



THE COURT OF APPEAL

Record No: CCAOT151/2020

**The President
Edwards J.
McCarthy J.**

Between/

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

V

TREVOR HARLOWE

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on the 21st of March, 2022 by Mr. Justice Edwards

1. The appellant was charged on indictment before Galway Circuit Criminal Court with burglary and his trial was scheduled to proceed on the 2nd of July 2019. On the day of the trial he pleaded guilty to the single count of burglary, contrary to s.12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001. Following his guilty plea, the case was adjourned to the 11th of December 2019 for sentencing. In so adjourning it, the Court directed the procurement of a medical report (to be procured by the defence), a probation report and a victim impact statement. The accused was remanded on continuing bail.
2. During the sentencing hearing on the 11th of December 2019, defence counsel apprised the court that due to an oversight the directed medical report had not been obtained. He asked for further time to obtain it, and also requested that if the court was minded, to adjourn the case so that an up to date probation report could be prepared prior to sentencing. An initial probation report prepared for the 11th of December hearing was already to hand. The court proceeded to hear evidence relevant to sentencing but adjourned the imposition of sentence to the 22nd of January 2020.
3. On that occasion, the up to date probation report was to hand, but there was no formal medical report available. A note from a Dr Anthony Lundon was handed in, and there is a reference to that in the transcript. However, the transcript does not indicate what were the contents of that note, and we have neither been informed as to that nor provided with a copy.

4. The appellant was sentenced to six years imprisonment with the final two years suspended for five years upon certain conditions. These included that the appellant would be under the supervision of the Probation Service post release for a period of 12 months.
5. The appellant now appeals against the severity of his sentence.

Factual background

6. Evidence was given in court by Detective Garda Horkan outlining the circumstances of the offence.
7. On the 2nd of August 2018, CCTV footage from outside No. 107 Dunaras, Bishop O'Donnell Road, Salthill, Galway shows the appellant entering this address at 04.18 am and exiting at 04.23 am. Further CCTV footage shows the appellant re-entering the above address at 04.33 am and exiting at 04.35 am.
8. This address was the dwelling of Charles Chinkuta and Deluse Kaloma, who are foreign students from Malawi, and Bronwen Kircher who is a US national. All the occupants are attending NUIG to further their studies.
9. On the night in question all the occupants of the house went to bed at around midnight. Charles Chinkuta and Deluse Kaloma slept in the same room in separate beds. They stated that they had placed their wallets and mobile phones on their bedside lockers before going to sleep.
10. Bronwen Kircher slept in a separate room and before going to bed she had locked the door to her bedroom. During that night she had heard someone pressing the door handle on the door to her room and thought it was one of the other occupants who had mistakenly gone to the wrong room during the night. She then fell back asleep.
11. On the 2nd of August 2018 gardaí at Salthill Garda Station were contacted by the occupants of No. 107 Dunaras, Bishop O'Donnell Road, Salthill who reported a burglary. Detective Garda Horgan attended the scene and the two students from Malawi reported that their mobile phones and wallets had been stolen however, nothing belonging to Bronwen Kircher had been taken during the course of the burglary.
12. Following examination of the CCTV footage the appellant was arrested on the 3rd of August 2018 and detained at Galway Garda Station. During the two interviews relating to the matter the appellant made no admissions to the offence. He was charged and the matter was listed for hearing on the 2nd of July 2019. Charles Chinkuta and Deluse Kaloma were flown from Malawi to attend the hearing and arrangements were made for Bronwen Kircher to attend the trial. On the morning of the 2nd of July 2019 the appellant entered a guilty plea and the case was adjourned to the 11th of December 2019 for sentencing.
13. No property was recovered belonging to the complainants.

