THE COURT OF APPEAL

Birmingham P.
Hedigan J.
Edwards J.

Record No: 222CJA/17

IN THE MATTER OF S.2 OF THE CRIMINAL JUSTICE ACT, 1993,

AND IN THE MATTER OF:

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

V

CARL FREEMAN

Respondent

JUDGMENT of the Court delivered on the 3rd of October 2018 by Mr. Justice Edwards.

Introduction
1. On the 25th of July 2017, the respondent to this appeal pleaded guilty in Bray Circuit Criminal Court to one count of aggravated burglary contrary to s. 13 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

2. On the 26th of July 2017, the respondent was sentenced to a period of seven years' imprisonment in respect of count one, with the final three years suspended on the condition that he enter into a bond of €200 to be of good behaviour for a period of three years post-release. In sentencing the respondent, the sentencing judge also took into consideration the following further counts on the indictment: two counts (counts nos. 2 & 3) of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act, 1997, and two counts (counts nos. 4 & 5) of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997.

3. The applicant, namely the Director of Public Prosecutions, now seeks a review of the said sentences under s. 2 of the Criminal Justice Act 1993, on the basis that they were unduly lenient.

Background facts
4. At the sentence hearing on the 26th of July 2017, Sergeant Pat Carroll gave evidence as to the circumstances in which the offences were committed. The victims were a Mr. William Crean ("Mr. Crean") and his wife, Mrs. Kathleen Crean ("Mrs. Crean") and the incidents occurred at their family home at Ashlawn, Killoughter, Ashford, Co. Wicklow. Their home is in a rural area, about a mile and a half from Ashford Village, at a cross roads on a back road between Rathnew and Newcastle.

5. Mr. Crean was born on the 16th of August 1942, making him 72 years of age at the time of the offence, whilst Mrs. Crean was born on the 28th of August 1949, making her 65 years old at the time of the offence. Mrs. Crean did not enjoy good health. She had unfortunately been suffering from cancer and kidney failure for some time prior to the incidents and was on a lot of medication.

6. The offences were committed in the early hours of Thursday the 12th of March 2015. Earlier on the night of the 11th of March, Mr. Crean had locked up his house at around midnight and had gone to bed, Mrs. Crean being the only other person in the house. Mrs. Crean woke in the early hours with some physical discomfort associated with her medical problems. As she lay in bed awake she saw the headlights of a car turning in their driveway, and their dog started barking. This was at about 3:30am. Mrs. Crean woke her husband who got up immediately because, as he explained, *"the dog does not bark..I knew there was someone or something outside."* Mr. Crean walked from the bedroom up to the kitchen, opened the inside kitchen door and turned on the kitchen light. As he did so, there was a bang and the outside kitchen door came in and three men entered the kitchen. Mr. Crean went to close the inside kitchen door and one of the men hit the inside door twice. The glass in the door broke but did not smash.

7. Mr. Crean then retreated to their bedroom, and tried to shut the bedroom door, but the door was pushed in on top of him. One of the men shouted at him to *"Get into bed".* In his statement to the Gardaí, Mr. Crean described one of the men as being of his own height, with a *"flattish face"*, and as wearing a grey hoodie with the hood up and having gloves in his hand. This man also had a hurl in his hand. In fact, each of the men was armed with a hurl, but the individual in the grey hoodie did all the talking. He asked: *"Where is the money? We know you have money"*. This man then drew out his hurl and hit Mr. Crean *"as hard as he could give it"* on his left shoulder. Mr. Crean was then ordered to *"Get up off the bed"* and he was marched down the hall, his assailant all the while screaming back into the bedroom and shouting. The intruder then demanded to know what was out in the garage, and Mr. Crean replied *"There is nothing, only rubbish."* The man in the grey hoodie kept shouting *"We know you have money, we know[you] have guns, we know you have silver, we know you have gold"*. Mr. Crean told him in reply *"We have nothing in here. We don't have money."*

8. Mr. Crean was later in a position to also describe the other two intruders to Gardaí, but they had their faces covered unlike the man in the grey hoodie who had his face uncovered. Mr Crean stated to the Gardaí that *"The other lads did not hassle us. It was the lad with the smudge face, the boss, who hassled us."*

9. Mrs. Crean in turn described how the intruder who had his face uncovered told her to sit on the bed, and he then grabbed her by the throat. Mrs. Crean believed he was checking to see if she had gold chains on. He then grabbed both her hands and looked at her

fingers to see whether she had any rings on. She had in fact no rings on as she had earlier removed them due to the fact that her fingers were swollen due to her medical condition. The intruder then held his hurley over Mrs. Crean's legs in a threatening manner as if he was going to hit her, but Mr. Crean pleaded with him *"Don't hit her. She's not well."*

10. The man kept on at Mr. Crean *"about money, guns, gold and silver"*, but eventually the intruders left, having taken about €150.00 in cash. They ripped the landline out of the wall as they left and took Mr. Crean's mobile phone so the elderly couple were left with no way of contacting the Gardaí after the incident. Mr. Crean eventually walked to a neighbour's house to raise the alarm. The Gardaí were then contacted and Mr. Crean reported what had happened.

