



THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

267/CJA/16

In The Matter of an Application Pursuant to Section 2 of the Criminal Justice Act 1993

The People at the Suit of the Director of Public Prosecutions

Appellant

V

Kean Doherty

Respondent

JUDGMENT of the Court delivered on the 2nd day of March 2017 by

Mr. Justice Hedigan

Introduction

1. This is an appeal by the Director of Public Prosecutions who argues that the sentence imposed was unduly lenient. The respondent was sentenced by Her Honour Judge Elma Sheehan in the Dublin Circuit Criminal Court on the 6th October, 2016. The respondent pleaded guilty to burglary for which he was sentenced to two and a half years imprisonment with one and half years suspended for two years, unlawful use of a mechanically propelled vehicle for which he received a sentence of one and half years imprisonment with six months suspended for two years, four counts of dangerous driving for one of which he received a two year disqualification, the remainder were taken into consideration. There was also a charge of criminal damage for which a *nolle prosequi* was entered. He is currently a prisoner in Wheatfield Prison. The sentences were to run concurrently. The respondent had been denied bail so the sentences were backdated to the 13th April, 2016.

2. The periods of suspension were on the following conditions. The respondent enter into a bond to keep the peace and be of good behaviour for two years. He attend for all appointments with the Probation Service and engage in offence focused work. He engage with all relevant support services in relation to substance misuse including residential treatment if required. He engage with the Linkage Service in relation to education/employment/training needs and attend relevant programmes as directed. In sentencing, the learned trial judge found the aggravating factor to be the serious nature of the offences. The mitigating factors identified were the respondent's early plea, his drug addiction, his efforts at rehabilitation while in prison and his supportive parents.

3. On 6th May, 2016, less than a month after the commission of the within offences the respondent was sentenced for ten offences (including burglary, criminal damage, s. 112 RTA and possession of housebreaking implements) in the Children's Court and was sentenced to a total of seven months detention. Five days after that appearance the respondent withdrew a District Court appeal wherein he had appealed the imposition of a six month detention order for eight other offences (including burglary, criminal damage, failure to stop for a Garda and possession of knives). The seven month detention order imposed by the Children's Court (6th May, 2016) and the six month detention order (6th June, 2016) as affirmed by the Circuit Court were to run concurrently to each other and also concurrently to the sentences as imposed by the learned sentencing judge. As such, the penalty imposed by the learned sentencing judge extended the respondent's stay in custody by just three months and seven days.

The Circumstances of the Offences

4. In the early hours of the morning on the 13th April, 2016, the respondent and an accomplice burgled the residence of Ms. Howard while she was asleep upstairs. Her television, X-Box games console, handbag containing cash and car keys were stolen. Ms. Howard did not know the burglary had taken place until alerted by her neighbour.

5. Her car keys were then used to steal her Volkswagen Polo. The Gardaí responded within minutes and came across the stolen car being driven in convoy with a Hyundai. Lights and sirens were activated and an attempt was made to block the path of the vehicles.

6. The Volkswagen Polo, being driven by the respondent, crashed into Garda Gerard Smith's patrol car. Both vehicles then led a fleet of Garda cars on a high speed chase. Speeds of up to 170kph were reached and a number of red lights broken during the five kilometres chase before the Hyundai crashed through the bridge wall at Celbridge and landed on its roof in the river. The Volkswagen Polo followed through the gap and landed upright 40 feet from its point of entry.

7. Garda Smith then rescued and arrested the respondent. The respondent acknowledged that the Garda probably saved his life. At this point he stated that he was a passenger in the vehicle. During questioning the respondent denied committing the burglary, driving the stolen vehicle and knowing that the vehicle had been stolen. The respondent pleaded guilty at the earliest possible stage before the Circuit Court.

The Respondent's Personal Circumstances

8. A probation and welfare report was ordered. The respondent re-affirmed his denials of driving the Volkswagen Polo but subsequently expressed remorse. He was deemed to be at a high risk of re-offending. He was 17 years old at the time of the offence and 18 years old when sentence was imposed.

9. At the time of sentencing he had 33 previous convictions. These included seven convictions for unlawful use of a mechanically propelled vehicle, five for burglary, four for criminal damage, four for possession of articles for theft or fraud, two for interference with motor vehicles, two for possession of knives or other articles, and one for theft, trespass, robbery, public order and failing to stop for Gardaí.

