



THE COURT OF APPEAL

Record Number: 223/20

**The President
McCarthy J.
Kennedy J.**

BETWEEN/

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT/**

- AND -

ROBERT O' HAIRE

APPELLANT

**JUDGMENT of the Court delivered (ex tempore) on the 7th day of February 2022 by
Ms. Justice Isobel Kennedy.**

1. This is an appeal against severity of sentence. On the 16th of October 2020 in the Circuit Criminal Court, Mullingar, the appellant was sentenced to five years' imprisonment with the final two years suspended for a period of five years for burglary offences and a theft offence.

Background

2. On the 19th April 2020, Gardaí responded to a report of burglary in the Cloncoose area of Longford. Gardaí attended at the residence of Mr. Bartley who reported that at 6:35am he was leaving his house and he observed the cover of a chainsaw outside the garage of his house and he noticed a footprint on the windowsill and that the latch was off the garage door. He then noticed that certain items were gone, including a leaf blower, a chainsaw, an Apple watch and €200 cash.
3. A second injured party, Mr. McDermott, reported that on the morning of the 19th April 2020 his wife had gone for a jog and when she had come home she noticed that the large garage door had been forced open and that some items were gone.
4. A third injured party, Mr. Brennan, outlined that he got a call from the alarm company at around 5:30am that same morning. He did not answer it but his brother in law contacted him. Mr. Brennan got up and turned off the alarm. He noticed a broken spade inside the garage door and that the door was still locked. When he got up at 9:30am he noticed tools and a power washer outside the shed, under the bushes and that the shed had been locked.

5. A fourth injured party, Mr. Brady, reported that his cigarettes had been taken from his daughter's car that morning and a bag of tools taken from his van. These items had an estimated value of about €300-€400.
6. Gardaí carried out house to house inquiries and a witness in a neighbouring house recalled being woken at around 5:30am and observing a car parked in his driveway. This witness took a photograph of the car. Gardaí discovered that it was registered to the appellant's girlfriend. The appellant was on bail at the time of the commission of these offences for a similar offence.
7. Gardaí searched the appellant's residence. The stolen property was recovered and the appellant was arrested for burglary and taken to Longford Garda Station.
8. In interview, the appellant made full admission to carrying out three burglaries and one theft in the Cloncoose area earlier that morning.
9. A victim impact statement was furnished to the court by Mr. Brennan, in which he detailed the anxiety and worry he has been suffering since the burglary. He was 65 years of age at the time and his wife had passed away so he was living alone.

Personal circumstances of the appellant

10. The appellant was 39 years of age and a father of three at the time of sentencing. He has 67 previous convictions, 15 of which are for burglary. At the time of the offending, he was on bail for burglary.
11. The appellant's parents passed away when he was at a young age. His mother passed away when he was seven years old and his father passed away when the appellant was eighteen years old. The appellant was living on the streets, and as a result, had become embroiled in drug usage. It was understood by Gardaí that, at the time of the offending, the appellant was suffering from heroin addiction and he committed crimes in order to feed this addiction.
12. The appellant gave evidence in which he outlined to the court that he is free of his addictions. He acknowledged his guilt and offered an apology to the injured parties. He has been attending addiction counselling in prison.

The sentence imposed

13. In imposing sentence, the judge listed as aggravating factors that the offences were committed in a quiet rural neighbourhood, the effect the offending had on the victims, that Mr. Bartley's house was occupied when the accused entered it, the amount of items taken, that the appellant was on bail when these offences were committed, that the appellant has 67 previous convictions and that he is at a high risk of reoffending.
14. In terms of mitigation, the judge noted that the appellant entered an early guilty plea, that he cooperated and made full admissions when being interviewed by Gardaí, that he has a chronic heroin addiction, that he committed these offences in order to get money to feed his habit, that he has a tragic background in which he lost both parents at a young

age and that he is in a stable relationship and has three children who were in court as a show of support for him.

15. The judge placed the offending at the lower to mid-range for sentencing purposes and identified a headline sentence of between four and seven years' imprisonment. Taking into account mitigating factors, he imposed a sentence of five years' imprisonment with the final two years suspended for a period of five years on the conditions, in order to foster and encourage rehabilitation.

Grounds of appeal

16. The appellant appeals the severity of sentence imposed on him by the sentencing judge on two grounds, namely, that the judge erred in placing a headline sentence of five years in circumstances where he had placed the offending in the low to mid-range and that the judge did not give sufficient credit to the mitigating factors in the case.

Submissions of the appellant

17. In contending that the judge erred in placing a headline sentence of five years, the appellant notes that Counsel for the State had indicated that the Director's instructions were that this case came within the mid-range of the scale which is four-nine years. It is therefore submitted that the headline sentence of five years was within the mid-range but not within the low to mid-range as identified by the judge.