11. The sentencing court was told that a Garda Brian McCormack had just finished his shift in Tallaght Garda Station at 7 am on the morning of the 12th of March 2015, and was driving home when he observed an Audi A6 Estate pulled up beside him at the traffic lights at Cheeverstown Road, Tallaght. Garda McCormack took note of the registration of the car, and then recognised the vehicle as one that had been reported stolen on the previous day. Garda McCormack further recognised the driver of that car as Carl Freeman, the respondent herein, who was known to him. He began to follow the car and a vehicle chase ensued along the M7 motorway. Eventually, the Audi Estate was crashed and two occupants of the vehicle were arrested, one of whom was the respondent.

12. A number of hurleys were found in the boot of the crashed Audi Estate and some time later forensic examination of these confirmed that glass particles embedded in one of the hurleys matched the glass that had been broken in the inside kitchen door of Mr. & Mrs. Crean's house. Glass particles were also found in the respondent's clothing which matched the broken glass in Mr. & Mrs. Crean's house.

13. The respondent was initially charged with certain road traffic offences - namely dangerous driving and the unlawful taking of a vehicle. Guilty pleas were entered in respect of these offences and, on the 30th of July 2015, the respondent was sentenced to a total of two years' imprisonment in respect of these offences to be backdated to the 10th of July 2015. On the 9th of September 2015, the respondent was arrested at Wheatfield Prison on foot of a warrant pursuant to s.42 of the Criminal Justice Act 1999, following which he was removed from the prison, detained and questioned in respect of his suspected involvement in the aggravated burglary at Mr. and Mrs. Crean's dwelling on the 12th of March 2015. Nothing of probative value arose from this questioning. However, both Mr. and Mrs. Crean identified the respondent in an identification parade.

14. Ultimately, the respondent was charged with aggravated burglary to which he entered a plea of guilty.

The impact on the victims

15. Both Mr. and Mrs. Crean furnished victim impact statements to Sergeant Carroll on the 21st of July 2017. Mr. Crean's statement reads as follows: *"since the aggravated burglary life has not been the same. Before that day I was happy-go-lucky. We were living in the country; nobody was going to go near us. That's gone. Everything has changed. You would think it wouldn't bother you but it does bother me. When I feed the dogs at night I say to myself, 'I will get in now.' I make sure I lock the doors to make myself safe. I take the keys out of the doors. I have put a lot more locks onto the doors. We got the alarm in. We got an Alsatian dog. I wear an alarm pendant on my neck. My life has changed big time. I remember cutting grass here and sitting outside having a cup of tea, happy. That's gone. I am nervous now. If the dog barks, before I would have gone outside to see what's going on. I won't go out now. Someone came into my home to beat us up. This has affected me. Life has totally gone the opposite way to what it was."*

16. Mrs. Crean's victim impact statement was also before the sentencing court. It reads as follows: *"Since the aggravated burglary at my home on the 12th March 2015 I try not to think about it. It's my way of coping but it really does bother me. If I hear a sound at night, I'll say, 'Willie, what was that?' I am not comfortable at night any more. I still wake up at 3 o'clock every morning. I would be awake for at least an hour. I am on a lot of medication which should make me sleep but I always wake up at that time. It annoys me. The fact that they made me get out of bed really bothers me. I have two bags draining my kidneys. I was so afraid that night I just got out of bed and the bags ended up on the floor. That part was very embarrassing. Willie doesn't even see my bags. Before this, I would never have a problem staying in my house on my own. There is no way I will now stay in the house on my own. Since this happened I don't feel free anymore. I am like a prisoner in my own home. I say to myself, 'They will never come back' but you never know. I spent three months in hospital lately. I can't explain it but I felt different. The nurses were there; I felt safe. I did not wake at 3 o'clock in the morning when in hospital but since I came home, it's back to waking at 3 o'clock in the morning. That's the time they were here."*

17. Both victims were also medically examined by Dr. Deirdre Doyle subsequent to the incident. Medical reports, dated the 29th of May 2015, were put before the sentencing court. In respect of Mr. Crean, Dr. Doyle states that *"on examination, there was a large area of bruising on the left upper arm, approximately 13 cm by 11 cm in size. The overlying skin was quite red and the impact of the hurley quite clearly could be seen."* The report also notes that Mr. Crean had full range of movement of his arm and left shoulder, that the injuries were soft-tissue in nature and that he was advised to take paracetamol over the next few days.

18. In respect of Mrs. Crean, Dr Doyle noted that she was quite upset and shaken on the morning after the ordeal, but that she did not have any physical injuries. Her blood pressure was slightly higher than normal and she was advised to re-attend the following week to have her blood pressure monitored again.