10. On the 6th May, 2016, the respondent received a total of seven months detention from the Children's Court for ten offences. Five days later the respondent's appeal against the imposition of six months detention for eight other offences was withdrawn. These

sentences were to run concurrently with each other and the sentence the subject matter of this appeal. As such the penalty imposed herein extended the respondent's stay in custody by three months and seven days.

11. Garda Smith accepted that most of the convictions related to offences which occurred in 2014 and 2015.

12. In mitigation it was submitted that the respondent was a young man. He entered a guilty plea at an early stage. He was a regular drug user who had made some efforts to rehabilitate himself. He had the support of his family. Due to administrative delays he lost the opportunity to make submissions in the Children's Court pursuant to s. 75 of the Children Act 2001.

Sentence

13. In sentencing the learned judge found the aggravating factor to be the serious nature of the offences. The mitigating factors identified were the respondent's early plea, his drug addiction, his young age, his expressed wish to become a productive member of society, his efforts at rehabilitation while in prison and his supportive parents.

Appellant's Submissions

14. It was the appellant's submission that the sentences imposed on each count are individually and cumulatively unduly lenient. It was submitted that the sentencing judge erred in principle in:

- i. The manner in which the sentences imposed were structured by applying insufficient weight to the aggravating features of the case and/or undue weight to the mitigating factors present which resulted in her failing to adequately reflect the seriousness of the offending behaviour before her;
- ii. Circumstances where the sentences imposed failed to adequately reflect the principles of specific and/or general deterrence;
- iii. Imposing an entirely insufficient additional punishment on the respondent for the commission of escalating offences similar to those for which he had been convicted in the past.

15. It was submitted that while the unlawful driving did not cause any injuries it posed a very significant risk to the respondent, the Gardaí and any other people in the area. It was fortuitous that the chase took place in the early hours.

16. In relation to the burglary the appellant refers to *The People (Director of Public Prosecutions) v. Murray* [2012] 2 I.R. 477 where it was recognised that a residential burglary is often more like an offence against the person. The Court was also referred to the list of aggravating factors relevant to burglary cases set out by the English Court of Appeal in *R v. Saw* [2009] 2 Cr. App R. (S.) 54 p. 367, para. 19.

17. In *The People (Director of Public Prosecutions) v. Shaun Kelly* [2016] IECA 204 it was acknowledged that not all burglary cases are at the same level of seriousness and it is essential to weigh the actual gravity of the offence in each case. The court considering the available penalties should assess the appropriate headline sentence and then discount mitigating factors.

18. The Court was referred to the spectrum of penalties for residential burglaries suggested by O'Malley, *Sentencing Law and Practice*, 3rd Ed., (Dublin, 2016). It suggests that the least serious should attract less than two years imprisonment, moderately serious cases with some aggravating factors two to five years and those with serious aggravating factors, such as using or threatening violence, between five and ten years.

19. It was submitted that the sentencing judge should have placed the offences on the spectrum of gravity, considered all the aggravating factors and mitigating factors that bore on moral culpability and reduced, if appropriate, the notional sentence to take account of the accused's circumstances and any remaining mitigating factors.

20. It was submitted that the following aggravated factors should have been considered and appropriate weight attached to them. That the property was residential. It was occupied at the time. The burglary was at night. High value goods were stolen and treated in a reckless manner. The respondent had 33 previous convictions, five of which were for burglary and seven unlawful use of a mechanically propelled vehicle. It was submitted that a number of significant factors were seemingly omitted from consideration.

21. In *The People (Director of Public Prosecutions) v. Edward and Patrick Wall* [2016] IECA 319 at para. 34 it was noted that there is "a willingness, depending on the circumstances of the case, and as an exception to the rule, to regard a previous conviction for an identical or very similar crime as aggravating".

22. It was submitted that the penalty imposed was an unequivocal divergence from the range of appropriate sentences for these serious offences where the offender has been repeatedly previously convicted of similar offences.

23. It was submitted that the sentence imposed failed to reflect the principles of general deterrence and specific deterrence given the seriousness of the offences, the respondent's previous convictions, pattern of offending, and high likelihood of re-offending. Adequate consideration was not given to the probation officer's assessment. The importance of deterrence has been noted by O'Malley.

24. It was also submitted that the sentence amounted to insufficient additional punishment where there were multiple convictions for the same or similar offences. In *The People (Director of Public Prosecutions) v. Michael Tanner* [2010] IECCA 107 it was noted that there is discretion in whether to backdate a sentence to account for time in custody. It was submitted that it is common practice to backdate to the date when the accused was in custody and such backdating is entirely at the discretion of the trial judge. In *The People (Director of Public Prosecutions) v. Stephen Fitzpatrick* [2010] IECCA 31 the Court noted that "time spent in custody is not of necessity taken into account".