It is also submitted that in considering the case of *DPP v. Casey* [2018] IECA 121, the judge failed to take into consideration that this was not a crime committed with the use of violence, that the appellant did not use any weapons in the commission of the offence, that the appellant did not put any victims in immediate fear of harm and that the appellant did not ransack the dwelling houses when committing the offences.

18. It is further contended that the judge should have reduced the headline sentence to account for an early guilty plea and then should have proceeded to consider the mitigating circumstances.
19. The appellant also contends that the court failed to give sufficient credit to the mitigating factors in the case. In support of this, it is pointed out that the early guilty plea was entered in the throes of the ongoing Covid-19 pandemic and that prisoners who are incarcerated during this time endure unique difficulties and hardships, including substantial interference with visitation and educational courses etc. It is also pointed out that the appellant admitted full responsibility and did not try to inculcate any other persons in his offending, that he expressed remorse for what he had done, that he had given evidence that he was now free from his addictions and that he was hopeful of securing a residential treatment programme to equip him with the necessary tools to deal with the outside world, and that the appellant's partner and child were in court to support him.
20. In support of these contentions, the appellant quotes from *the People (DPP) v. McCormack* [2000] 4 IR 356, as follows:

“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 the accused.”

21. In conclusion of their submissions, counsel for the appellant reiterates that the judge erred in not giving sufficient credit to the mitigating circumstances; the appellant’s fulsome cooperation in the investigation which was followed up with an early plea of guilt, the appellant’s addiction difficulties and the fact that he is now free from his addictions and was desirous of gaining a residential treatment programme. It is also submitted that the judge erred in his identification of the headline sentence where the offending in this matter ranged from the low to mid-range of the scale. It is also said that the judge should have proceeded to identify the headline sentence, then detract from the said sentence for the early guilty plea and then take into consideration the suspension of any sentence for the mitigating factors in this case.

Submissions of the respondent

22. In response to the grounds of appeal set out by the appellant, the respondent notes that the appellant’s sentence was indeed reduced from a headline of between four and seven years to five years on account of the mitigating circumstances. In response to the appellant’s reference to the *People (DPP) v. McCormack*, the respondent sets out that the appellant had 67 previous convictions, the majority under the Criminal Justice (Theft and Fraud Offences) Act 2001, coupled with the fact that the offences herein were committed when the appellant was admitted to High Court bail. In this respect, it is submitted that the sentence was proportionate and fair and well within the judge’s margin of appreciation.
23. The respondent outlines that Section 11(4) of the Criminal Justice Act 1984, as inserted by the Bail Act 1997 (s.10), provides that where a court is determining the sentence to be imposed for an offence committed while on bail and is required, by virtue of s.11(1) of the 1984 Act to impose consecutive sentences, it must treat the fact that the offence was committed while on bail as an aggravating factor. It is submitted that the fact that these offences were committed while on bail is a significantly aggravating factor.
24. Reference is made to *People (Attorney General) v. O’Driscoll*, (1972) 1 Frewen 351, to Walsh J, as follows:

“The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest way of life and indeed the public interest would best be served if the criminal could be induced to take the latter course. It is therefore the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal.”

25. In this respect, the Director submits that the appellant's sentence was perfectly tailored to him in light of the high number of previous relevant convictions and the commission of the offence on bail and that the imposition of the suspended sentence was expressly imposed for the purpose of fostering and encouraging the rehabilitation of the appellant, in accordance with *O'Driscoll*.
26. To conclude, the Director submits that the net custodial sentence of 3 years, bearing in mind the aggravating factors and the mitigating factors, was proportionate in all the circumstances, citing Birmingham J (as he then was) in *Casey*: "the sentence imposed for the offence of conviction may be increased as a result of other offences properly being taken into consideration, provided the maximum penalty is not exceeded."

The respondent contends that the headline sentence was one in excess of 5 years and that after mitigation and suspension the appellant was handed down a net 3 year sentence.