The respondent's personal circumstances

19. The respondent was born on the 3rd of June 1995, making him 19 years old at the time of the offence and 22 at the time of sentence. Various letters and testimonials were handed into the sentencing court during the plea in mitigation. From a perusal of said documentation, the following picture emerges as to the respondent's personal circumstances. The respondent had a pretty difficult background. His parents split up when he was four years of age. He lost his older brother when he was just ten years of age, an incident which had a devastating impact on the respondent. A letter from the respondent's mother indicates that this incident had a devastating impact on her as well, and meant that she wasn't able to guide the respondent in the way that she should have been during his formative teenage years.

20. The respondent attended St. Josephs School in Tallaght up until Junior Certificate, a school that caters for children with mild learning disabilities. In 2009, the respondent was referred to St. John of God Community Services, where he was diagnosed with attention deficit and hyperactivity disorder and oppositional defiant disorder. An assessment by the National Education and Psychological Services placed him in the mild learning disability range.

21. A letter from the respondent's girlfriend was also put before the sentencing court. This indicated that they have a three-year-old child. Whilst the relationship did not last due to the type of lifestyle that the respondent was leading, it seems that she is willing to give him another chance on foot of the fact that he appears to be trying to turn his life around. Indeed, all of the various letters put before the Court from family members of the respondent attest to the efforts on the part of the respondent to leave his criminal

lifestyle behind him. His father refers to noticing *"a genuine change to him and his outlook on life and how he could better himself"* on a recent visit to prison. Similarly, a letter from the respondent's cousin, who spent a lot of time with him, refers to *"seeing a huge difference in [the respondent]. I do believe that he has went through a lot of healing".*

22. There was evidence that prior to, and at the time of the offence, the respondent had a very serious drug addiction. However, it seems that he is making sustained efforts to rehabilitate himself. A letter from Merchant's Quay Ireland states that *"Carl presented himself as reflective and engaging. He expresses a focus and motivation for change so that incarceration and substance use are no longer part of his lifestyle. While the said client was in Wheatfield, he accessed all resources at his disposal."* Further, a letter from the Probation Service stated that the respondent partook in an eight week course on *"Offender Behaviour, Choice and Challenges",* concluding in August 2016. Most recently, a letter from the Peter McVerry Trust, dated the 24th of July 2017, stated that the respondent has requested a place on the 20-week residential drug treatment centre in Cuan Mhuire. The author of the letter further states that the respondent is drug-free in Cloverhill Prison and will be offered a place in Cuan Mhuire when it becomes available and subject to the *"attitude [the sentencing] judge takes to the offer of treatment".*

23. The respondent has a very lengthy list of previous convictions, involving sixty two in total. Thirty nine of these previous convictions are road traffic related, thirteen are for crimes of dishonesty variously involving possession of housebreaking implements, theft, burglaries, trespass and handling stolen property, two are for assault, two are for non-compliance with bail, and the remainder are for drug-possession related offences. The majority of the respondent's previous convictions were the result of summary prosecutions in the District Court. However, he received a two-and-a-half year suspended sentence for burglary in Dublin Circuit Criminal Court on the 13th of April 2014.

The plea in mitigation
24. It should be briefly pointed out that in his plea in mitigation to the sentencing judge, counsel for the respondent submitted that the sentence about to be imposed for the aggravated burglary ought to be backdated to the date at which the respondent went into custody for the road traffic offences. The respondent went into custody in respect of the road traffic offences on the 4th of April 2015. The two year sentences he received for those offences were to date from the 10th of July 2015. He had been in custody in respect of the aggravated burglary from the 4th of December 2016.

25. The basis for counsel's suggestion was that had all of the charges been brought at the same time, the respondent would almost certainly have been subjected to concurrent sentences. If the sentence for the aggravated burglary was either not backdated at all, or only backdated to the date on which he was charged for that offence, he would in effect end up serving consecutive sentences.

26. The sentencing judge stated that he could not as a matter of law backdate the sentence for the aggravated burglary to a date prior to which the appellant went into custody for that particular offence. However, he said that he would take the issue raised by counsel into account when sentencing.

Sentencing judge's remarks
27. The sentencing judge delivered a lengthy judgment in passing sentence, the majority of which summarised the evidence we already outlined. The remainder of the judgment, and the portion most relevant to this appeal, is set out below:

> *"The very concerning factors in the -- in relation to the count is that there was planning in respect of this aggravated burglary. The -- William and Kathleen Crean's house was targeted and, in particular, having regard to the belief that there was money in the house, that there was jewellery, there was gold, obviously that Mr Freeman and the other or others were of the view that there was some valuable jewellery or some valuable items. There was reference to guns as well in the house. My understanding is that … approximately €150 was stolen from the Creans.*
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> *These were two extremely vulnerable persons. They were living on their own in an isolated area. William Crean was 72 years, Kathleen Crean was 65 years. What could they do? They were so vulnerable. They were in an absolutely hopeless, useless situation being confronted by young people. Mr -- well, I don't know about the other person, but in respect of Mr Freeman he is now aged 22 years. He was 19 going on 20 years at the time. The raiders had hurleys so really they were at -- the Creans were at their mercy when these people unlawfully entered and trespassed on their house.*
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> *In respect of William Crean, the threatening and the degree of violence that was used in the course of the burglary, and likewise in respect of Kathleen Crean, she had a very serious illness and that having regard to the victim impact statement of both of them she was understandably very concerned for her condition and indeed, the demeanour and the threats by the raiders in respect of the aggravated burglary were indeed very serious for her, as they were for her husband.*
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> *One of the rooms was ransacked in the course of the aggravated burglary and it -- they were subjected to a frightening, terrifying and -- ordeal, indeed a horrific ordeal, in the course of the aggravated burglary and indeed, as I already -- from the victim impact statement, it had significant and substantial effects on both William and Kathleen Crean in respect of the aggravated burglary.*
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> *At the particular time, the accused had a chronic drug addiction prior to and at the date of the offence. That is not a mitigating or an excusing factor but it is by way of background information in respect of the accused, Carl Freeman.*
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> *In respect of count No. 1, the maximum custodial prison sentence is life imprisonment. Then I must decide where does this count lie in respect of the maximum sentence. I am satisfied in the higher range and I will give the headline sentence in -- when I am concluding.*
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> *In respect of his personal circumstances, he is now aged 22 years. He has a partner, a young child. There is good support from his partner. It appears that he had a difficult childhood also as well there was tragedy in his life. His older brother died in tragic circumstances and indeed his brother is a loss to Carl Freeman. He himself, in respect of his education, he attended St Joseph's school in Tallaght. I think he attended school up to the Junior Cert programme. I'm not sure whether he completed it or not but St Joseph's caters for children with mild general learning disabilities and the letter from the school confirms that he fell into this category. He has been assessed with ADHD which is attention deficit hyperactivity disorder and there is a history of drug abuse, drug addiction prior to and at the time of this offence.*
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> *In mitigation, there was an early plea of guilty. He pleaded guilty, being aware and informed that one of the complainants, Mrs Kathleen Crean, was unwell, and certainly I -- he did not take any advantage of that situation or position. In respect of the plea of guilty, he knowingly -- that she was unwell pleaded guilty. I am satisfied that the plea*

of guilty was of substantial benefit to the prosecution and in particular to William and Kathleen Crean in that, first, in respect of any identification issues that may have arisen, any forensic issues that may have arisen, all these were eliminated by the plea of guilty and bringing the case to a successful conclusion by the prosecution and I am also satisfied, having regard to William and Kathleen Crean, the plea of guilty was of substantial benefit, in that, being aware that he had pleaded guilty, they were saved the trauma and stress of having to come to Court and to give evidence, had the charge or count been contested as the accused was perfectly entitled to do and they have been saved substantial stress and trauma in not having to give evidence in a trial had the count being contested.

There is an expression of remorse and that's confirmed by his letter to the Court and I accept that there is genuine remorse in respect of his offending behaviour, in respect of the -- of William and Kathleen Crean.

Now, while in custody, in respect of his drug addiction, he is currently drug-free indicating positive rehabilitation steps in respect of his drug addictions. He completed an offending behaviour programme which is an eight-week programme. It's a programme for prisoners with a history of burglary-related offending behaviour. He has completed educational courses and he has -- he certainly has taken positive rehabilitation steps and there is an improvement in Carl Freeman. He also was assessed for a place as suitable by Cuan Mhuire. That's where a person has to be firstly drug-clean and to be deemed to be suitable which means that it is an important category to be put into if you are deemed suitable for Cuan Mhuire. Of course, that all depends on the course to be taken by the Court but it's important that should also be included. I also have regard to the testimonials and references handed in on his behalf.

The aggravating factors in the case is the serious nature of the offence. The aggravated burglary was planned. William and Kathleen Crean were targeted. The manner of the aggravated burglary: Carl Freeman, with others, broke into William and Kathleen Crean's home. The raiders had hurleys, Mr Freeman had a hurley, and it's my understanding he was part of the joint enterprise venture in respect of the aggravated burglary. William Crean was threatened in his own home with a hurley. William was hit on the hurley -- with the hurley on the left shoulder and then when being marched down the hall there was a threat of the hurley; the hurley was swinging. Kathleen Crean, when on her bed, was grabbed by her throat and a hurley held over her legs in a threatening manner as if she was going to be hit. This, of course, would have been extremely terrifying, frightening for both William Crean and Kathleen Crean. The aggravated burglary was carried out in a frightening, intimidating and aggressive manner, a high degree of -- or level of threats and indeed there was a degree of violence, in the circumstances a high degree of violence threatened, and there was violence used in the course of the burglary particularly in respect of the -- William Crean and of course the threats then to Kathleen Crean, and particularly having regard to her very serious condition, it would have been extremely terrifying, frightening, shocking for her and indeed also for William Crean.

