



THE COURT OF APPEAL

Record Number: 15/20

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

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

EDDIE O'LOUGHLIN

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) on the 20th day of January 2022 by Ms. Justice Kennedy.

1. This is an appeal against conviction and severity of sentence. In February 2018, the appellant pleaded not guilty in Galway Circuit Court to one count of aggravated burglary pursuant to s. 13(1) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001. On the 27th February 2018, the appellant changed his plea and entered a guilty plea. On the 15th January 2020, the appellant was sentenced to 10 and ½ years' imprisonment.

Background

2. On the 20th June 2016, Gardaí responded to a call from an address in County Galway. On arrival, Gardaí noted blood on the carpet, stairs, walls and in the upstairs bathroom and designated the property a crime scene.
3. Gardaí took an extensive statement from the resident of the property, Adrienne Keary, who gave evidence on the 27th February 2018 that at approximately 07:55 am, she opened the door to a man known to her who enquired about the whereabouts of her ex-partner Jonathan King. Ms. Keary called for Mr. King and, as he was halfway down the stairs, the appellant then entered the property with a knife and attacked him. Mr. King was stabbed on his ribs, across his chest and on his face. Ms. Keary's children were witness to the attack. Ms. Keary ran to her neighbours' house seeking help and the

appellant fled the scene in a car driven by the other man. A neighbour drove Mr. King to hospital.

4. On the 20th June 2016, Gardai executed a search warrant at an address in County Galway and arrested the appellant for an offence of aggravated burglary. He was brought to Galway Garda Station and detained pursuant to s. 4 of the Criminal Justice Act 1984. No admissions were forthcoming. A number of clothing items were seized from him and the forensic science laboratory determined that the blood of Mr. King was present on the appellant's jeans.
5. On the 27th February 2018, the appellant appeared before Judge MacCabe in Galway Circuit Criminal Court and pleaded not guilty to one count of aggravated burglary. A jury was impanelled and two witnesses were called. Towards the latter stages of Ms. Keary's direct testimony, counsel for the appellant objected to a question asked and the jury retired. During that period the appellant changed his plea and entered a guilty plea. On the 6th June 2018 the appellant filed a notice of motion and affidavit seeking to vacate his guilty plea. There was a change of solicitor on the 7th June 2018 and the matter was adjourned on several occasions and heard on the 14th November 2019. Two psychiatric reports were put before the court in respect of the appellant. On the 6th of December 2019, having heard the appellant's application, Judge MacCabe refused to vacate the his plea of guilty. On the 15th January 2020, the appellant was sentenced to 10 and ½ years' imprisonment.
6. This appeal addresses conviction and sentence.

Grounds of Appeal

7. In appealing his conviction, the appellant contends that the trial judge erred in law in failing to vacate his guilty plea.
8. The appellant appeals his sentence on three grounds, namely:
 1. That the judge erred in law and in fact in imposing the sentence that it did.
 2. That the judge erred in law and in fact in that he failed to place adequate significance on the mitigating factors in the case.
 3. That the judge approached the structure of the sentence in a way which lacked clarity, and failed to adhere to the correct manner in which a sentence of this nature should be approached.

Submissions of the Appellant on Conviction

9. On his ground of appeal against conviction, namely, that the trial judge erred in law in failing to vacate his guilty plea, On the 6th June 2018 a notice of motion and affidavit seeking to vacate his guilty plea were filed.

Counsel (not the counsel at trial) opened the appellant's affidavit wherein he averred that he intended at all times to plead not guilty, that he was represented by solicitor and counsel, (in fact senior and junior counsel), that his solicitor and counsel told him of the

potential sentence he might face should he plead guilty as against the sentence he might face should he plead not guilty. He averred that he was overwhelmed by the conversation for the reasons hereunder. A strong feature of his recollection was his solicitor informing him that 'they'll give you a right bollocking'. He became very worried that he was going to get a significant sentence if found guilty and consequently, he changed his plea to guilty. He further states that he was under great stress and pressure while awaiting trial and that his relationship with the mother of his children also broke down during this time. As a result of this, for the nine months leading up to the trial, the appellant was taking Xanax or variants thereof and claimed he was "heavily under the influence of Xanax on the 27 of February 2018" when he changed his plea from not guilty to guilty.

The appellant contended statement that he felt he was not in his right mind when he changed his plea and that it was something that he regrets.