25. It was also submitted that there was discretion on whether to impose concurrent or consecutive sentences.

26. The combination of accounting for mitigating factors, employing concurrent sentences and backdating the sentences resulted in a cumulative tariff which was unduly lenient in all the circumstances.

Respondent's Submissions

27. The respondent referred to *The People (Director of Public Prosecutions) v. Byrne* (Court of Criminal Appeal, O'Flaherty J., ex tempore, 7th November, 1994) and the guidelines it set down in relation to an application under s. 2 of the Criminal Justice Act 1993.

It was submitted that the appellant bears a heavy onus in proving the sentence was “unduly lenient”. Further there was no “substantial departure” in the instant case from what would be regarded as the appropriate sentence given the circumstances of the offence and mitigating factors.

28. In *The People (Director of Public Prosecutions) v. Jarosz* [2008] IECAA 151 it was noted that the sentence might be lenient or more lenient than that court would have imposed but the concern was whether it was unduly lenient. In *the People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356 it was noted that it should be “not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused”.

29. It was submitted that the prosecution addressed the Court with great clarity on the options available regarding the Court’s discretion and the requirement that the sentencing principles of proportionality and totality were taken into consideration. The Court was also advised on how a probation bond operated in conjunction with custodial sentences and the different variations they could take.

30. The respondent was deprived of the opportunity to make submissions under s. 75 of the Children Act 2001. This loss of protection was highly prejudicial as he could not make submissions as to why the District Court should retain jurisdiction.

31. It was submitted that the sentencing judge rose to fully consider all the information. Sufficient weight was given to the aggravating and mitigating factors.

32. The sentences imposed were neither individually nor cumulatively unduly lenient to the point where it can be held to be an error in principle. The sentences adequately reflect the principles of specific and/or general deterrence by imposing a lengthy two year period for the suspended sentence to remain operational. The sentences were not unduly lenient so that there was an error in principle in structuring the sentence. The prosecution advised the sentencing judge that the Court was required to carefully consider the principles of proportionality and totality. She was fully cognisant of the seriousness of the offending behaviour.

33. The respondent referred to *R v. Saw* and submitted that while he was not a “first offender” he is a “youthful offender”. He has reached that point where he has a chance to break from crime and addiction and this point was noted by the sentencing judge.

34. The respondent referred to *The People (Director of Public Prosecutions) v. Shaun Kelly* which held that constructing a proportionate sentence is a two step process. It was submitted that the sentencing judge recited the aggravating and mitigating factors prior to setting the “headline” sentence. The appropriate sentence, in the absence of mitigation, was then addressed. This was a clear indication that the first step regarding construction had been considered. i.e. considering the aggravating factors whilst assessing gravity. The sentencing judge then gave the appropriate sentence after having taken the mitigating factors into account.

35. It was submitted that in this jurisdiction it is not unusual for a guilty plea to give a reduction of 25% to 30%. The reduction here was 28.6% and 40% on the first two counts respectively.

36. The respondent referred to O’Malley’s spectrum for residential burglaries and submitted that the instant case would fall into the moderate category with a sentence range of two to five years. The sentencing judge stated the appropriate sentence was three and a half years.

37. The respondent referred to *The People (Director of Public Prosecutions) v. Edward* and Patrick Wall and noted that the overall judgment is a useful comparator. The headline sentence in the absence of mitigation was four years. There was an attempted burglary and a burglary which involved considerable damage and planning. Further while there was evidence of previous burglary convictions the specific nature of the type of burglary was not addressed except to confirm that the respondent was a juvenile.

38. It was submitted that a further comparison could be drawn as the appellant is asserting that the sentencing judge erred in giving undue weight to the mitigating factors and/or in failing to give due consideration to all the aggravating factors. They were unable to say with precision where the error lay. The Court was referred to *Wall* where it was stated that the “Court is in a very difficult situation in circumstances where the applicant effectively invites us to speculate” where they couldn’t say which of the three things it was.

