THE COURT OF APPEAL

CRIMINAL

CCAOT0185/2023

Bill No.: DUDP0584/2020; DUDP0631/2020; DUDP0439/2021

Neutral Citation No: [2024] IECA 7

Birmingham P.

Ní Raifeartaigh J.

Burns J.

BETWEEN/

DARRAGH DUNNE

Appellant

-**AND**-

PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of the Court delivered (*ex tempore*) on the 12th day of January 2024 by Ms. Justice Ní Raifeartaigh

1. This is an appeal against severity of sentence. The Appellant pleaded guilty to offences before the Dublin Circuit Criminal Court on three bills of indictment and was sentenced by His Honour Judge Martin Nolan to 28 months' imprisonment on each bill number, the sentences to run concurrently to each other. The sentencing judge took into account the fact that the Appellant had already spent 14 months in custody by the time of sentence.
2. The three bills of indictment were as follows:
   - Bill 584/20 – five counts of burglary, contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001;
   - Bill 631/20 – one count of burglary, contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001; and

- Bill 439/21 – one count of burglary, contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

3. During the sentencing hearing on the 16th of January 2023, the Court heard evidence from three members of An Garda Síochána. In respect of the first bill of indictment, Bill 584/20, relating to five counts of burglary between the 9th of May 2019 and the 13th of August 2019, Garda Gary Farrell gave the following evidence:
    - The first burglary was carried out on the 9th of May 2019 in Harvey Norman, Blanchardstown Retail Park, Blanchardstown, Dublin 15. The Appellant entered a private warehouse area and attempted to take a 32-inch television before being stopped by staff. Nothing was taken in this burglary.
    - The second, third and fourth burglaries were carried out on the 10th of May 2019 in various outlets in Blanchardstown Shopping Centre, Blanchardstown, Dublin 15, where the Appellant entered the private part of the premises. Again, in these three burglaries, nothing was taken.
    - The fifth burglary occurred on the 13th of August 2019 from Gourmet Food Parlour, North Street, Town Parks, Swords, County Dublin. The Appellant entered a private office area of the premises and took a cashbox containing €400 in cash.
    - The Appellant was identified by Gardaí from CCTV footage in respect of each of the five incidents. He had an identifiable tattoo on his neck and wore similar clothing in all of the burglaries.
    - He was arrested on the 25th of September 2019, interviewed, and made admissions and apologies to the Gardaí whilst also citing loss of memory owing to the influence of drugs. He had also told them that he had been taking certain medications for psychiatric issues and had suffered an adverse reaction to them. During interview, the Appellant admitted that he did not remember being in the Blanchardstown Shopping Centre. He attributed his behaviour to a drug debt he had at the time.

4. In respect of the second bill of indictment, Bill 631/20, Detective Garda Robert Rawl gave evidence of a burglary of the Abbey Tavern, Howth, Dublin 13, on the 23rd of August 2019. The Appellant entered the premises through an open fire escape, kicked open a private locked door, opened a safe and took €6,860 in cash and a cheque for €3,156. The cheque in question was later cancelled but the cash was not recovered.
5. In respect of the third bill of indictment, Bill 439/21, Garda Jennifer Finnegan gave evidence relating to a burglary of The Town, Main Street, Leixlip, County Kildare on the 1st of March 2019 during which the Appellant took cash amounting to €2,475.
6. The Court heard that the Appellant was initially granted bail on these charges but that in late 2020 he stopped complying with the conditions of bail and was remanded in custody. He spent a period of 14 months in Cloverhill Prison before being admitted to bail by the High Court in order to attend a residential treatment course at Coolmine for his drug addiction.
7. The Court heard that the Appellant had been liaising with drug counsellors in Cloverhill Prison during part of 2021. The court was provided with two references from counsellors in this regard. He had completed a number of detox programmes in Cloverhill Prison, had clean urinalysis tests

from the beginning of 2022 up until the date of the sentencing hearing and as, already noted, was admitted to bail to complete a residential treatment course in Coolmine Treatment Centre.