The Creans, having regard to their age, were in a very vulnerable, hopeless and helpless situation and indeed this was exploited by Mr Freeman in the course of the burglary. What could they do? They could do absolutely nothing and they were subjected to a horrific ordeal in the course of the burglary, the injury suffered by William Crean in the course of the burglary and indeed then the distress and the trauma caused to Kathleen Crean in the course of the burglary. The serious interference, violation and invasion of William and Kathleen Crean's entitlement and right to the peaceful enjoyment, occupation and use of the property, this was outrageously interfered with and breached by the accused, Carl Freeman. The effect of the offences on William and Kathleen Crean, and the previous convictions, they are substantial aggravating factors in the case. Then I must have regard to the serious nature of the offences, or serious nature of the offence, there's one offence, and to the substantial aggravating factors and have regard to the mitigating and the personal circumstances. He has -- in respect of this offence he has been in custody from the 4th December 2016. He's also been in custody in respect of the -- was it the unlawful taking and other related offences, for the -- from the 10th July 2015.

Whereas I am satisfied that I -- the back -- I have to -- whatever sentence I impose will be backdated to the 4th December 2016 but I believe that I -- as a matter of law, I simply cannot backdate it to the 10th July 2015. It is a separate offence. I accept the submissions made by counsel that the -- Mr Ó Lideadha, on behalf of the defence, that there is -- they're interlinked, they're interconnected, that the probability is that, had all the counts been dealt with together, that there would be a concurrent sentence in all probability and I certainly would not disagree with him in that but it's a matter which I am satisfied that there isn't an interconnection in respect of the offences that he was sentenced for -- sentence -- and in respect of the sentence that he is serving in respect of those matters and that he was in custody from the 2nd of -- was it the 2nd -- the 10th July 2015, but I will take it into account in respect of the sentence that I will impose and I will give an additional discount in respect of the suspended period which I believe it will be a fair matter of dealing with it and I will have regard to the totality in the overall context.

So, in respect of count No. 1, I am satisfied that the headline sentence is one of seven years, that the seven years to run from the 4th of December 2016. However, having regard to the mitigating and the personal circumstances and to the interconnection in respect of the sentence -- or sentences imposed in respect of the other matters, I propose to suspend the last three years of the seven and that is my reasoning for doing so, the last three years of the seven years on the following terms: that he enters into a bond before this Court, the bond to be €200, to be of good behaviour for a period of three years from the date of release from the sentence now imposed by this Court and three years from the date of his release from the sentence that he must serve."

Grounds of Application

28. The application for a review is based on the following two grounds:

(i)) The suspension of the final three years of the seven year sentence imposed for aggravated burglary was (a) excessive, and (b) unwarranted on the facts notwithstanding the plea entered by the respondent.

(ii) The sentence imposed was disproportionate to the gravity of the offence and the surrounding circumstances both of the respondent and the victims, and represents a disproportionate elevation of the mitigating factors over the aggravating factors in the overall context of the sentence imposed.

Applicant's submissions

29. In terms of ground no (ii), the applicant takes issue with the sentencing judge's reasoning in granting a degree of additional discount by way of suspension of sentence, on the basis that the respondent was already serving time in prison for the road traffic offences committed proximate to the aggravated burglary. The applicant submits that the judge's reasoning for doing this was unclear in that he appeared to accept defence counsel's submission that, had both offences been sentenced at the same time, then the respondent would have been subjected to concurrent sentences, but then proceeded to hold that *"it's a matter which I am satisfied that there isn't an interconnection"*, only to ultimately hold that *"I will impose and I will give an additional discount in respect of the suspended period which I believe it will be a fair matter of dealing with it and I will have regard to the totality in the overall context."* Counsel for the applicant submits that this was an error of principle as they were separate offences and that there was no need to conflate the sentence imposed on the 10th of July 2015, with the present offence.

30. In respect of ground 2, the applicant submits that the sentencing judge failed to place sufficient weight on the following factual circumstances pertaining in the present case; the old-age of the victims of this offence – Mr. & Mrs Crean. were 72 and 60 years old respectively – and the profound impact that the offence has had on both of them, as outlined in their victim impact reports; and the fact that the respondent has a bad record which includes thirteen relevant previous convictions, including a conviction for burglary by Dublin Circuit Criminal Court for which he received a two-and-a-half-year suspended sentence on the 13th of April 2014.

