instances.