10. It is said that on the 1st May 2019, unbeknownst to the appellant, Mr. King swore an affidavit denying he was assaulted by the appellant and showing a willingness to release his medical records in support of this statement. It is said that it has never been suggested that this affidavit sworn by Mr. King was done so under any threats, coercion, duress or any other external influence and that Mr. King never made a statement during the course of the original investigation nor was there a medical report supporting the allegation of stabbing. We observe that Mr King was not a witness on the book of evidence.

It is submitted that the court below failed to consider the affidavit of Mr. King, which, it is said completely contradicted the evidence of the principal witness for the prosecution, in refusing to allow the appellant vacate his guilty plea on the 6th December 2019 and in so doing, failed to correctly consider and determine the principles and policies that apply in respect of an application to vacate a plea of guilty.

11. With reference to the principles set out by Laffoy J in *Dunne v. McMahon* [2007] 4 IR 471, namely that the respondent ought to have due regard for the applicant's constitutional right to a fair trial, the appellant contends that a sworn affidavit from an alleged injured party that contradicts the evidence given by the main prosecution witness was of such significance that the judge ought to have determined that it was unsafe to allow the appellant's conviction to stand.

The appellant also cites *DPP v. E.R.* [2017] IEHC 802 in which Faherty J cites *R v. Goodyear* [2005] EWCA Crim 888, as follows: "the defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered voluntarily, without improper pressure" to support his contention that his plea of guilty was not entered voluntarily.

Submissions of the Respondent on Conviction

12. In response to the appellant's ground of appeal against conviction, the Director notes that on the 27th February 2018, when the appellant changed his plea from not guilty to guilty, he was represented by a very experienced solicitor, senior counsel and junior counsel. It

is also noted that no medical evidence was adduced by the appellant before the court as to his state of mind or his reliance on drugs on the date of his change of plea despite several adjournments being granted to obtain psychiatric reports. Furthermore, on the 14th November 2018, it was stated to the court that the appellant was not criticising or blaming his legal team for his change of plea on the 27th February 2018.

The Director also points out Judge McCabe's acknowledgment of the appellant's "consumption of non prescribed medication, significant social upheaval in his life over a period of months and possibly longer and a high level of anxiety" and the psychiatric reports in his decision on the application to vacate the plea.

13. Addressing the appellant's submission that the court failed to consider the affidavit of Mr. King and that this affidavit contradicted the evidence of the prosecution's main witness, the Director submits that the affidavit does not contradict the evidence of the prosecution's main witness as he does not state that the appellant did not attend in the manner alleged at the home of Ms. Keary or that the appellant did not have a knife or use it nor does it address how Mr. King's blood was found on the appellant's clothing that day or explain how this blood was on the stairs, walls, bannisters, floor, carpet of the stairs and the upstairs bathroom. Furthermore, it is submitted that said affidavit was read out in court at the hearing of the application to vacate the plea of guilty and opened to Judge McCabe who noted that it "does not provide a defence to the charge of aggravated burglary."

The Director contends that the court did consider at length, the affidavit of Mr. King.

14. The Director also submits that the Judge correctly considered and determined the applicable principles in respect of an application to vacate a plea of guilty, quoting from the decision of Judge McCabe as follows:

"There's no evidence that his (the appellant) mental state changed at any time in the course of the trial other than when the likely implications of a jury conviction as against a plea were outlined to him. The inescapable fact is that given the state of the evidence at the time, he having, consulted with his legal team who in the proper exercise of their professional obligations to him, which he accepts, gave advice. He then instructed them that he had decided to change his plea to guilty. There is not an iota of independent evidence that this was anything other than an informed decision, freely made, devoid of any external pressure or discernible alteration in the applicant's mental state from that at the outset of the trial."

15. The Director goes on to distinguish the cases of *Dunne v. McMahon* [2007] 4 IR 471, *Byrne v. McDonnell* [1997] 1 IR 392 and *DPP v. B* [2002] 2 IR 246 from the instant case on factual grounds and notes there is no independent evidence for the appellant's allegations of stress while on bail, the breakdown of his long term relationship with the mother of his children, his consumption of Xanax or his regret at his change of plea.

The Director quotes from *Dunne v. McMahon* and accepts that a judge has discretion to allow an accused to change his plea from guilty to not guilty before the case is disposed

of by way of sentence but it is submitted that Judge McCabe carefully considered the matters urged on him at the hearing of the application to vacate the appellant's plea and that he follow the principles as set out in caselaw.