Impact on the victim

14. In her victim impact statement to the court Bronwen Kircher outlined how the actions of the appellant had had "*a profound impact*" on her "*daily life*" and how the sounds of that night still haunted her.
15. Since the burglary she has moved to a new dwelling which she ensured was gated and guarded by guard dogs even though these security measures were outside of her budget. She stated that the psychological impact of the crime has caused her to often get up during the night and check again and again that she has locked the front door and that when she hears noises she is fearful that someone is in her house. She has sought help to address both the impact of the crime and her difficulty with sleeping since it occurred.
16. Ms Kircher recalled that when she heard the noise of her door handle being rattled that night she thought it odd that her roommate would grab the door handle in that manner. However she went back to sleep and was taken aback when she was informed the following morning that the residence had been burgled.
17. She recalled being "*terrified and shaking*" when ringing the gardaí and of being "*completely numb*" while waiting for them to arrive. She says that she felt violated by the fact that while she was asleep someone had entered a place where she had previously felt safe, to commit a crime.
18. Although nothing was stolen from her she stated that "*she wished this hadn't happened at all because this is something no one should have to face.*"
19. During the sentencing hearing on the 11th of December 2019 the appellant offered Ms Kircher an apology through his counsel.

Personal circumstances of the respondent

20. A Probation Service report was prepared at the request of the sentencing court for the hearing on the 11th of December 2019. This was conducted to assess, *inter alia*, the appellant's suitability to undertake community service and his likelihood of reoffending within 12 months.
21. The appellant was 44 years of age at the time of sentencing. He is married and has five children ranging from six to eighteen years of age. He also has three adult children from two separate relationships.
22. In the report the appellant referred to his childhood as unhappy, with his parents separating when he was four years of age. He has four siblings from his parent's marriage and two step siblings. The appellant stated that the tragic death of his brother had had a significant impact on his wellbeing. Some of his past family history includes anti-social and criminal activities involving his siblings which contributed to the appellant's criminal behaviour and illicit drug and alcohol use.
23. The appellant completed his primary level education but left school in his first year of secondary school without sitting any state examinations or gaining any qualifications. He states that in 1991 he was assessed in St Michael's Assessment Unit in Finglas Children's

Centre but he was unable to hold down positions of employment due to his drug addiction and custodial sentences.

24. The report stated that the appellant has a long history of illegal drug and alcohol addiction. In the past he has had periods of sobriety and has previously attended Harristown House residential centre in 2003, AA meetings, the alcohol addiction service for supervised Antabuse medication and addiction counselling. The appellant attended a methadone maintenance clinic following release from custody, which confirmed that on one occasion, i.e., on the 22nd of October 2019, urinalysis of a sample provided by the appellant tested positive for cocaine.
25. The report stated that the appellant was unable to recollect the offending behaviour the subject of this appeal due to his intoxicated state at the time.
26. The report concluded that the appellant's depth of understanding of the consequences of his offending behaviour was questionable. It continued that he was at a high risk of reoffending within 12 months post release, with predominant risk factors including previous criminal history, substance misuse, unemployment, negative peers, childhood and family issues. The report suggested a Probation Supervision order of 12 months post release with conditions including long term residential treatment.
27. A subsequent Probation Service report dated the 22nd of January 2020 has highlighted that the appellant did not attend two methadone clinic appointments scheduled for the 20th of December 2019 and the 15th of January 2020. Urinalysis submitted by him on the 22nd of October 2019 and the 10th of January 2020 had tested positive for cocaine. The probation report concluded that due to the nonattendance of methadone clinic appointments during the period of the court adjournment, the appellant was not a suitable candidate for probation supervision at that time.
28. The appellant has 53 previous convictions with 11 relating to similar matters the subject of this appeal. They are outlined as follows:
 - 12th of September 2019 – Galway District Court – Convicted of theft and sentenced to four months imprisonment.
 - 1st of June 2017 – Galway Circuit Court – Convicted of theft and sentence to one months imprisonment.
 - 19th of February 2014 – Galway District Court - Convicted of handling stolen property and sentenced to one months imprisonment.
 - 18th of December 2013 – Convicted of burglary and sentenced to one months imprisonment.
 - 10th of July 2013 – Convicted of burglary and sentenced to one months imprisonment.