39. In relation to deterrence it was submitted that O’Malley notes the acceptance of suspended sentences as being genuinely punitive and the penultimate sanction in the hierarchy of penalties. In *The People (Director of Public Prosecutions) v. Stronge* [2011] IECCA 79 at para. 35 it was recognised that the length of the operational period can form part of the punishment. Due regard was had to the principle of deterrence in suspending 18 months of a two and a half year sentence for two years when the respondent was 18 and a child at the time of commission. The conditions show that the sentencing judge gave adequate consideration to the contents of the probation report and the respondent’s high risk of re-offending. The structure encompassed a rehabilitation element where the respondent is only 18 and expressed a desire to become a useful member of society.

40. It was submitted that the sentencing judge was required to give consideration to the fact that he was a juvenile at the time of the offence. The respondent referred to *R v. Ghafoor* [2003] 1 Cr. App. R. (S.) 84 at 428 where the English Court of Appeal, where there was a maximum sentence a juvenile could receive, stated that when the offender crosses the age line between commission and sentencing the starting point is the sentence he would likely have received at the time the offence was committed. There should be good reasons to depart from this starting point. This is not the only factor but a powerful factor.

41. The sentencing judge has an unfettered discretion to backdate the sentence and to choose between a concurrent or consecutive sentence.

42. The respondent referred to *The People (Director of Public Prosecutions) v. Jennings* (Court of Appeal, O’Flaherty J., ex tempore, 15th February, 1999) and submitted that when structuring a sentence rehabilitation is an important factor especially where there is a young defendant.

43. The headline sentence was reduced based on the mitigating factors. Suspension was included to allow a rehabilitation aspect. The sentence was backdated having considered the submissions of counsel, the probation report, testimonials handed in, the evidence of Garda Smith and the totality and proportionality tests.

Decision

44. The first of the offences to which the respondent pleaded guilty was one of burglary. In the early hours of the morning of 13th April, 2016, he and an accomplice broke into a woman’s house while she was asleep upstairs. He robbed valuable items therein

including her handbag and car keys. Burglary of a person's home is not just an offence against property nor is it the same as a robbery outdoors or on the street. It may be considered to be a particularly serious offence against the person. See *The People (Director of Public Prosecutions) v. Murray* [2012] 2 I.R. 477. This is because it is an egregious violation of the sanctity and security of the home. The sense of safety and privacy that characterise the home for its inhabitants is destroyed and may take years to reconstruct if it ever can be. It is thus among the most serious of offences. Among its many aggravating factors is the presence of the occupier at the time of the burglary, the theft of property of high economic or sentimental value and the offender's previous record. See *R. v. Saw* [2009] 2 Cr. App. R. (S) 54, p. 367. It is noteworthy that among his 33 previous convictions, five were for burglary. In this Court's view this was a serious burglary with aggravating characteristics. He proceeded to take Ms. Howard's car and drive it in a madcap cross country chase. He wound up crashing it into the river at Celbridge. It is only thanks to the bravery of Garda Gerard Smith that he survived to face justice. The reckless nature of that car chase might well have ended up in the actual loss of life of any of the Gardaí involved or of entirely innocent third parties. This was a further serious aggravating factor.

45. This Court has been referred to the range of penalties considered by O'Malley in his *Sentencing law and Practice*, 3rd Ed., (Dublin, 2016). There it is suggested by the learned author that the least serious burglaries should attract a sentence of less than two years imprisonment, moderately serious cases with some aggravating factors two to five years and those with serious aggravating factors to between five and ten years. In light of the above circumstances, this burglary seems on the cusp of the third category. It is certainly at the very top end of the second. The probation and welfare report directed by the Court deemed the respondent to be at a high risk of re-offending.

46. In mitigation on behalf of the respondent it was urged upon this Court that he was a youthful offender who was a juvenile at the time of the offence. He had the chance now to break free from crime and addiction. It must be said that despite the best efforts of Mr. McKeone on his behalf, there was little to be weighed in mitigation in favour of the respondent.

47. In the Court's view the learned trial judge erred in that she gave insufficient weight to the very serious aggravating factors of two very serious offences or alternatively gave too much weight to the very limited mitigating factors that were present. It is not clear that sufficient weight was given to the fact that there were five previous convictions for burglary. The sentences imposed will be quashed and the Court will proceed to re-sentence.

48. The Court will impose the following:

The two sentences on counts one and two will be consecutive but concurrent inter se. The suspensive provisions of each will be increased by an additional three months. The sentences will therefore be:

I. On Count one – two years and six months imprisonment with the final one year and nine months suspended for two years on the same conditions.

II. On Count two – one year and six months with the final nine months suspended for a period of two years on the same conditions.