



THE COURT OF APPEAL

Record Number: 159CJA/18

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE DIRECTOR OF PUBLIC PROSECUTIONS

- AND -

APPLICANT

DARRAGH O'HARE

RESPONDENT

Judgment of the Court delivered (ex tempore) on the 7th day of May 2019 by Ms. Justice Kennedy

Introduction

1. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s.2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence which was imposed on the 27th April 2018. The respondent, Mr. O'Hare was sentenced to a period of twenty-eight months' imprisonment in respect of one count of burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, with one count of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 taken into consideration.

Background

2. On the 16th May 2017, the respondent stole a bicycle valued at €150.00 from a premises in Balbriggan, Co. Dublin which was subsequently recovered. The following day at 8:45 pm, the respondent entered a house in Balbriggan. One of the occupants of the house, a Ms. Fernandez, walked into the hallway and discovered the respondent, Mr. O'Hare, holding her handbag.

3. When confronted, Mr. O'Hare stated that he had witnessed the bag being stolen and was returning the bag. Ms. Fernandez asked the respondent to leave, he refused, and he tried to walk into her house and kept trying to talk to her. He asked her repeatedly if she had a husband and if there was a male person present in the house. The injured party eventually succeeded in removing the respondent from the house and once the door was closed, the respondent ceased trying to gain access. There were a number of small items missing from the handbag valued at €47.00.

4. The respondent was arrested on the 18th May 2017. He was taken to the Garda Station. He made admissions in relation to the theft of the bicycle, he did not make admissions in relation to the burglary. However, the respondent pleaded guilty on his first arraignment date before Dublin Circuit Criminal Court.

The Sentence

5. In his sentencing remarks, the sentencing judge stated as follows:

"Now, obviously I'm aware of the Casey case. I'm aware, let's say, of the categories that were created. I accept totally that basically it is very difficult to say in what categories an offender fits. But this is a reasonably serious burglary. Now, he has pleaded guilty. That's to his credit. He didn't do any act of violence to the occupier. He has a record of conviction, some for burglary, many for other type of serious offences. So, he has that record. He has had difficulties with drugs and such like and obviously he has had personal difficulties in the past. So, taking all of those factors into account, I think the appropriate sentence for him is a term of imprisonment of 28 months. Obviously in deciding that sentence I'm taking into account the term of imprisonment already served or term of custody already served in the matter...

I would say the headline sentence would be something in the region of four years if I was to put a headline sentence. If he had retreated immediately the sentence probably would be -- would have been considerably less than the -the sentence I've imposed."

Personal circumstances

6. The respondent was twenty-six years of age at the time of sentencing. He has ninety-one previous convictions. Of those convictions, seventy-three were committed whilst on bail. Whilst the majority of his convictions relate to summary offences, he has four convictions for burglary, one for handling stolen property and three convictions for s.4 theft. At the time of the commission of the burglary offence, the respondent was on bail for dangerous driving and unauthorised taking of a manually-propelled vehicle.

The respondent has long-standing difficulties with substance abuse. At the time of sentencing, a letter from Father McVerry was handed into the Court confirming the respondent's drug-free status.

Grounds of appeal

7. The appellant puts forwards the following grounds of appeal, as outlined in written submissions:

- (i) The learned sentencing Judge erred in principle and failed to have any or any adequate regard to the seriousness of the burglary offence committed by the Respondent in the calculation of the sentence imposed on him. In particular, the learned judge failed to take account of the following factors:
 - a) The Respondent specifically targeted a residential dwelling;
 - b) The Respondent entered a dwelling that was occupied by a female and her two young children;
 - c) The Respondent failed to leave immediately when he learned that the dwelling was occupied;
 - d) The Respondent failed to leave when he was confronted and asked to leave by the female occupant;
 - e) The Respondent enquired of the female if there was a male present in the dwelling;
 - f) The impact that the burglary had on the female occupant of the dwelling as outlined in her victim impact report.
- (ii) The learned Judge erred in principle in nominating a head line sentence of four years;
- (iii) The learned Judge failed to attach any or any adequate weight to the fact that the Respondent was on bail when the offence was committed;
- (iv) The learned Judge failed to attach any or any adequate weight to the fact that the Respondent had a large number of previous convictions including convictions for burglary;
- (v) The learned sentencing Judge erred in principle in failing to afford due consideration to the factors outlined in the judgment of this Honourable Court in *DPP v Casey* [2018] IECA 121;
- (vi) The learned sentencing Judge erred in principle in attaching excessive weight to the mitigating factors and in reducing a head line sentence of 4 years to 28 months even taking account of the period spent in custody;
- (vii) In all the circumstances, the sentence imposed was unduly lenient.