31. Further, the applicant submits that the sentence handed down failed to reflect the fact that the law has always viewed burglary as being an inherently serious type of criminality, particularly where an occupied dwelling is violated, and actual violence is used in the course of its commission. In this regard, we were referred to Hardiman J's comments in *The People (Director of Public Prosecutions) v Barnes* [2007] 3 IR 130, where he said (at 149):

> *61. As noted above, the special protection afforded to the dwelling house dates back to time immemorial. It has been expressed in various ways, none perhaps so well known, even outside legal circles as that in Semaynes case (1604) 5 Co Rep.91a.*
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> > *'That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose' ".*

32. We were also referred to the decision of this Court in *The People (Director of Public Prosecutions) v Gentles* [2014] IECA 56, which concerned another aggravated burglary case. Whilst conceding that this case is not on "all fours" with the present one, counsel for the applicant submits that the cases are analogous to the extent that the occupants in both were subjected to a particularly terrifying ordeal. In *Gentles* the intruder, who was wearing a balaclava, burst into the victims' house in a rural area armed with a loaded sawn off shotgun. He pointed it at the lady of the house and her fourteen-year-old son, and also prodded the lady in question with the gun threatening to blow her head off unless she revealed the location of the safe. The court below had determined upon a headline sentence of seven years from which three years had been discounted to reflect mitigation. The DPP sought a review of the sentence on the grounds of undue leniency and this Court found it to be unduly lenient. Mahon J, giving judgment for the Court, indicated that an appropriate headline sentence would have been in the range from ten to twelve years, and an appropriate reduction for mitigation would have been in the range from two to three years. The Court ultimately decided to impose a post-mitigation sentence of seven years' imprisonment in substitution for the sentence of four years' imprisonment imposed by the Court below.

33. Based on the overall circumstances of the present case, and with reference to the *Gentles* case as a comparator, it was submitted that the sentence imposed in this case was too low, and disproportionate to the gravity and the circumstances of this offence.

Respondent's submissions

34. In response, counsel for the respondent submits that the sentencing judge's reasoning for suspending such a portion of the sentence was justified on the basis that the road traffic matters in question were in truth connected with the aggravated burglary offence and that, had the respondent been charged with all of the offences at the same time, it was highly likely that he would have had concurrent sentences imposed on him.

35. In respect of ground two, counsel for the respondent submits that the sentencing judge properly took account of all of the mitigating factors in the case, including the respondent's age, remorse, the death of his older brother, his addiction issues, his efforts at rehabilitation and the support of his family. The most significant mitigating factor which the sentencing court was entitled to, and indeed did, take into account was the early plea of guilty. Sergeant Carroll had accepted under-cross examination that the guilty plea was entered into in circumstances where the respondent knew that Mrs. Crean was unwell and might not be available for trial, and that the early plea had been valuable in sparing the victims the traumatic experience of trial. Thus, it is submitted, the sentencing judge was correct in suspending the final three years of the sentence to properly reflect all of these mitigating factors.

36. It is further submitted that the trial judge in fact had full and sufficient regard to all of the aggravating factors in the case, including the planning and premeditation involved, and the harm caused with reference to the impact on the victims. In seeking to urge upon us the proposition that the sentence imposed did not meet the threshold to be deemed unduly lenient, namely that it was a substantial departure from the norm, this Court's attention was drawn to some of this Court's recent decisions in burglary cases *i.e.*, *The People (Director of Public Prosecutions) v. Rice* [2018] IECA 61; *The People (Director of Public Prosecutions) v. Byrne* [2018] IECA 120, and *The People (Director of Public Prosecutions) v Casey* [2018] IECA 121.

The law in relation to undue leniency reviews

37. The basis of the Court's jurisdiction to review the sentences imposed on the grounds of alleged undue leniency is not controversial in this case. It is accepted that it derives from s. 2 of the Criminal Justice 1993. It was accepted that the law as to the applicable principles to be followed in determining any such application is well settled. The relevant jurisprudence (in particular *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356; *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 I.R. 390 and *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 I.L.R.M. 279), indicates that before a reviewing court can find the sentence to have been unduly lenient, it must be satisfied that the sentence imposed involved *"a clear divergence by the court at trial from the norm"* that will have been caused by *"an obvious error of principle".*

38. Moreover, the following particular points were emphasised by O'Flaherty J giving judgment for the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Byrne*:

> "In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.

Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case — both women were very adamant that they did not want to come to court — he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Flood J has termed the 'constitutional principle of proportionality' (see *People (DPP) v. W.C.* [1994] 1 ILRM 321), his decision should not be disturbed.

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr Grogan SC, the test to be applied under the section is not the converse of the enquiry the court makes where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

39. In *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 36 Barron J. said (at page 359):-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

40. More recently in *The People (Director of Public Prosecutions) v Stronge*, [2011] IECCA 79, McKechnie J. distilled the case law on s. 2 applications into the following propositions:

"(i) the onus of proving undue leniency is on the D.P.P.;

(ii) to establish undue leniency it must be proved that the sentence imposed constituted a substantial or gross departure from what would be the appropriate sentence in the circumstances. There must be a clear divergence and discernible difference between the latter and the former;

(iii) in the absence of guidelines or specified tariffs for individual offences, such departure will not be established unless the sentence imposed falls outside the ambit or scope of sentence which is within the judge's discretion to impose: sentencing is not capable of mathematical structuring and the trial judge must have a margin within which to operate;

(iv) this task is not enhanced by the application of principles appropriate to an appeal against severity of sentence. The test under s. 2 is not the converse to the test on such appeal;

(v) the fact that the appellate court disagrees with the sentence imposed is not sufficient to justify intervention. Nor is the fact that if such court was the trial court a more severe sentence would have been imposed. The function of each court is quite different: on a s. 2 application it is truly one of review and not otherwise;

(vi) it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified; and finally

(vii) due and proper regard must be accorded to the trial judge's reasons for the imposition of sentence, as it is that judge who receives, evaluates and considers at first hand the evidence and submissions so made."