8. In his sentencing remarks, the judge said:

> *'Mr Dunne comes before this Court in relation to what is essentially seven burglaries. Five on one bill and two individual burglaries on two other bills. They're similar type. I suppose he -- in relation to the first bill, he entered the premises and wandered into the private areas, made various attempts to steal and stole on one occasion I think. In relation to the other two burglaries, he entered a property and stole significant amounts of cash. Now, he has a record and it's relevant and the Court does take that into account. It's noted that he spent 14 months in custody in relation to these matters and obviously aggregate that, he's entitled to about 20 months credit in relation to the amount of time he already served. In mitigation, he has pleaded guilty. He has cooperated. He has taken steps to reform himself. He is doing very well at present, as evidenced by the reports handed in on his behalf. He has family responsibility and I have no doubt he takes these responsibilities seriously. I have been asked by Mr McCormack on his behalf not to send him to prison or send him back to prison in relation to these burglaries. Unfortunately, for this man, I cannot accede to that, there's too many burglaries involved here over this period of time and he deserves a prison term; an extra prison term if you want it. Doing the best I can for him, what I'm going to do in relation, taking into account the time he has already served in relation to these matters, I'm going to impose upon him a period of 28 months in relation to each of the burglaries and they're to be run concurrently with each other.'*

9. The Appellant's two grounds of appeal are that:
    a. *The sentence imposed was disproportionate and excessive in all the circumstances;*
    b. *The learned sentencing judge erred in law and/or in fact in that he failed to have any, or any adequate, regard to the penal objective of rehabilitation with regard to the Appellant's personal circumstances in the case.*

10. The Appellant relies upon the usual authorities concerning the principle of proportionality (*People (DPP) v. M* [1994] 3 I.R. 306. and *People (DPP) v. McCormack* [2000] 4 IR 356). He refers to the discussion of this principle in the context of burglary sentences in *People (DPP) v Casey and Casey* [2018] 2 I.R. 337 and also points out that in *Casey,* the Court outlined that a mid-range offence would attract a headline sentence of 4-9 years, and a high-end range offence, 9-14 years. Factors which would place an offence in the mid-range category, and more generally in the higher-end of the mid-range were said to include:
    - a significant degree of planning or premeditation;
    - two or more participants acting together;
    - targeting residential properties, particularly in rural areas;
    - targeting a residential property because the occupant was known to be vulnerable on account of age, disability, or some other factor; and
    - taking or damaging property which had a high monetary value or high sentimental value.

11. The Appellant submits that this case would not have merited a headline sentence in the mid-range category. He makes this submission on the basis that:
    - There was no significant degree of planning or premeditation.
    - In respect of four of the burglaries, no property was stolen;
    - There were no injured parties or victim impact statements;
    - There was no violence or threat of violence.

12. As to the issue of rehabilitation, the Appellant cites *People (DPP) v O'Brien* [2018] IECA 2 where the Court stated:

> *'In the past it has been suggested by the former Court of Criminal Appeal in People (DPP) v GK [2008] IECCA 110 that a court in sentencing, or an appellate court in reviewing a sentence, 'must examine the matter from three aspects in the following order of priority, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence' (this Court's emphasis), thereby suggesting that the penal objective of rehabilitation is always to be afforded the highest priority. While we do not now think that this is necessarily a correct statement of principle and prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, we readily accept that in many cases it may indeed be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to prioritise deterrence, or retribution and incapacitation.'*

13. The Appellant also relies on *People (DPP) v Fagan* [2020] IECA 290 at [93].where the Appellant pleaded guilty to four counts of burglary and three counts of production of an article contrary to Section 11 of the Firearms and Offensive Weapons Act 1990. The Court heard evidence of the Appellant's drug addiction, rehabilitation and previous convictions, which included a relevant conviction for burglary, and said that:

> *'[F]or a court to metaphorically "go the extra mile" in showing leniency to an offender in the interests of promoting rehabilitation and reform and incentivising continued progress in that regard there requires to be a sound evidential foundation for doing so. In practice, what is required is evidence both as to a genuine desire to reform and rehabilitate and a track record showing concrete steps already taken that regard.'*.

In that case, the Court considered that the penal objectives of deterrence and retribution could be treated as having been addressed by reason of the time already served in custody prior to imposition of sentence, and allowed the objectives of rehabilitation and reform to be prioritised thereafter.

14. The Appellant submits that the sentencing judge did not afford enough weight to the cogent and compelling evidence of the Appellant's rehabilitation and efforts to overcome his drug addiction. He had, it is said, significant mitigating factors by way of his remorse, his efforts in tackling his drug addiction, his guilty plea and his familial responsibility.