The Director also distinguishes the instant case from the case of *DPP v. E.R.* wherein the latter case there was pressure applied on the appellant by the judge, there was no such pressure in the instant case.

16. It is submitted that the appellant's plea was entered voluntarily and there was no independent evidence before the court at the hearing of the application to change his plea to support his claim that he was consuming Xanax or any medical evidence of the effect of such medication. It is stated that everyone who is facing serious criminal charges before the court is usually stressed and that the appellant's stress or difficulties were no different to that which would be normally expected.
17. The Director concludes her response to the appellant's ground of appeal against conviction through quotation from *Dunne v. McMahon* and *DPP v. E.R.* to emphasise the importance of having regard for an applicant's constitutional right to a fair trial and the requirement for evidence of undue pressure to be advanced by an accused in change of plea applications.

It is respectfully submitted that Judge McCabe considered all of the evidence before him at the hearing of the application and gave a comprehensive and reasoned judgment as to why he refused the appellant's application to change his plea.

Discussion

18. It is the position that the judge has a broad discretion to determine whether to permit an accused person to change his plea from one of guilty to one of not guilty until the time when sentence is imposed. This discretion must be exercised with regard to an accused person's constitutional right to a fair trial in terms of Article 38 of the Constitution.
19. In the present case, no issue is raised regarding the legal advice provided to the appellant following the direct testimony of the primary prosecution witness. Indeed, this is readily apparent in light of the submission made by the then counsel for the appellant on the 14th November 2019, when referring to the content of the affidavit sworn by the appellant in support of his application to vacate his plea of guilty.

It appears that in his affidavit the appellant avers that he was informed of the potential sentence he might face depending on whether he was found guilty or should he plead guilty. He then proceeds to state that he was overwhelmed by the conversation due to stress he suffered in the preceding 18 months, the breakdown of a long-term relationship, the taking of non-prescribed medication and sporadic heavy alcohol abuse. As a consequence he felt he was not in his right mind when altering his plea and regretted his decision.

It is however noteworthy that in the same affidavit he indicates that having been advised by his legal team as to the potential consequences of his course of action, he became

very worried that he was going to get a significant sentence should he maintain his plea of not guilty.

20. In expanding in his oral submission before this Court, it is argued on behalf of the appellant that the trial judge failed to properly consider an affidavit of Mr. King. In this affidavit, which has been furnished to the Court, Mr. King states that he was not assaulted by the appellant and was willing to release his medical records. It also states that he, (Mr. King) was aware that the appellant intended to call to him the day of the incident.

It may be inferred therefore that Mr. King and the appellant were known to each other. The affidavit of Mr. King was sworn on 1st May 2019. It is argued that the advice given to the appellant on 27th February 2018 would in all likelihood have been quite different if the affidavit of Mr. King had been received prior to trial. However, we must observe that it was always open to the appellant to call Mr. King in his defence should he have so wished.

21. Secondly, whilst it is contended that the appellant was labouring under certain stresses at the time when he altered his plea of guilty, no supporting evidence of the medical kind was adduced before the court in this regard, ample opportunity was afforded for the appellant to adduce evidence of his mental state on 27th February 2018. This evidence was not forthcoming. In addition, there was no medical evidence to support his contention of having taken significant quantities of nonprescribed medication.
22. Two psychiatric reports were available to the court. Dr. Kelly interviewed the appellant on 4th December 2018 and found no evidence of any mental illness. It is noteworthy that in a psychiatric report of Dr. Smith dated 14th November 2019, reference is made to the appellant's assessment by the prison GP on his admission to the prison on the 28th February 2018. Paragraph 12.2 of that report does not support the appellant's contention of severe stress or mental health issues.

Conclusion

23. The application to vacate his plea of guilty was moved on behalf of the appellant on 14th November 2019. The application was moved by counsel, relying upon the appellant's affidavit and Mr. King's affidavit. Evidence was heard from the prosecuting Garda, following which extensive submissions were made. Evidence was given by the prosecuting Garda setting out the evidence of Ms. Keary, the observations of the Gardaí on arrival at the house, where blood was noted on the stairs and walls. Evidence was also adduced regarding Mr. King and that there was DNA evidence.

Judge McCabe adjourned the matter to the 6th December 2019 to consider the application and to enable him to deliver a reasoned decision.