Discussion and Analysis

41. It requires to be stated immediately that the *Rice* case relied upon by the respondent was not a classical aggravated burglary. The perpetrator in that case was a youth, on temporary release from serving a four-year prison sentence at the time, who had been invited in the first instance with a group of other youths to an apartment for a drinking session. A row broke out and he was ejected at the insistence of one of the group who was the occupier. Some time later, he returned and re-entered the apartment by kicking in the door. In doing so he took a knife from his track suit and waved it at the occupant, nicking the knuckle of one of her fingers as he did so. He received five years' imprisonment, with the last twelve months suspended, for aggravated burglary which was made consecutive to the four-year sentence from which he had been temporarily released. This Court subsequently rejected his appeal against the severity of his sentence.

42. The cases of *Casey* and *Byrne*, respectively, do not, it seems to us, greatly assist the respondent. The former concerned a spree of burglaries, and the latter concerned three incidents of offending (although not committed in a spree) involving, *inter alia*, aggravated burglary, burglary and robbery. The circumstances of both cases were significantly different from those in the present case. Nevertheless, in terms of the sentencing principles applicable to burglary (and aggravated burglary cases), we identified a number of potentially aggravating circumstances in *Casey*, including burglary at night, confrontation with an occupier, the use of violence against a person, injury caused and ransacking, (all of which were present in the present case) and we said (at para 48) that:

"If a number of factors to which reference is made are present, this will place the offence in the middle range at least, and usually above the mid-point in that range. The presence of a considerable number of these factors or, if individual factors are present in a particularly grave form, will raise the offences to the highest category. Cases in this category will attract sentences, pre-application of mitigation, above the mid-point of the available scale, i.e., above seven years imprisonment and often significantly above the mid-point"

43. We further stated in *Casey* (at para 49) that (in the case of ordinary burglary):

> *"… the Court would suggest that mid-range offences would merit pre-mitigation sentences in the range of four to nine years and cases in the highest range nine to fourteen years"*

44. In *Byrne*, which concerned aggravated burglary, burglary and robbery, we suggested that, save in the most egregious cases, the effective range for aggravated burglary, which in theory attracts up to life imprisonment, in effect caps out at fifteen years, providing a low range of zero to five years, a mid range of five to ten years and a high range of ten to fifteen years.

45. There were numerous aggravating factors in this case. In terms of mitigating factors going to culpability, the only one of significance was the respondent's serious addiction to drugs. He was under a chemical compulsion to feed his drug habit by any and every means, leading him to resort to crime as his principal means of doing so.

46. The sentencing judge stated that he was satisfied that the offending conduct fell into *"the higher range"*, and we would not greatly quarrel with that. By any yardstick, the offending conduct in this case was a very serious instance of aggravated burglary. In our assessment it fell to be located either at the high end of the mid range, or at the lower end of the high range, for that crime. It is necessary to bear in mind, however, what Birmingham J (as he then was) said in *Casey* (at para 49):

> "Again, the Court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range / lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's margin of appreciation may well straddle both. In that event, how it is labelled may in fact not impact greatly on the sentence that will ultimately be imposed."

47. Accordingly, taking account of the trial judge's margin of appreciation, any headline sentence to be selected in this case required to be either a very high single figure sentence or a low double figure sentence. The sentencing judge, however, started at seven years and in our view that was ostensibly too low unless it can be rationally explained.

48. A possible partial explanation for starting where he did was the judge's desire to take into account in some way the sixteen months and three weeks which the respondent had spent in custody on the road traffic offences alone, *i.e.*, the period from the 10th of July 2015 to the 4th of December 2016. The nomination of the headline sentence of seven years follows immediately upon the sentencing judge's indication that he intends to do this in two ways. He said*: "I will take it into account in respect of the sentence that I will impose and I will give an additional discount in respect of the suspended period which I believe will be a fair manner of dealing with it,* ***and I will have regard to the totality in the overall contex****t"* (our emphasis). If that was the judge's thinking then the true headline sentence was not seven years, but something higher. If this was to be the only way in which the sentencing judge was going to take into account the time served solely for the road traffic convictions, then in fact the true headline sentence would be eight years, four months and three weeks. Unfortunately, the matter is more complicated because the time served was to be partly reflected in a somewhat increased suspended period, and partly in the assessment of gravity. Accordingly, the sentencing judge's true headline sentence was somewhere between seven years and eight years, four months and three weeks, but it cannot be isolated with any greater precision. The question for us is whether, even if that were the case that the true headline sentence was somewhat higher than seven years, it was still disproportionate to the gravity of the offending conduct and too low on that account, with the consequence that it caused, or contributed to, the imposition of an ultimate sentence that represented a clear divergence from the norm?