Submissions of the appellant

8. The appellant submits that the sentencing judge did not have sufficient regard to a number of aggravating factors present in this case, including the respondent's relevant previous convictions, the fact that the offences were committed whilst on bail and the factors outlined in the grounds of appeal, in particular at ground (i) of the notice of appeal. In particular, Mr. Kennedy BL for the appellant submits that the judge had insufficient regard to the victim who described in her impact statement the significant impact the offence has had on her life, leading to much anxiety and stress in the aftermath of the respondent's offending behaviour.

9. Moreover, Mr Kennedy says that the judge attached undue weight to the mitigating factors and in summary it is argued on behalf of the Director of Public Prosecutions that the sentencing judge erred in determining a headline sentence of four years imprisonment and further erred in adjusting the sentence downwards to a period of twenty eight months' imprisonment by virtue of the mitigating factors, and says that the judge failed to have due regard to the court's judgment in *The People (DPP) v. Casey* [2018] IECA 121.

Submissions of the respondent

10. Mr McCormack BL on behalf of the respondent submits that in identifying a headline sentence of four years' imprisonment, the sentencing judge was correct in placing the offence on the low end of the mid-range of sentence as outlined in the *Casey* decision, having determined the offence to be a "reasonably serious burglary", and says that the multitude of aggravating factors, posited by the respondent, are not present and that the only aggravating factor was that of targeting a residential property. There was no evidence, he says, that the offence involved significant planning. Furthermore, Mr. McCormack argues that the respondent acted alone, and that the property was valued at some €47.00.

11. It is argued that the judge's approach to the confrontation between the respondent and the injured party, Ms. Fernandez, during the commission of the offence was in line with the law established in *Casey* and that the judge attached considerable weight to this factor and held that the sentence would have been less if the respondent had immediately retreated when confronted by the occupier of the house.

12. In relation to the respondent's previous convictions, Mr. McCormack submits that this factor would not, in and of itself, promote the offence above the low end of the mid-range. He refers to the decision of *Casey*, where it was asserted that it was the court's experience that burglary cases are commonly characterised by the presence of relevant previous convictions. Whilst such convictions should be regarded as aggravating, it was held that, in appropriate cases:-

"The prosecution should be able to provide information to the sentencing judge. If a burglary is recorded, was it a burglary of a domestic dwelling? If there are a number of dwellings recorded, was there a consistent modus operandi?"

As such, it is argued that there was no evidence before the Court that the respondent had a consistent modus operandi which would increase the degree of aggravation to be applied.

13. The respondent submits that the reduction of twenty months was appropriate in the circumstances given the early plea of guilty on the first arraignment date and the fact that the respondent had spent a period of five months in custody on remand on these charges which was accepted in the course of the evidence adduced before the sentencing judge.

Discussion and conclusion

14. Burglary is a serious offence and in this instance, impacted significantly on the injured party. Certain of the respondent's previous convictions are an aggravating factor. Issue is taken with the pre-mitigation sentence, that is the headline sentence of four years' imprisonment nominated by the sentencing judge. However, it appears to this court that the nomination of such was within the margin

of appreciation of the judge for offences of this category.

15. The primary aggravating factors included the fact that the respondent entered an occupied dwelling and confronted the injured party, he refused to leave immediately when requested, the impact on the victim, and the relevant previous convictions. Furthermore, these offences were committed whilst the respondent was on bail, which is in and of itself an aggravating factor and whilst the judge properly considered the aggravating factors, he did not specifically identify this latter factor as an aggravating factor. Nonetheless, we are satisfied that the judge did not err in identifying the pre mitigation sentence as being one of four years' imprisonment. He then proceeded to adjust the sentence downwards in light of the mitigating factors, the greatest of which was the plea of guilty on the arraignment date, thus constituting an early plea of guilty. He then reduced the sentence to one of twenty-eight months' imprisonment imposed from the date of sentence, in the knowledge that the respondent had already spent a period of five months in custody on remand.

16. In our view, the sentence imposed was a lenient sentence. In fact, the sentence was at the outer limits in terms of leniency. Had a more severe sentence been imposed, the court would very likely have upheld that sentence. But, as the jurisprudence of this Court has consistently made clear, that is not the point. The question is whether the lenient sentence imposed is so unduly lenient, so as to justify intervention by this Court. We have concluded that the sentence is not so lenient so as to justify such intervention. It is not a substantial departure from the appropriate sentence in the particular circumstances. We are of the view that the lenient sentence imposed fell within, though at the very limit, of the discretionary range available to the sentencing judge.

17. In the circumstances, we will dismiss the application.