15. The Director of Public Prosecutions points out that the sentence imposed equated to a post-mitigation sentence of 48 months or 4 years imprisonment. She does not take issue with the factual background described by the appellant except to say that (a) the burglary of Leisureplex in Blanchardstown on 10th May 2019 entailed criminal damage because the Appellant kicked in a private locked door, (b) the burglary of the Abbey Tavern in Howth on 23rd August 2019 entailed a confrontation with the owner and (c) the total sum of cash taken in the burglary of 'Town' Pub/Restaurant in Leixlip was €2,476. The Director draws attention to the fact that three of the burglaries occurred in a spree on the same date of 10th May 2019 on business premises in the Blanchardstown Shopping and Retail Centres. She also points out that in *Casey,* the Court said at para 12:-

> *"Where multiple offences have been committed in a spree there is nothing in principle wrong with a court taking account of the overall gravity of the offending conduct viewed globally, indeed it is desirable that it should do so.* ***Where a court is sentencing for multiple offences committed in a spree, the fact that they were committed in a spree should be regarded as an aggravating factor.*** *That it was part of a spree renders the gravity of each individual offence more serious and the overall offending conduct must consequently be regarded as more serious than any individual offence considered in isolation. There are a number of ways in which this increased gravity can be reflected. The first is to impose proportionately higher (sentences) for each individual offence and simply make them all concurrent. The second is to assess gravity in respect of each individual offence without reference in the first instance to the fact that they were committed in a spree and then, having done so, to at that point seek to reflect the aggravating circumstance of the spree by having recourse to at least some degree of consecutive sentencing. However, going further and nominating a global headline sentence, while certainly possible, complicates the sentencing process as we will explain."*

16. The Director points to the appellant's previous convictions and says that the Court in *Casey* also described this as an aggravating factor when setting the headline sentence for burglary. Further the appellant was on bail at the time of the burglaries.
17. She notes that the pleas were entered late in the day, and that there was no return of monies or offer of compensation.
18. With regard to the mitigating factors, the Respondent submits that the judge was effectively being asked not to return the Appellant to custody after a 14-month period on remand before taking up High Court bail to undergo a residential drugs programme and that, given the number of burglaries concerned and seriousness if the offending, this was wholly unrealistic and untenable. She submits that sentencing remarks show that the judge took into account the efforts at rehabilitation undergone by the appellant but also that the judge considered the history of the offences as being too serious to warrant the course of action which was being urged upon the court on behalf of the Appellant.

19. The Director therefore submits that the sentence chosen was well within the margin of discretion of the trial judge and that there was no error in principle.

Decision

20. The Court is of the view that the sentencing judge was well within his range of discretion when he chose the sentence that he did. We do not underestimate the major significance in the Appellant's life of the fact that, having suffered from drug addiction for a very long time, he started and persevered with addressing that addiction and successfully completed the resident course in Coolmine. Nor do we underestimate how difficult it is for a person with a long-standing addiction to do so and the challenges they face, as well as the particular challenge that his man faced while doing so (including the death of his mother, the diagnosis of ASD in respect of one of his children). The Court accepts that there was cogent evidence concerning his rehabilitative efforts before the sentencing judge.
21. However, as the Court said in *O'Brien,* it is not necessarily the case that priority must be given to the rehabilitative component of the sentence. The sentence judge here expressly referenced the rehabilitative efforts of the Appellant but chose nonetheless not to suspend the remainder of the sentence. The Court cannot find any error of principle in his choice in doing so. The Appellant had a significant record of previous convictions (43 in total albeit that 27 were for road traffic offences); there were 7 burglaries in total (some of which were indicative of a spree); there was a confrontation in one case; criminal damage inflicted and a not insignificant sum of money taken in another. The Appellant was on bail at the time of the offences. Given those circumstances, a headline sentence firmly within the mid-range would have been an appropriate place to start and a reduction to 4 years from there could not be said to have been in error. While we do not know what headline figure the sentencing judge had in mind as a starting point and/or what percentage he applied in mitigation, we cannot see that a post-mitigation sentence of 4 years was too severe.
22. The Court dismisses the appeal.