This he did on the 6th December 2019. This Court is in no doubt whatsoever that the judge carefully considered the application. He referred to the basis for the application, that the appellant contended he was overwhelmed by a combination of factors. He

referred to the fact that no reliance was placed by the appellant on the psychiatric report sought by the appellant. However, the court considered the reports and appropriately so, in our opinion. Moreover, the court carefully considered the affidavit of Mr King, which recited a denial that the appellant had assaulted him. It did not concern the entry to the house or doing so while in possession of a weapon.

24. Judge McCabe further considered the jurisprudence, to which we have referred earlier in this judgment in the section addressing the submissions on behalf of the parties.

The inescapable conclusion is that the appellant received legal advice with which he, understandably takes no issue. The contention that he was under considerable stress for a variety of factors is not supported by medical evidence. It is clear he is a man who suffers from anxiety, however, it is also clear from his own affidavit that on foot of the advice received from his legal team, he took the decision to change his plea to one of guilty as he was concerned he would receive a significant sentence if he were convicted by a jury.

In the circumstances, it is readily apparent that the judge exercised his discretion with due regard to the appellant's constitutional right to a fair trial and in light of the evidence before him.

25. We do not see any basis to interfere in the manner in which the judge exercised his discretion and accordingly, the appeal against conviction is dismissed.

The Sentence Appeal

26. The argument advanced by the appellant was a net one and succinctly argued by his counsel, Mr. Patrick McCarthy BL. Accordingly, we are now in a position to address the appeal against sentence.

The Sentence Imposed

27. The judge identified a headline sentence of 12 years imprisonment. In terms of mitigation, the judge considered there to be limited evidence to mitigate the gravity of the offence and was not persuaded that there was any reasonable prospect of rehabilitation for the appellant. On the basis of the mitigation the judge reduced the headline sentence by 10% to a sentence of ten and a half years' imprisonment.

Submissions of the Appellant on Sentence

28. In relation to the appellant's first ground of appeal against severity of sentence, it is submitted that the sentencing judge failed to correctly apply the principles which govern the imposition of a proportionate sentence. Reference is made to the People (DPP) v. Kelly [2005] 2 IR 321 in which Hardiman J states that "sentences must be proportionate not only to the crime but to the individual offender." The appellant also cites the State (Healy) v. Donoghue [1976] IR 325, in this regard.

Furthermore, counsel for the appellant argues that evidence of the appellant's previous convictions was heard without any detail provided about the "relevant" previous

convictions under the Criminal Justice (Theft and Fraud Offences) Act 2001, citing DPP v. Casey and Casey [2018] 2 IR 337.

Reference is also made to *The People (Attorney General) v. O'Driscoll* (1972) 1 Frewen 351, the *People (Director of Public Prosecutions) v. M* [1994] 3 IR 306 and the *People (DPP) v. McCormack* [2000] 4 IR 356 to emphasise the necessity of having regard to both the particular crime and the particular criminal, in support of his contention that the judge erred in law and in fact in imposing sentence.

29. In support of his second ground of appeal against severity of sentence, that the judge did not place appropriate significance on the mitigating factors in the case, paras 6-19 of O'Malley's *Sentencing Law and Practice*, 3rd ed, are referenced as follows:

"Implicit in the concept of proportionality as adopted by the Irish Courts is the obligation to give due credit for mitigating factors in every case in which a court has a discretionary sentencing power. This applies irrespective of the nature of gravity of the offence though, of course, serious offences may still attract a heavy sentence even after allowance is made by all relevant mitigating factors."

The appellant also cites the *People (DPP) v. Counihan* [2015] IECA 76 in which the Court of Appeal identified the issue of sentencing courts having undue and excessive regard to mitigating factors in any case and that this equally applied to aggravating factors. It is submitted that the sentence imposed for the aggravated burglary in the instant case was both excessive and oppressive because of the judge's failure to consider mitigation.

30. The appellant draws attention to his age at the time of sentencing, being thirty-six years of age and his difficult and unstable childhood which he says led him to initially engage in low-level criminality. He was first incarcerated at fifteen years of age and regularly received custodial sentences thereafter. Letters of support for the appellant were submitted to the court to the effect that the appellant was suffering from drug addiction and suicidal ideation around the time of the offence in the instant case. It is argued by the appellant that the court had no regard to a psychiatric report from Dr. Smith which outlined the appellant's mental health issues and treatment.
31. The appellant argues that no demonstrable appreciation of the mitigating factors can be identified in the manner in which the sentence was constructed.