- 15th of December 2011 – Galway Circuit Court – Convicted of burglary and sentenced to eight months imprisonment, and another conviction of burglary receiving eight months imprisonment.
- 19th of July 2007 – Galway Circuit Court – Convicted of robbery and sentenced to four years suspended for two years and six months.
- 9th of February 2006 – Galway District Court – Convicted of handling stolen property and sentenced to five months imprisonment.
- 10th of March 2004 – Galway Circuit Court – Convicted of burglary with intent and received the Probation Act and in a second conviction of full burglary he received the Probation Act.

Remarks of the sentencing judge

29. In initial remarks on the 11th of December 2019 the sentencing judge said:

"JUDGE: Very good. Well, the accused has pleaded guilty to entering a private residence as a trespasser with the attention [?? possibly "intention", we suggest] of stealing. He did this twice. And at the time the residence was occupied and the occupants were asleep. Evidence of the impact on one of his victims was given in court today and it's clear that this incident affected her profoundly. Caused her significant disruption. It isn't possible to assess in full the impact on the other two victims. Save to the extent that the evidence is that their property was stolen and wasn't recovered, so that extent it's clear that the impact included economic loss. Now, the accused has a significant history of criminal offending and also for crimes of dishonesty that were described as, in many cases, similar to this. He has served a number of sentences. He has been given the benefit of a number of suspended sentences."

[Comment in square brackets by the Court of Appeal]

30. Having queried the position concerning whether the accused was still serving a sentence, and being satisfied that he was not, the sentencing judge continued:

"The headline sentence in this case is nine years' imprisonment. I place this offence at the higher end of the scale, given the aggravating factors that I have already identified in the case. I have been asked to adjourn finalisation of the sentence for two purposes. The first to obtain a medical report which, through no fault of the prosecution, is not to hand. And secondly to permit Probation and Welfare Service to update the report on certain matters. I see very little reality in disposing of this sentence, or coming to a proportionate sentence, without a significant portion of it being custodial. But I will put the matter back until the 22nd of January."

31. Then at the resumed hearing on the 22nd of January 2020 the sentencing judge said:

JUDGE: I've indicated, I think, at an earlier stage that the headline sentence for this is nine years' imprisonment which is a significant sentence but it's taking into account the very considerable background of previous offending and the episodic attempts that have been made by Mr Harlowe to deal with his problems. And as recently as late last year and this year, he didn't find himself able to attend appointments that he was offered, which, had he done so, I might be in a different position now dealing with this but it seems to me that I don't have any other option but to impose a custodial sentence, an immediate custodial sentence. And I can recommend that he be afforded whatever treatment he seeks out.

Now, the appropriate sentence is six years. I think, more in an act of faith than anything else, provided that he seeks out and avails of treatment while in custody, I think it will be important that he has support when he's released.

So what I propose to do, as a mixture of an incentive and as an ongoing deterrent, I'm going suspend the final two years of the sentence for five years and I'm going to place him under the supervision of the Probation Service post release for a period of 12 months."

Grounds of Appeal

32. Two principal complaints were advanced on behalf of the appellant. The first was that the headline sentence nominated by the sentencing judge was too high at nine years imprisonment. It is said that it is out of kilter with the headline sentences typically nominated for similar cases, and that it is out of line with this court's guideline judgement in *The People (Director of Public Prosecutions) v. Casey and Casey* [2018] IECA 121. The sentencing judge had characterised the case as belonging in the mid-range. While a headline sentence of nine years was in the mid-range it was at the very top of the mid-range. Defence counsel contended that the headline sentence for this case ought not to have been placed at the very top of the mid-range and that it more properly belonged in the middle of the mid-range. It was suggested that the error in placing the headline sentence at the top of the mid-range infected the rest of the sentencing process and had led to a sentence that was incorrectly structured overall.
33. The second main complaint was that insufficient weight was attached to the appellant's efforts at rehabilitation. It is said that the probation officer had recognised that it was highly desirable that the appellant should be facilitated in getting onto a residential treatment program and it was submitted that the sentencing judge had failed to structure his sentence to provide for that. It was recognised that there had been a suspended element to the sentence which was intended to facilitate rehabilitation but it was contended that it was not conditioned in a way that was likely to sufficiently promote the appellant's rehabilitation.
34. Responding to these complaints counsel for the DPP pointed to the fact that while the headline sentence may have been high the appellant had received a very generous discount by way of mitigation, plus the suspension of a substantial portion of the post

mitigation sentence in a situation where there was little evidence of a true commitment to rehabilitate.