Discussion

27. In essence, the appellant contends that the judge erred in placing the series of offending in the low to mid-range of sentence in accordance with the jurisprudence of this Court, and proceeded to identify a headline sentence of between four and seven years' imprisonment. On behalf of the appellant Mr. Flynn BL cogently argues that the headline sentence must have been in the region of seven years given that the judge reduce the sentence for mitigation to one of five years' imprisonment. It is said in the circumstances that that headline sentence is simply too high.
28. We observe and as stated in the decision of this court in *DPP v. Casey*, there is no clear blue water between the ranges of sentences. Offending which falls on the mid- of range may attract a pre-mitigation sentence of between four – nine years. That case also involved a spree of burglaries and where the offenders had relevant previous convictions, albeit not of the same magnitude as in the present case.
29. In the present case, the judge properly identified the aggravating and the mitigating factors. He carefully looked at the gravity of the offending and the culpability of the appellant and was most alert to the fact that a sentence must be fair and proportionate. The court identified the aggravating factors, with which we agree as being; offending which was committed in a rural area, the upset and distress to the victims, the items taken, the fact that one of the dwellings was occupied and that the appellant was on bail at the time the offences were committed. He is a man with relevant previous convictions, 15 of those for the offence of burglary, 6 for entering a building as a trespasser, 10 for the offence of theft and 10 for the offence of handling stolen goods.
30. To those aggravating factors, we add that the offences related to a series of dwellings, all located proximate to each other and it appears, occurred in the early hours of the morning when one might expect a dwelling to be occupied. We are aware that the burglaries occurred in the garage area of each house, but it is the position that the houses were proximate to the garages. In relation to one of the offences, the appellant

entered the house via the back door and took some items, including an apple watch and charger and some cash and then proceeded to the garage area.

31. The items stolen included *inter alia*, gardening tools, the above mentioned Apple watch, assorted tools and, in relation to the theft charge, a bag of tools together with paintbrushes and plastering tools. In the circumstances, it appears to us that the aggravating factors are of a significant order. The appellant is a man with significant and relevant previous convictions, the offences took place in a rural area making it necessary for the appellant to use a car to get to the location, thus indicating an element of planning or preparation. The time of the burglaries is significant, being in the early hours of the morning, moreover, the appellant was on bail for another burglary offence. It was accepted that the appellant has drug addiction difficulties and he gave evidence indicating that the offences were committed in order to feed his habit.
32. In the view of this Court, given the number of relevant previous convictions, there is no doubt but that this spree of offending falls within the mid-range of sentencing. If we were to be more precise, a sentence of seven years' imprisonment, pre-mitigation, falls entirely within the discretion of the sentencing judge and we find no error in the identification of the headline sentence.
33. We now move to consider the mitigation present, again there are a number of mitigating factors, including, of course, the fact that the appellant entered an early plea of guilty, he cooperated with the Gardaí, he has family support and he is a man with addiction difficulties in respect of which the court had documentation indicating that he was addressing those difficulties. Accordingly, the judge reduced the pre-mitigation sentence to one of five years' imprisonment affording a reduction of approximately a quarter should the nominated headline sentence have been that of seven years' imprisonment. Again, we find no error whatsoever in this regard.
34. We now move to consider the fact that the judge suspended the final two years of that sentence in order to foster the rehabilitation of the appellant. The judge had been furnished with documentation indicating that the appellant was drug-free and he also observed that the appellant's appearance appeared to support this fact. Properly, the judge indicated that if he were to remain drug-free, he may avoid further offending. In particular, the judge was satisfied that the appellant, in recognising the need for a residential drug treatment program, was indicative of a measure of maturity on his part and no doubt in that particular context, the judge decided to suspend the final two years of that sentence in order to foster and encourage the potential for rehabilitation.
35. We are entirely satisfied that the judge did not err in principle in identifying the pre-mitigation sentence or in reducing the sentence as he did for mitigation. The only issue for this Court is as to whether the judge erred in suspending two years of the five year sentence in order to incentivise rehabilitation. Rehabilitation is without doubt one of the important objectives in sentencing, however, in the present case we believe the judge erred in suspending 24 months of that sentence. We have very carefully considered the position as this Court is often reluctant to increase a sentence where a person presents an

appeal against the severity of that sentence. However, in the present case the appellant is a man with 67 previous convictions which have the consequence of a progressive loss of mitigation. While he has 14 convictions from the Circuit Court; these concern matters which were appealed from the District Court. This is his first matter for trial on indictment. He has 15 previous convictions for burglary and six convictions for entering a building as a trespasser, he also has 10 previous convictions for theft and 10 previous convictions for handling stolen property. Whilst the court recognises that rehabilitation must be incentivised wherever that is possible and wherever the potential for rehabilitation lies, we cannot in the present case ignore the scale of this appellant's previous convictions. Whilst those identified relevant previous convictions aggravate the appellant's offending conduct, we cannot ignore the fact that this is a man with 67 previous convictions and that he committed the within offences whilst on bail for another burglary offence.

36. In those circumstances, we are taking the unusual step of increasing the sentence imposed by the Circuit Court Judge. We do so by suspending 15 months of the five year sentence rather than suspending 24 months thereof.