Submissions of the Respondent on Sentence

32. In addressing the appellant's grounds of appeal against severity of sentence, the Director submits that the sentencing judge did not fail to correctly apply the general principles and policies which govern the imposition of a proportionate sentence.

The appellant relies on the dicta of Hardiman J. in *People (DPP) v. Kelly* wherein he states that, "sentences must be proportionate not only to the crime but to the individual offender" the Director submits that this was done in the instant case as Judge McCabe had regard to both aggravating and mitigating factors in imposing sentence. It is noted that the court had been informed of the appellant's age, that he was a father, that he had

a difficult childhood and initially engaged in low-level criminality and that he received his first prison sentence at age fifteen. The court were also informed of his addiction problems.

33. In the present case the occupants were home and there were three children present during a violent knife attack for which there was planning and premeditation.

It is noted that the sentencing judge fixed the headline sentence at 12 years and gave a reduction of 18 months for mitigation.

34. In conclusion, it is submitted by the Director that the sentence imposed by the sentencing judge for the aggravated burglary offence was not excessive and disproportionate having regard to all the circumstances of the case.

Discussion

35. This is a most serious case, the events on the date in question occurred early in the morning, when there were young children present and involved planning in their execution, as a getaway driver was in place. The appellant had a knife and used that knife, he is a man with 35 previous convictions, some of which are relevant previous convictions, including three convictions for burglary and a conviction for the possession of a knife.

36. It is well established that a court must construct a proportionate sentence and should do so by locating where the offence falls on the overall scale of the gravity regarding the offending conduct. In order to do so, the court will have reference to the culpability of the offender and the level of harm done. In the present case both are of a high order. The maximum sentence in the present case is one of life imprisonment and we consider the nominated notional or pre-mitigation sentence of 12 years to be appropriate.

From that notional sentence a court will then consider the particular circumstances of the offender and it is in that context that a court will consider the mitigating factors. In the present case, the court considered that there was limited mitigation available in order to mitigate the gravity of his offending conduct. Nonetheless he reduced the notional sentence of 12 years to one of 10 ½ years imprisonment. This constitutes a considerable reduction given the level of mitigation present. Moreover, it must be recalled that the appellant is a man with 35 previous convictions.

37. It is argued that there was insufficient detail given regarding his previous convictions, however, it is clear from the transcript that the convictions include a conviction for theft, a conviction for participating in the activities of a criminal organisation for which he received a sentence on appeal of 6 ½ years imprisonment in 2014 before this Court, two convictions for trespass, two convictions for assault contrary to s.3 of the Non-Fatal Offences Against the Person Act and a conviction for possession of a knife. These convictions result in a progressive loss of mitigation and are aside from the aforementioned burglary convictions which aggravate the gravity of the offending conduct.

38. In the court below, reference was made to his plea of guilty, and the judge properly indicated in effect that he was not going to be penalised for the circumstances surrounding the plea, but that it could not be considered to be an early plea of guilty. Counsel relied upon the psychiatric reports which contained the background material respect of the appellant, reference is made to his family situation, his educational difficulties, his addiction issues, the deterioration of his relationship, his anxiety issues and letters from his family. These matters resulted in the aforementioned reduction of the headline sentence.

39. We consider that the judge afforded considerable discount to the appellant in terms of the mitigation present, it must be recalled that remorse could not be offered as a mitigating factor, that the plea was a late plea of guilty and that his convictions resulted in a progressive loss of mitigation. We find no error in the approach by the judge in this respect.

The court considered that there was limited evidence to persuade that there was any reasonable prospect of rehabilitation for the appellant and indeed this is understandable in light of the fact that on release from the 6 ½ year sentence it appears he acquired eight convictions.

40. In the present case, it is a concern as to whether there is a realistic possibility that a part-suspended sentence will incentivise the appellant from committing further crime. However, we note the report of the psychiatrist dated the 4th November 2019 makes reference to his substance abuse difficulties and the potential benefit of the appellant availing of treatment, albeit in a residential setting under the supervision of the probation service.

41. In the circumstances, we are minded to give the appellant some light at the end of the tunnel and in that regard, we propose to suspend the final 18 months of the sentence in the appellant's own bond of €100 for a period of three years on the condition that he remain under the supervision of the probation services for that period. The bond may be entered into before the Governor or the Assistant Governor of the prison with liberty to re-enter should any difficulties arise in this regard.