35. It was said that the report from the methadone centre annexed to the probation report of the 22nd January 2020 was very concerning. It had disclosed numerous missed appointments and the appellant had been found positive for cocaine on two occasions. It was suggested that there had been a number of significant aggravating factors which would have justified both the headline sentence nominated and the ultimate sentence. This was a burglary of a residential premises, at night, in circumstances where the premises were occupied. At least one of the occupants was significantly traumatised by the experience of discovering that her home had been violated in the middle of the night. None of the property had been recovered. Moreover, the appellant had a very bad criminal record including numerous convictions for similar type burglaries.
36. It was further said that there had been relatively little true mitigation available to the appellant. The plea came very late. It was in circumstances where the victims had had to travel from abroad to testify at the trial. Little expense was spared by the plea, the trial date had not been available to be taken up by anybody else, and the victims were not spared the trouble and inconvenience of having to travel. He had progressively lost all mitigation due to his bad record. Indeed, his record had aggravated the offending on this occasion. While he had significant addiction issues, there was little evidence of a true commitment to address these. On two occasions while he was undergoing methadone treatment he had tested positive for cocaine. Further, he had missed numerous appointments suggesting little commitment to the programme. We were also asked to note that he had been given at least one suspended sentence in the past and despite this he had continued to offend.

The Court's Decision.

37. In our view the headline sentence nominated in this case was high. Indeed, it was probably at the outer limits of what the case potentially merited but we are not persuaded that it was outside of the range. While it is somewhat speculative, it seems likely to us that the sentencing judge may have nominated an exemplary headline sentence with a view to emphasising to the accused the seriousness of his conduct, but with the intention of significantly discounting from the headline sentence so as to impose a post mitigation sentence that was ultimately proportionate and just. If that was the sentencing judge's approach it was somewhat unorthodox, but we have said many times that if the ultimate sentence is correct the court will not interfere, even if the process by means of which that sentence is arrived at is unorthodox or even erroneous.
38. We think that the sentencing judge was very generous in discounting from his headline sentence by one third, leading to a post mitigation sentence of six years before consideration of the question of whether it would be appropriate to go further and partially suspend any part of that six-year sentence. In circumstances where the plea was a last-minute one, and where the appellant had a very bad record, there was little enough to avail him in the way of significant mitigation. Some account had to be taken of the adversities in his life including his drug addiction and difficult background. However, it is

hard to see how that would have entitled him to a discount of one third of the headline sentence nominated. Accordingly, even if the headline sentence was somewhat high, that was well counterbalanced for by the generous allowance made for mitigation.

39. We also reject the complaint that the sentencing judge failed to give sufficient consideration to the sentencing objective of rehabilitation. He went on to suspend a further two years of the six-year post mitigation sentence he had arrived at. This was done in circumstances where the evidential foundation for what is sometimes euphemistically referred to as "going the extra mile" was very weak. The suspended portion was made subject to a condition that the accused should be under the supervision of the Probation Service for a period of 12 months. It is not correct therefore to say that it was unstructured. We think that this was as far as the sentencing judge could justifiably go in terms of structuring, given the evidence before him. It is clear that this accused was going to have to serve a substantial period in custody before any question would arise of him being released and being available to enter residential treatment. It would have been unrealistic for the court to impose specific conditions relating to eventual residential treatment in those circumstances. It was more appropriate to leave the micromanagement of the appellant's rehabilitation programme to the Probation Service who were being entrusted with the task of supervising him post release. We therefore find no error of principle in how the issue of rehabilitation was addressed.
40. Indeed, we find no error of principle overall. While the headline sentence was high, the post mitigation sentence was appropriate and within the range of the sentencing judge's discretion. Moreover, this accused was dealt with mercifully in so far as a generous proportion (a further one third) of the resultant post mitigation sentence was suspended.
41. Accordingly, the appeal is dismissed.