49. However, and before considering that question, we should say that if the time served for the road traffic matters is treated as having been taken into account in that way, it means that the subsequent suspension of the last three years of the seven year term was intended, firstly, to reflect mitigation not already taken into account (*i.e.*, mitigation not going to culpability), secondly, to reward his progress towards addressing his addiction and substance abuse problems to date and to incentivise his continuation along that path, and thirdly, to partly take account of time already served solely in respect of the road traffic offences. The main items of mitigation that required to be reflected at this stage were his early plea of guilty; his remorse (which the sentencing judge accepted as being genuine); his relative youth, and his mild learning disability and ADHD which might make prison more difficult for him to cope with.

50. The suspension of the final three years represented a discount of approximately 43% on the headline sentence. A second question for us to consider is whether, bearing in mind the judge's various objectives, a discount at this level was justifiable and within the sentencing judge's margin of appreciation; and if not, whether it caused, or contributed to, the imposition of an ultimate sentence that represented a clear divergence from the norm?

51. Returning to the assessment of gravity, we consider that an appropriate headline sentence in this case would have been in the range from nine years to eleven years. Proceeding on the basis that the seven-year headline sentence nominated by the sentencing judge was in reality somewhat higher, but less than eight years, four months and three weeks, any figure bracketed in that way would have been somewhat outside of the range of the judge's margin of appreciation. It represents a very lenient starting point, and it was a divergence from the norm in our view.

52. We do not, however, feel that the level of discount afforded to reflect mitigation; to reward rehabilitative steps taken to date and incentivise continued rehabilitation; and to partly take account of the time served solely for the road traffic offences, was inappropriate.

53. Overall, we are satisfied that this sentence was unduly lenient. We will therefore proceed to quash the sentence in the court below and proceed to a re-sentencing. Before doing so, however, we wish to say something about the taking into account of the time served solely for the road traffic offences.

54. We believe that it was a matter legitimately within the discretion of the sentencing judge to take into account that if the respondent had been sentenced for all matters together he would, as a matter of likelihood, have received concurrent sentences. It was not a certainty that the sentences would have been concurrent. The nature of the offending was undoubtedly different, and different victims were involved in the road traffic offences (i.e., the car owner and his/her insurers). Accordingly, it would also have been within the discretion of the judge to have imposed consecutive sentences on that account. However, it is also true to say that there was a clear connection to the aggravated burglary in as much as the stolen Audi was used to transport the intruders to the home of Mr. and Mrs. Crean, and it was used as the getaway vehicle after the crime. On balance, we feel that there is force in counsel for the respondent's submission that it is likely that if all matters had been dealt with at the same time that the sentences would have been concurrent rather than consecutive.

55. We should also say that, while the sentencing judge's reservations as to whether it would be legal for him to backdate his sentence to take account of the time served for the road traffic matters were entirely understandable – he was faced with a very unusual situation - we do not think that there was in fact any legal obstacle to him simply nominating a start date for his own sentence that took account of the time served. Because he felt he could not backdate, he could then only take it into account either by imposing a somewhat lower headline sentence than he would otherwise have done, or by suspending a greater portion than he would otherwise have done, or a combination of both. He opted for the combination of both, but did not clearly isolate by how much he was reducing the headline sentence, and by how much he was increasing the suspended element of the sentence. Unfortunately, his having approached matters in this way, albeit for the best of motives, made our review of his sentence all the more difficult. It is clear, however, that overall the sentencing judge approached his task carefully and conscientiously.

Resentencing

56. In re-sentencing the respondent we consider that the correct headline sentence would have been one of ten years' imprisonment. We will suspend three years and six months of that (representing a discount of 35%) to take account of mitigation, to reward progress to date towards rehabilitation and to incentivise future rehabilitation. It is also our practice when increasing a sentence following an undue leniency review to take account of the "disappointment factor" from the perspective of the respondent, who is faced with having to serve a longer sentence than he had been given to expect. To take account of this we will suspend a further six months of the sentence. Accordingly, the ultimate sentence is one of ten years' imprisonment with the final four years thereof suspended.

57. What this amounts to in terms of time to be actually served (excluding remission, and assuming he keeps to the conditions upon which his sentence is being partly suspended) is a sentence of six years' imprisonment.

58. To take account of the time served solely for the road traffic offences we will backdate the start date for our sentence by sixteen months and three weeks to the 10th of July 2015, rather than the 4th of December 2016 which was the start date for the sentence imposed by the court below.

59. The partial suspension of the sentence is to be on the same terms and conditions as attached to the partially suspended sentence imposed at first instance.